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## TRIBUTE



## LECTURE



## ARTICLES



## COMMENTS

# Peace in the Valley: For Chris Iijima

## I. INTRODUCTION

This address was given by Professor Mari Matsuda* on October 14, 2005, at the Na Loio Keeper of the Flame Awards Dinner.[1] Professor Chris Iijima was one of the awardees. He passed away on December 31, 2005.

## II. ADDRESS

We are the children of the migrant workers
We are the offspring of the concentration camp
Sons and daughters of the railroad builder
Who leave their stamp on Amerika

We are the children of the Chinese waiter,
Born and raised in the laundry room
We are the offspring of the Japanese gardener
Who leave their stamp on Amerika[2]

Those lyrics by Chris Iijima and Nobu Miyamoto created a community, by putting down on vinyl what they called "a song of ourselves," at a time when we were otherwise absent from the space called popular culture. I first heard that song not off the famous *Grain of Sand* album,[3] but sung at a Nuclear-Free Hawai'i fundraiser at Harris Memorial Church, performed by earnest young ethnic studies professors from the University of Hawai'i. That song traveled from Harlem to Honolulu. It was part of a huge wave of activism that picked up Asian Americans across the nation and plucked them down in sit-ins and

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* The author thanks Sonny Ganaden and Arash Jahanian for excellent research assistance.


[1] Founded in 1983, Na Loio Immigrant Rights and Public Interest Legal Center is a public interest law firm serving poor and low-income immigrant families. *See* Na Loio, Immigrant Rights and Public Interest Legal Center, http://www.naloio.org (last visited Nov. 7, 2006). Na Loio annually awards The Keeper of the Flame Award, which is given to individuals who demonstrate lifelong commitment to social justice movements.

[2] CHRIS IIJIMA, JOANNE MIYAMOTO & CHARLIE CHIN, *We are the Children*, *on* A GRAIN OF SAND: SONGS FROM THE BIRTH OF THE ASIAN AMERICAN MOVEMENT (Bindu Records 1997) (1973).

[3] CHRIS IIJIMA, JOANNE MIYAMOTO & CHARLIE CHIN, A GRAIN OF SAND: SONGS FROM THE BIRTH OF THE ASIAN AMERICAN MOVEMENT (Bindu Records 1997) (1973). In the early 1970s, Chris became known as a singer-songwriter with Yellow Pearl, a trio consisting of Chris, Joanne, and Charlie, which toured the country singing about Asian American identity and freedom struggles. *A Celebration of Life: Remembering Chris Iijima*, UH NEWS, Jan. 12, 2006, http://www.hawaii.edu/cgi-bin/uhnews?20060112111139.

fundraisers and up against police lines[4] where the motto "serve the people" was not just theory, but also practice. It was life. It was music. It was a way to change the world, and Chris wrote the soundtrack.

The first time I saw Chris, he was speaking at a meeting of the East Coast Asian American Student Union,[5] a semi-political but largely social gathering of college kids.[6] I have learned over the years that law schools are adept at finding faculty of color who are smart and ineffectual. So, frankly, I was not expecting much when this Professor Iijima got up to talk.

I was concentrating on preparing my own remarks, when I was hit by the whirlwind that is the public Chris Iijima. He got up and assumed the posture of a pugilistic grizzly bear. He actually held his fist in the air at one point. He leaned into the microphone, then backed up, as if winding up for a punch, then came booming forward again, pacing rapidly to the front of the stage. He exhorted and orated and scolded the roomful of earnest pre-professionals. "Get out there and DO something for the people who sacrificed so you could get your precious college education." He talked about power. He talked about oppression. He talked about racism. And when he sat down I looked at him and said, "Where did YOU come from?"

"Harlem," he said.

And then I got it. This was one of those "Malcolm Asians." Like Yuri Kochiyama,[7] like the Issei[8] communists[9] who drank whiskey and read Lenin,

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[4] *See generally* ASIAN AMERICANS: THE MOVEMENT AND THE MOMENT (Steve Louie & Glenn K. Omatsu eds., 2001).

[5] The East Coast Asian American Student Union is an intercollegiate organization founded in the Ivy League in 1978. The group describes itself as "serv[ing] the social, political and educational needs of Asian American students." *See* East Coast Asian American Student Union, http://www.ecaasu.org/index.php?category=home (last visited Nov. 7, 2006).

[6] This speech took place in 1993 at the State University of New York at Albany.

[7] Yuri Kochiyama (1921- ) is a grassroots civil rights leader who has advocated international political prisoner rights, nuclear disarmament, and Japanese American redress for World War II internment. She was a close friend and associate of Malcolm X, and she was by his side at his assassination in 1965. *See generally* DIANE C. FUJINO, HEARTBEAT OF STRUGGLE: THE REVOLUTIONARY LIFE OF YURI KOCHIYAMA (2005); YURI KOCHIYAMA, PASSING IT ON (2004).

[8] First-generation immigrants from Japan.

[9] Japanese socialists came to the United States beginning in 1904 in response to persecution in Japan, and they established their own organizations. The Japanese Socialist Group in America, formed in 1919, became a branch of the United Communist Party of America as the Japanese Communist Group in America in 1921. The group stated there were 100,000 Japanese people living in California and another 110,000 in Hawaii at the time. *See generally* Foreign Language Federations (1890s – 1930), Japanese Socialist Movement in America, http://www.marxists.org/history/usa/eam/lf/lfedjapanese.html (last visited Nov. 7, 2006); Sen Katayama, *Japanese Socialists in America*, *in* THE AMERICAN LABOR YEAR-BOOK 137-38 (1916); Yuji Ichioka, *A Buried Past: Early Issei Socialists and the Japanese Community*, AMERASIA JOURNAL (July 1971).

like the New York artist collectives[10] that took the Japanese woodblock style and made prints of workers and demonstrations and evictions.

And Chris said to me, "You're Mari Matsuda? You're married to Chuck Lawrence,[11] whose sisters are Paula Wehmiller[12] and Sara Lawrence-Lightfoot?[13] Gee, isn't that kind of intimidating?" Chris knew Paula because they had both taught at the Manhattan Country School, a successful experiment in utopian, progressive education—a place where teachers and students are all learners, involved in the joint project of education, where education has as its end justice, peace, and humanity.[14] I put the pieces of the story together. This was the *Grain of Sand* guy, the one who wrote the song sung by those young ethnic studies professors. He talks like Malcolm and teaches like Paula. In that moment, I was inducted into the Chris Iijima fan club.

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[10] An example is the political art of Hiroharu Nii, who founded Hanga Undo Kyokai (Japan Print Movement Society) with Makoto Ueno and Jiro Takidaira. HELEN MERRITT & NANAKO YAMADA, GUIDE TO MODERN JAPANESE WOODBLOCK PRINTS: 1900-1975, at 108 (1992). With Takidaira, he produced *Hanaoka Monogatari* (Story of Hanaoka), a series of prints on Chinese mine workers forced into labor. *Id.*

[11] Professor Charles Lawrence has taught at Georgetown University Law Center since 1992, after teaching at the University of San Francisco and Stanford Law School. He is a pioneer of critical race theory. Professors Lawrence and Matsuda have co-authored two books and are currently writing a third. *See* Charles R. Lawrence, III, http://www.law.georgetown.edu/curriculum/tab_faculty.cfm?Status=Faculty&Detail=281 (last visited Nov. 7, 2006).

[12] The Rev. Paula Lawrence-Wehmiller is a gifted teacher and educational consultant. She has taught graduate and undergraduate education courses, directed a day-care center, and served as principal of an elementary school. She was ordained to the Episcopal priesthood in 1998. *See* Association of Independent Schools in New England, Retreat for School Heads with Rev. Paula Lawrence Wehmiller, http://www.aisne.org/member_services/professional_dev/calendar_detail.asp?eventid=14116 (last visited Nov. 7, 2006); *see also* PAULA LAWRENCE-WEHMILLER, MIRACLE OF THE BREAD DOUGH RISING (1985).

[13] Dr. Sara Lawrence-Lightfoot is a sociologist and professor of education at Harvard University. *See* Sara Lawrence-Lightfoot, http://www.gse.harvard.edu/faculty_research/profiles/profile.shtml?vperson_id=440 (last visited Nov. 7, 2006).

[14] Inspired by the philosophy of Dr. Martin Luther King, Jr., the Manhattan Country School has the dual mission of providing "equal opportunit[ies] . . . to students of a pluralistic society" and serving as a model for the desegregation of American schools. Manhattan Country School, http://www.manhattancountryschool.org/index.php?option=com_content&task=view&id=18&Itemid=239 (last visited Dec. 14, 2006); *see also* AUGUSTUS TROWBRIDGE, BEGIN WITH A DREAM: HOW A PRIVATE SCHOOL WITH A PUBLIC MISSION CHANGED THE POLITICS OF RACE, CLASS, AND GENDER IN AMERICAN EDUCATION (2005); Gus Trowbridge, *Progressive Education and Civil Rights*, ENCOUNTER, Summer 2004, at 5; Damaso Reyes, *An Upper East Side Success Story, A Mirror to City's Diversity*, NEW YORK AMSTERDAM NEWS, Nov. 6, 1997, at 21.

Pat[15] asked me to say something tonight honoring Chris as he receives the most prestigious social change award offered in the state of Hawai'i. Some of you know him well; many of you have never met him—for all of us, I searched for words that convey the essence of this human being, why we should all be his students, and why we honor him tonight.

I decided the way to do this is to sit at his feet as a student and see what there is to learn, gathering the yellow pearls—a random selection of five things Chris would like us to know.

Chris would like you to know that there are Hawaiian words for every kind of rain that falls in these islands, and that when the whisper mists of the *tuahine* rain fall in Manoa, as the late afternoon sun comes in from the west turning everything gold, you must stop, and feel that you are smaller than the rain. Take a deep breath, and notice. Remember that the Hawaiian people are the first people of this place, and their relationship to the rain is the one that recognizes what human beings need to survive and thrive.

Chris would like you to know that when Asian Americans gathered at *Grain of Sand* concerts, they heard songs in Spanish as well as English, because the movements for the liberation of Puerto Rico, to organize migrant farmworkers, to claim rights for Latino immigrants, were integral to the movement for Asian American liberation.[16] And the claim of Puerto Rican sovereignty is a cousin of the claim for Hawaiian sovereignty.[17] Whatever move is made to kill the dream of sovereignty will not succeed. The dream will never go away because the human will to freedom will never go away, and someday *Puertorriqueños* and *Kanaka maoli* will regain control of their homelands.

Chris would want you to know that there are schools where rich children and poor children, Black, brown, yellow, and white children, are learning side by side with resounding success. Chris knows the teachers who know how to do this. Right in the middle of New York City, where school after school is labeled failing, there is the school where Chris and his wife Jane taught, where children from poor and working class homes are treated as learners, doers, and shapers of their world, with the predictable result that they learn and do and shape.

Chris would like you to know something about what law and lawyers and law schools can do. It is called justice, and there is no other justification for the existence of law and lawyers and law schools. He wrote this pledge, which

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[15] Pat McManaman is the executive director of the Na Loio Immigrant Rights and Public Interest Legal Center. *See supra* note 1.

[16] As Chris sang, *Hablamos la misma lengua, porque luchamos por las mismas cosas.* (We speak the same language, because we struggle for the same things.).

[17] *See* James Early, *An African American-Puerto Rican Connection*, *in* THE PUERTO RICAN MOVEMENT: VOICES FROM THE DIASPORA 316 (Andrés Torres & José E. Velázquez eds. 1998) (describing coalition building around the Puerto Rican liberation movement).

all students at the William S. Richardson School of Law take, and which is worth repeating:

> In the study of law, I will conscientiously prepare myself; To advance the interests of those I serve before my own, To approach my responsibilities and colleagues with integrity, professionalism and civility, To guard zealously legal, civil and human rights that are the birthright of all people, And, above all, To endeavor always to seek justice. This I do pledge.

In directing the pre-admissions program,[18] Chris has produced an army of students who not only took that pledge, but who live it. He pushed, pulled, and shoved them through law school and into a profession that was not made for brown-skinned justice seekers from rural O`ahu. They are remaking that profession, with Chris's voice in their heads as they go.

And in the end, Chris would like you to know something about meaning. A few years back, before we knew that Chris would hit the wall of illness, he began prodding friends about the Big Questions. He observed with interest that progressive Asian American feminists of a certain age were going to the dojo and turning to Buddha. Chris and I were both raised by Nisei[19] progressives[20] who inculcated a healthy skepticism of religion. If religion is the opiate of the people, why was spirituality suddenly so intriguing to Chris?

Chris Iijima is a humanist and he takes human beings seriously, just as Marx did. A coal miner's son/organizer/communist named George Meyers[21]

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[18] Established in 1975, the William S. Richardson School of Law's Ulu Lehua (Preadmission) Program admits and supports students from historically underserved communities who show great promise as lawyers and community leaders. Professor Iijima served as director from 1998 until his death. *See* William S. Richardson School of Law, Ulu Lehua Program, http://www.hawaii.edu/law/information-for-students/prospective-students/how-to-apply/pre-admission-program/index.html (last visited Nov. 7, 2006).

[19] Offspring of Issei. *See supra* note 7.

[20] *See* Glenn Omatsu, *Always a Rebel: An Interview with Kazu Iijima*, 13 AMERASIA JOURNAL 31 (1986) (an interview with Chris's mother).

[21] George Meyers (1913-1999) chaired the Labor Department of the Communist Party, USA from 1968 until near the end of his life. George Meyers, *Why Join the Communist Party?*, *available at* http://www.pww.org/archives97/97-08-30-3.html. He was a founding organizer of the Congress of Industrial Organizations ("CIO") and president of the CIO Council of Maryland-DC. *George Meyers: 1913-1999*, http://www.pww.org/past-weeks-1999/George%20A%20Meyers%20%201913-1999.htm. Prior to that, he was president of the 10,000-member Local 1874 of the Textile Workers Union in Cumberland, Md. *Id.* Meyers served a four-year sentence in federal prisons for violating the Smith Act. *Id.* He ran for U.S. Senate in 1952. *See* Frostburg State University, Meyers Collection, http://www.frostburg.edu/dept/library/archives/series.htm (last visited November 7, 2006). The George A. Meyers Collection at the Frostburg State University Library in Maryland is a collection of Marxist and working class literature built around his personal library. *Id.*

changed the way I see Marx's famous quote on religion.[22] He described his father leaving for the coal mines every morning. His mother would say goodbye with a look of terror on her face, because nearly every family they knew had lost someone in the mines.[23] Every morning's goodbye was quite possibly the last good bye. George's father would say gently to his wife, "Don't worry, the good lord will bring me home to you." That, George Meyers explained, is what Marx meant by the opiate of the people. You don't reach for the drug because you are a stupid dupe to capitalism, but because you are in pain.

Well, aren't we all? Many of us who do social change work throw ourselves into it with life-eclipsing zeal. As a young lawyer I was pulled into doing pro bono work for Na Loio, and stayed up all night at the Xerox machine, borrowed from the International Longshore and Warehouse Union ("ILWU")[24] across the street, making copies of briefs. The quick dinner grabbed from the food court, the stapling assembly line, the agonizing over strategy, the big emergency—no time to sleep or to stop and think about your messed up personal life or the fact of your mortality, or to confront whatever demon it is that breathes down your neck. The People! The Struggle! The Cause!

Chris the activist might have lived that way at times, but Chris the artist never has. The guitar won't resonate for fingers that are denying the existence of the soul. When I picture Chris the musician, I see the eyes close, the brow crease, the head tilt forward in the posture of the seeker. In theoretical terms

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[22] "Religious suffering is, at one and the same time, the expression of real suffering and a protest against real suffering. Religion is the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people." Karl Marx, *Contribution to the Critique of Hegel's Philosophy of Right*, DEUTSCH-FRANZÖSISCHE JAHRBÜCHER (Feb. 1844).

[23] Coal mining has a tragic history of disaster and death caused by explosions and other accidents. "The deadliest year in U.S. coal mining history was 1907, when 3,242 deaths occurred. That year, America's worst mine explosion ever killed 358 people near Monongah," West Virginia. MINE SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, INJURY TRENDS IN MINING (1999), http://www.msha.gov/MSHAINFO/FactSheets/MSHAFCT2.HTM. While the fatality rate in coal mining dropped ninety-two percent between 1970 and 2005, the 2004 rate of 28.3 per 100,000 employees for all of mining made it the second-most dangerous job in the U.S. *See* Pamela M. Prah, *Coal Mining Safety*, 16 CQ RESEARCHER 241, 245-48 (2006).

[24] The International Longshore and Warehouse Union has approximately 42,000 members in more than sixty local unions in California, Washington, Oregon, Alaska, and Hawaii, along with a separate marine division and 14,000 members in the autonomous ILWU Canada. *See* International Longshore and Warehouse Union About Us, http://www.ilwu.org/about/index.cfm (last visited Nov. 7, 2006). The ILWU has a long and proud history of supporting the civil rights movement and other progressive causes. *See generally* SANFORD ZALBURG, A SPARK IS STRUCK!: JACK HALL & THE ILWU IN HAWAII (1979).

we might call it thesis/antithesis, or simply contradiction: that a guitar-playing atheist brings forth the voice of God.

So what does it mean that in his most recent publications Chris used words like "love?" He wrote: "[A]s I mature as a law teacher, engaged in my own existential, personal, and professional searches for who I am, part of that journey has also become a search in the pedagogy of my profession for some indication that we collectively are concerned about where each of our student's 'who' is."[25] He challenges all teachers to take each student's search for self and meaning seriously.

Some of my students went to visit Chris recently, and from his hospital bed he handed out organizing lessons. "You can organize a campaign," he said, "where you are in and out—work on one issue, hit it and leave. Or you can organize a community: think about building it and nurturing it as a place of strength from which structural change is possible."

Chris is the community builder: through his music, his writing, his teaching, through the many struggles for peace and human dignity that he has signed on to in his long life as an activist he has made those around him feel like they belong to something deep and precious.

Che said all revolutionaries are motivated by love. Chris is a lover: of the *tuahine* rain, of the dream of sovereignty, of the struggle for justice, of the search for meaning.

To the Iijima family, greetings of aloha and solidarity from everyone in this room. I know in your *enryo*[26] style, you would turn away from expressions of sympathy for the hard road you have faced, remembering that there is a world of suffering out there. Right now, as we sit in this banquet hall, in the park across the street there are those who are unhoused, hungry, ill with no doctor to care for them. There are brothers and sisters of ours in prison, some shipped off like cast-off junk to profit-making prisons five thousand miles away from their island home.[27] There is violence defacing our beautiful land, the raging violence of the fist lashing out in anger, the quiet violence of schools that can't teach children, the relentless violence of lives worn bare by hard work for lousy pay. You would want us to remember all of this and to respond not with

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[25] Chris K. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 IND. L. REV. 737, 739 (2000).

[26] From the Japanese cultural practice of self-denial, holding back with humility.

[27] Private prisons located on the U.S. continent and operated by the Corrections Corporation of America house close to 1,900 Hawaiian inmates. Kat Brady, Commentary, *Time to End Crisis in Hawai'i's Correctional System*, HONOLULU ADVERTISER, Apr. 23, 2006, *available at* http://the.honoluluadvertiser.com/article/2006/Apr/23/op/FP604230305.html. Hawai'i sends the highest percentage of its state's prison population to these prisons, and in 2004 and 2005, "41 percent of all inmates shipped to private Mainland prisons were Native Hawaiian." *Id.*

a liberal's guilt but with the revolutionary's love. Love people enough to go out and work for justice. And then when life knocks you down and you land in that hospital bed, at least you will know that you are part of the struggle, part of something bigger than yourself, that will last longer than any of us, and somehow that will have to make it all make sense.

Chris, we are learning from watching you. You said to me yesterday, "Get some joy!" So I end with that. "The Struggle" should not be like dragging around a bag of rocks. It should be like standing in the middle of the curl of a giant blue wave, carried by inexorable forces of nature, exhilarating, exquisite. Chris, you told me you are looking for serenity. I don't know a damn thing about serenity, but I do know about love. I love you, Chris.

I close with your words, from a song about the *tuahine* rain: "Peace will find the valley, when justice is reclaimed."[28] We'll see you there, Chris Iijima, *meka aloha pumehana, a hui hou.*

[28] CHRIS IIJIMA, *Tuahine Rain*. This song was not released or published, but it remains in folk memory as part of Chris Iijima's legacy.

# In Remembrance: Chris Iijima

Eric K. Yamamoto* & Jason Iokona Baker**

He had that gruff growl . . . and yet spoke the kindest words right into you.

He had the fiercest lash against injustice . . . and yet caressed the spirits of all those in his orbit in that generous, humble way of his.

He was bred, educated, and experienced in the hardstreets of New York City . . . and yet became a Hawai'i local boy—through his music, the local grinds, his sensitivity to the justice struggles of multicultural immigrants[1] and Native Hawaiians, and his deep love for the law school's Pre-Admission Program and respect and affection for every one of his students. He would write an incisive law review article about the dangers of abusive presidential power in the name of civil liberties[2] while also composing a lyrical song about the feathery healing "Tuahine Rain" of Manoa Valley.

This to and fro, strong and gentle, there and here, is Chris Iijima—our Chris.[3] Of course, there's so much more. Everyone knows, how deeply in every bit of his being he loved Jane (his "rock") and Alan and Christopher (he was so proud of his boys and happy that they were doing well at the University Lab School). Many do not know he grew up in black Harlem, with visionary social justice activists parents Tak and Kazu, was a singer, composer and guitarist in the path-forging Asian American folk group *Grain of Sand*—or that he once sang a duet on national television with John Lennon (yes, the Beatle). For a full and rich description of Chris' political and musical life and times, I encourage your reading of Phil Nash's remembrance.[4]

But there is something else about Chris that is not written about, something that is ours, special just to each of us. Maybe that boost in sagging confidence.

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* Professor of Law, William S. Richardson School of Law, University of Hawai'i, in remembrance of Chris for his students and for Jane, Alan, and Christopher.

** J.D. William S. Richardson School of Law 2006.

[1] Chris served for many years on the Board of Directors of Na Loio, Hawai'i's immigrant justice advocacy group.

[2] Chris Iijima, *Shooting Justice Jackson's "Loaded Weapon" at Yasr Hamdi: Judicial Abdication at the Convergence of Korematsu and McCarthy*, 54 SYRACUSE L. REV. 109 (2004).

[3] Chris joined the faculty of the William S. Richardson School of Law, University of Hawai'i, in 1998, as the Director of the Pre-Admission Program. Prior to joining the faculty he was an Assistant Professor at the Western New England Law School and taught in the New York University Law School's Lawyering Program. Immediately upon graduation from the New York University Law School, he clerked for the U.S. District Court for the Southern District of New York and then worked for a law firm in New York City.

[4] Phillip Taijitsu Nash, *Remembering Chris Iijima*, ASIAN WEEKLY, Jan. 11, 2006, *available at* http://news.asianweek.com/news/view_article.html?article_id=cb54893525548182c6ca56a746f8775c&this_category_id=169.

Or the change in life direction (his voice: "why are you doing that?!" (question mark, exclamation point). Or growing close as a genuine sharing group through his study sessions, with *ono* food. Or reading and arguing about what is right and just in a complex world. Or hearing him as a conscience of the faculty. Or just plopping down exhausted in his office couch for some tender loving care, and rising an hour later that much lighter in spirit.

Iokona Baker's spoken words illuminate this special feeling:

> On the very first day Chris sat us all down and posed to each of us a single question: "Why are you here?" It was a complex difficult question, one all of us have struggled to answer over these past three years. Chris asked it on the first day. But that question was typical of Chris. He was an intense person who was committed to bringing out of students that which was buried within.
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> That group was the incoming 2003 Pre-Admission class, and that moment was the beginning of an enduring friendship we have nurtured. Chris was respected and loved by many but it was his hard work and dedication as the director of our Pre-Admission program that Chris was most admired for. The program admits and supports students from historically underserved communities with great promise as lawyers and community leaders. Chris embraced this program with all his heart and he gave this school and his students absolutely everything that he had.
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> I spoke with Chris in October of 2005, just months before he passed away. I had gone, with a few other students, to visit him at the hospital. Chris, who had been courageously fighting sickness for three years, was suddenly enlivened and animated when he saw us he immediately resumed his role as teacher, informing and inspiring us to seek justice, to make this law school, this state, and indeed the world a better place.[5]

So, in a quiet moment, when we at the law school let our thoughts flow, as Iokona did, we sense that special part of Chris within us. And it is that part of him within that nurtures, that helps us grow toward who we want to be and helps us see how we can act together in giving something special to our communities and beyond.

On a Sunday in January, in a little black lava cove off of Kealakekua Bay, Kona, beneath *keawe* trees and a light breeze, food on the picnic bench, a friend brought out two guitars. At first my hands were tired, my voice shaky—not feeling it. And then in a quiet moment, I remembered hanging with Chris and Jane and the boys and parents and his sister Lynn in an open air beach house, beneath *keawe* trees, in south Kohala, watching turtles, eating, laughing—just loving being there. And I recalled too, talking with Chris two

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[5] Jason Iokona Baker, 2006 Graduation Commencement Speech at the William S. Richardson School of Law (May 15, 2006) (quotation slightly edited).

weeks earlier, the night a few hours before he lost consciousness, about his deep affection for Hawai'i and our law school (and our dean) and his faculty colleagues and students. We shared, he said, as wounded warriors—from jointly organizing the national Asian American Law Professors conference in Kahuku,[6] to the awesomely *ono* Side Street's braised Thai *poke*, to golfing in Makaha Valley—the richness and fragility of life. He was still "hoping for a miracle," but at peace.

So as the sun set in Kealakekua Bay on that Sunday, I realized Chris would have loved just being there too—playing, singing, laughing, talking story. Indeed he was. And that feeling for the music returned.

And so our dearest friend and colleague Chris, each of us in our own way feels your call to justice and your music for life and gives it right back to you—with love and aloha.

[6] Pono Kaulike Me Ke Anuenue, "Justice and the Rainbow," Joint Conference of The Asian Pacific American Law Faculty and the Western Regional Law Teachers of Color, June 2000.

# A Public Lecture by Anthony Lewis,* The First Amendment in Perspective

## I. INTRODUCTION

This public lecture, given by Anthony Lewis, took place on Friday, February 24, 2006, as part of *The First Amendment in Crisis* symposium. The symposium was presented by the William S. Richardson School of Law and the Cades Foundation. Additional support was provided by the Hawai'i State Bar Association, the *Honolulu Advertiser*, and the Society of Professional Journalists-Hawai'i chapter.

## II. LECTURE

It is an honor and a pleasure for me to take part in this conference on *The First Amendment in Crisis*. I cannot think of a happier place to be in crisis, or a more impressive group of conferees.

I am going to begin with a story that may not at first seem exactly on point. It is about the largest-selling daily newspaper in the world, Rupert Murdoch's British tabloid, *The Sun*. And what it did to Elton John, a rock singer. I remind you that John was a favorite of Princess Diana's and sang at her funeral in Westminster Abbey.

On February 25, 1987, *The Sun* printed a story that began, "Elton John is at the center of a shocking drugs and vice scandal involving teen-age 'rent boys,' *The Sun* can reveal today." "Rent boy" is British journalese for male prostitute. The story gave as its source one "Graham X." The next day Graham X was the source for a story saying: "Kinky superstar Elton John loved to snort cocaine through rolled-up $100 bills." Mr. John denied both stories and brought two writs for libel. The next day's *Sun* headline was: "You're a Liar, Elton." And so on through another dozen stories over the next months. During this time, we now know, *The Sun* was paying Graham X—his real name was Stephen Hardy—the equivalent of $400 a week and taking him and his girlfriend to Marbella, a chic seaside resort in Spain, for an extended vacation. The last attack on Elton John, published September 28, 1987, was headlined "Mystery of Elton's Silent Dogs." It said Mr. John had had his "vicious Rottweiler dogs" silenced by a "horrific operation." Mr. John sued again: his 17th libel action since the start of *The Sun*'s campaign against him.

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* Former *New York Times* columnist and author of *Gideon's Trumpet* and *Make No Law: the Sullivan Case and the First Amendment*.

For some reason, perhaps because the English love dogs, the last of the suits, the one about the non-barking dogs, was scheduled for trial first, on December 12, 1988. It turned out that Mr. John's dogs were not Rottweilers and did bark. It also turned out that Stephen Hardy, alias Graham X, had made up his tales of vice at *The Sun*'s urging. "I've never even met Elton John," he said later. "In fact, I hate his music."

The morning of the scheduled trial *The Sun* carried a two-word headline: "Sorry Elton." The story said that *The Sun* had settled all the libel actions by paying Mr. John one million pounds in damages—about 1.7 million dollars—and about half as much again in lawyers' fees. The story said: "We are delighted that *The Sun* and Elton have become friends again, and we are sorry that we were lied to by a teenager living in a world of fantasy."

What is one to say about behavior like that? I know of only one explanation. Rupert Murdoch is said to make a profit of one million pounds a week on *The Sun*.

Now why did I start off with that tale? To remind you that the press is not always a noble hero. Of course there is nothing as vicious or contemptuous of the truth in American newspapers or television or radio or the Internet, is there? Not in extremist talk shows? When Ann Coulter says that it would be wonderful if a bomb went off at *The New York Times*, she's just kidding, right?

Well, ladies and gentlemen, you do not have to be respectable, much less noble, to enjoy the freedom of speech and press guaranteed by the First Amendment. That is one lesson, a lesson often overlooked, of the first Supreme Court decision protecting the press: *Near v. Minnesota ex rel Olson*,[1] in 1931. Near was Jay M. Near, who put out a weekly paper, *The Saturday Press*. It could politely be called a scandal sheet. And it was viciously anti-Semitic. The theme it most often sounded was that political leaders in Minnesota were in league with a group of Jewish gangsters and that the police were doing nothing about it. Minnesota had a unique law calling for the suppression of malicious journals, and it was invoked to put Jay Near out of business. The Supreme Court, by a vote of five to four, said the suppression was a prior restraint especially disfavored by the First Amendment. The dissenting opinion, by Justice Butler, had a footnote giving an example of Near's anti-Jewish diatribes.[2] It is too nauseating to read.

You might think that the public weal suffered no injury by the disappearance of *The Saturday Press*. Perhaps the late Fred Friendly thought that when he began writing a book about *Near v. Minnesota*. Friendly—you can see him portrayed by George Clooney in the movie "Good Night, and Good Luck"—went from CBS Television to be vice president of the Ford

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[1] 283 U.S. 697 (1931).

[2] *See id.* at 724 n.1 (Butler, J., dissenting).

Foundation. One day he was at lunch there, and he told his companions about the book he was working on. Irving Shapiro, the chairman of the DuPont Company and a member of the foundation board, came over from another table. "Are you writing a book about the *Near* case, Fred?" he asked. "I knew Mr. Near." And he told this story.

Irving Shapiro's father, Sam, owned a dry-cleaning store in St. Paul. One day a group of gangsters came in and demanded that he pay protection money. When he said no, they sprayed acid on the clothes hanging in the store, doing $8,000 worth of damage. Irving, a young boy, watched. The establishment newspapers reported the attack but did not name the gangster mob; and they did not follow up the story. But Jay Near came to the store, talked with Sam Shapiro, published a full story in *The Saturday Press* and campaigned against the gangsters. They were arrested and prosecuted. So Sam Shapiro did not think that Jay Near's newspaper was worthless. And neither, incidentally, did Colonel Robert Rutherford McCormick, the splenetic owner of the *Chicago Tribune*, who noticed the case when no one else did and provided his lawyer to take the case to the Supreme Court and argue it there.

The year of the *Near* decision, 1931, was the start of what has been an enormous expansion of the reach of the First Amendment. The Supreme Court has interpreted it since then to protect political speech of even a revolutionary character; anything goes, unless it is intended to bring about immediate violence and is likely to do so. Art of all kinds—books, movies, painting—is now protected. The press is almost completely free to bare the secrets of government, and the secrets of the bedroom, without fear of penalty. There is almost no chance that anyone can stop the press from publishing what it wishes, even when the government claims that it will menace national security.

Freedom of expression is broader in this country than in any other, including some countries that we think of as like ourselves. In Britain, for example, the government would almost certainly have gone to court to enjoin publication of stories like those in *The New York Times* about warrantless wiretapping. And it would have got that injunction. English libel law is stricter than ours. Britain's courts have declined to adopt the rule of *New York Times Co. v. Sullivan*,[3] and it is not followed in any other country.

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[3] 376 U.S. 254 (1964). In *Sullivan*, the Court held that the constitutional guarantees of the First and Fourteenth Amendment require

> a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

*Id.* at 279-80.

Not only do we have more freedom than others. We have more than we had in this country at any time in the past. So why are we talking about "*The First Amendment in Crisis*"?

In my view, the greatest threat to free discussion of public issues today is not prior restraint but official secrecy. We have the most secretive federal government in American history. After the terrorist attacks of 9/11, Attorney General John Ashcroft ordered thousands of aliens arrested and detained, for weeks and months. Their names were kept secret, their places of imprisonment withheld even from their families. Just this week we learned that the Bush administration has a large program to reclassify documents that were declassified and have been on open library shelves for years.

But my guess is that the principal concern here is over subpoenas to journalists, requiring them to testify before grand juries in criminal investigations or to testify in discovery or trials in civil cases. The case of Judith Miller is surely on everyone's mind. She spent eighty-five days in prison for contempt after refusing to name her sources to a federal prosecutor looking into how the name of Mrs. Valerie Wilson, a covert CIA official, was leaked to the press. Other cases are pending. In one, reporters have refused to answer questions by lawyers for Wen Ho Lee in his civil suit against the government for, as he sees it, smearing him as a spy for China in leaks to the press.

The claim made by Judith Miller, and made generally by the press and its lawyers, is that the First Amendment gives journalists a constitutional privilege against having to testify when they are asked to name confidential sources. The argument is that use of such sources is essential to meaningful journalism, and they will dry up if reporters violate their promise of confidentiality and testify. Now I want to subject that claim to hard-headed scrutiny. The first thing to say is that the claim was squarely rejected by the Supreme Court in 1972—in *Branzburg v. Hayes*,[4] as you know. Some lower courts have found reasons to immunize journalists despite *Branzburg*.[5] But the Supreme Court has never changed its mind, and, in my opinion, there is zero chance of the Court's doing so.

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[4] 408 U.S. 665 (1972). In *Branzburg*, the Court specifically addressed this argument saying that, "[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen." *Id.* at 694.

[5] *See, e.g.*, Montezuma Realty Corp. v. Occidental Petroleum Corp. (*In re* Forbes Magazine), 494 F. Supp. 780, 782 (S.D.N.Y. 1980) ("The ability of a reporter or news publication to gather information in confidence and to sift and edit privately without being subject to governmental or court orders of disclosure is an important facet of the ability of the press to learn and publish news. It should not be overridden without compelling reason."); New York Times Co. v. Gonzales, 382 F. Supp. 2d 457, 490 (S.D.N.Y. 2005) (holding that reporters enjoy a qualified First Amendment privilege with respect to the compelled disclosure of confidential sources), *vacated*, 459 F.3d 160 (2d Cir. 2006).

Why do I say that? First, because freedom of the press has been protected, historically, almost entirely when a publication is penalized, for example in libel cases, or when there is an attempt at restraint before publication. The Supreme Court has rarely protected the press when it seeks to acquire news. It has done so only in the context of open courtrooms. And the basis of the press privilege claim is that it is needed to acquire news.

Second, there is the question of who is a journalist. In *Branzburg*, Justice White said freedom was just as much for the "lonely pamphleteer" as for the established press.[6] And now we have twenty-seven million lonely pamphleteers, self-nominated journalists publishing their blogs on the Internet. That is the latest estimate of the number of blogs, published last weekend in the *Financial Times*.[7] Are they to be protected against subpoenas when they come up with a scoop, as some of them do?

I think the interest of the press in this area has to be balanced against others. The citizen whose life has been ruined by false and damaging stories attributed to unnamed sources should not be left without a remedy. Think of Wen Ho Lee. Or go back to the case in which a constitutional privilege was claimed for the first time. The case was called *Garland v. Torre*,[8] decided by the U.S. Court of Appeals in New York in 1958.

Garland was Judy Garland. Torre was Marie Torre, a television columnist for *The New York Herald-Tribune*. She published a column saying that CBS executives had told her Ms. Garland was reluctant to appear on television because she thought she was too fat. Garland sued and demanded the names of the alleged CBS sources. Torre refused to give them, and made the constitutional claim. The Second Circuit rejected it, in an opinion by Potter Stewart, then a Sixth Circuit judge visiting the Second, later a Supreme Court Justice. The journalist's claim had to yield, he wrote, to the fundamental right of Americans to seek justice in the courts.[9]

I spoke just now of Marie Torre's alleged sources. Let me describe another case to show why I did. It arose years ago in South Africa, in the time of apartheid. A newsmagazine called *To the Point* published an article critical of a black minister named Manas Buthelezi. He spoke publicly of peaceful reform, the article said, but informed sources had told the magazine that in his private circles he called for revolutionary violence. That charge could have had terrible consequences for Buthelezi in apartheid South Africa. He sued, and demanded to know the names of the sources. The editor refused to give them. The courts, rejecting a privilege claim, entered judgment with damages

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[6] *Branzburg*, 408 U.S. at 704.

[7] Trevor Butterworth, *Time for the Last Post*, FINANCIAL TIMES (London), Feb. 18, 2006, (Weekend Magazine), at 16.

[8] 259 F.2d 545 (2d Cir. 1958).

[9] *Id.* at 549 & n.7.

for Buthelezi. Thereafter, in a great scandal, it came out that the article had actually been written by the secret police—and planted in *To the Point* to injure Buthelezi.

Justice William J. Brennan Jr., one of the greatest friends that freedom of speech and press have ever had on the Supreme Court, once cautioned the press against crying woe when, unusually, it lost a case in the Supreme Court. "This," he said, "may involve a certain loss of innocence, a certain recognition that the press, like other institutions, must accommodate a variety of important social interests."[10]

I think that is a fair warning. It does not mean that the press has no reason to worry about having to disclose confidential sources. It does. I have friends in the business who face that problem right now, and I have every sympathy with them. But I think it unwise to make overbroad claims—constitutional arguments that ignore other interests and that will not succeed. I think it is vital to show that the facts really do threaten acute public interests.

Take the Judith Miller case, for example. It was not an example of the press performing its vital function as a whistle-blower, exposing official wrongs. The wrong in this case was the disclosure of the CIA official's name in order to get even with her husband, Joseph Wilson, for telling us that President Bush's claim of Iraqi purchase of uranium ore in Africa was false. What is the public interest in protecting the author of that nasty business?

The example that to me really shows the need to protect the press's use of confidential sources is the reporting in *The New York Times* about President Bush's secret order to the National Security Agency to conduct warrantless wiretapping. The stories, by James Risen and Eric Lichtblau, disclosed a presidential action that violated the law.[11] The Justice Department has tried hard—very hard—to defend the legality of his order. But it plainly conflicted with the Foreign Intelligence Surveillance Act,[12] which provides a system of warrants before a special court and which declares that it is the exclusive method for such tapping. The Justice Department argues that a war president

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[10] William J. Brennan, Jr., Assoc. Justice of the U.S. Sup. Ct., Address at the Dedication of the Samuel I. Newhouse Law Center, Rutgers University (Oct. 17, 1979), *in* 32 RUTGERS L. REV. 173, 181 (1979).

[11] *See* James Risen and Eric Lichtblau, *Rice Defends Domestic Eavesdropping*, N.Y. TIMES, Dec. 19, 2005, at A28; James Risen and Eric Lichtblau, *Spying Program Snared U.S. Calls*, N.Y. TIMES, Dec. 21, 2005, at A1; James Risen and Eric Lichtblau, *Domestic Surveillance: The Program; Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. TIMES, Dec. 24, 2005, at A1; James Risen and Eric Lichtblau, *Legal Rationale by Justice Dept. on Spying Effort*, N.Y. TIMES, Jan. 20, 2006, at A1; James Risen and Eric Lichtblau, *More Attacks And Meetings On a Program Under Fire*, N.Y. TIMES, Jan. 21, 2006, at A8; James Risen and Eric Lichtblau, *Domestic Surveillance: The Hearings; Top Aide Defends Domestic Spying*, N.Y. TIMES, Feb. 7, 2006, at A1.

[12] 50 U.S.C. §§ 1801-1871 (2005).

has "inherent power" to ignore that law, but that proposition was definitively rejected by the Supreme Court fifty years ago in the *Steel Seizure* case.[13]

So the *Times* reports performed a signal public service: the sort of press performance essential to keep this a country of laws, not men. Now the Bush Administration is going all-out to investigate who leaked the facts to the *Times*. It may subpoena Jim Risen and Eric Lichtblau. If it does, that would present the strongest argument for protection of the reporters and their sources. The balance of interests, that is, would be for protection. How could that balance be struck? Judge David Tatel of the U.S. Court of Appeals for the District of Columbia Circuit suggested that the courts adopt a qualified privilege under a statute giving them the power to define all testimonial privileges.[14]

Ladies and gentlemen, I have to tell you that my views on these matters are affected by something else. I think the worst threat to our constitutional system today—to our freedom—comes not from challenges to the First Amendment, worrying though they may be, but from a relentless effort to secure unrestrained, unaccountable presidential power. The Bush Administration's lawyers have argued not just that the president can ignore the law and order wiretapping without warrants. They have argued that he can order the use of torture, ignoring treaties and a criminal statute that prohibit it. If he orders torture, they say, any attempt to stop him by statute or treaty would be an unconstitutional interference with his power as Commander in Chief. They have argued that the President can order the detention of any American citizen suspected of a connection with terrorism: detention forever, in solitary confinement, without a trial and without access to a lawyer. Those are not abstract arguments. Citizens have been imprisoned, conversations tapped, prisoners tortured.

Lest you think that I am speaking loosely, let me give you an example of what has been done to detainees in Guantanamo. I warn you that it will not make for pleasant listening.

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[13] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952). In the *Steel Seizure* case, the President directed the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to prevent an impending strike by steel workers. *Id.* at 582-83. The President believed that the indispensability of steel as a component of weapons and war materials ensured that any stoppage of production at the mills would immediately jeopardize the national defense. *Id.* at 583. The Government asserted that, "[A] strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had 'inherent power' to do what he had done." *Id.* at 584. The Court rejected this argument, holding that the seizure order was not within the constitutional power of the President. *Id.* at 587-89.

[14] *See In re* Grand Jury Subpoena, 397 F.3d 964, 988-95 (D.C. Cir. 2005) (Tatel, J., concurring).

One detainee at Guantanamo is Mohamed al-Kahtani. On August 8, 2002, he was moved into an "isolation facility," where he stayed for the next 160 days, his cell continuously flooded with light, his only human contact with interrogators and guards. He was questioned for eighteen to twenty hours a day for forty-eight out of fifty-four straight days. He was threatened with a menacing dog. He was forced to wear a bra while thong panties were placed upon his head. He was leashed and ordered to perform dog tricks. He was stripped naked in front of women. He was taunted that his sister and mother were whores and that he was gay. Seeing al-Kahtani after such treatment, FBI agents concluded that he evidenced behavior consistent with extreme psychological trauma: talking to non-existent people, reporting hearing voices, cowering in a corner of his cell covered with a sheet for hours on end.

Under the pressure of those tactics, al-Kahtani named thirty other Guantanamo inmates as terrorists. Each of them remains in prison solely because he listed them; there is no other evidence against them. That leads to another point about the detainees. Two recent studies have found that most of them were not members of al Qaeda. They just happened to be in the wrong place when sweeps for possible terrorists were made. Or they were turned over to the United States by Afghan warlords who were given a large bounty for every such prisoner. Thirty-four detainees have been killed in American prisons in Iraq and Afghanistan, some of them tortured to death. In only twelve of those cases has anyone been punished, and the longest sentence was five months in jail for an Army sergeant who killed an Afghan prisoner. An Army interrogator who smothered an Iraqi general was merely reprimanded.

Two years ago the Supreme Court held that the Guantanamo detainees were entitled to seek writs of habeas corpus, challenging the reasons for their imprisonment, in United States courts.[15] In an effort to stall off judicial examination, the Defense Department installed a system of what it called Combatant Status Review Tribunals. It holds hearings, but the detainee who appears before one has no lawyer, and almost all the evidence is secret. The legal adviser to the tribunals, a Navy judge advocate general, Commander James Crisfield, has said that the tribunals almost entirely rely on "hearsay evidence recorded by unidentified individuals with no firsthand knowledge of the events they describe."[16]

Congress passed a bill sponsored by Senator Lindsay Graham that strips the courts of jurisdiction to hear habeas corpus cases from Guantanamo.[17] The Supreme Court held that the statute was prospective only, not cutting off

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[15] Rasul v. Bush, 542 U.S. 466 (2004).

[16] Corine Hegland, *Guantanamo's Grip*, THE NATIONAL JOURNAL (Wash., D.C.), Feb. 4, 2006, at 1.

[17] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741-42 (2005).

already pending habeas cases.[18] The Court went on to hold that the Combatant Status Review Tribunals denied rights guaranteed by the Geneva Conventions.[19]

I have gone a long way from the subject of this conference, ladies and gentlemen; but I do not apologize for that. It is always good to keep things in proportion.

The author of the First Amendment, James Madison, thought its great function was enabling the press to, as he famously put it, "examine public characters and measures." When we talk about the press and the First Amendment today, we should not only point to legal threats to the press but consider how well the press has been performing its high constitutional function. Over the years since the terrorist attacks of 9/11, how well has the established press done in alerting the public to the concentration and abuse of power in the White House? How hard is it working now to report the realities of what is going on in Guantanamo?

After 9/11 there was, I think, what could be called a paralysis of the will. *The New York Times* and *The Washington Post* actually apologized to readers for their timid performance in the run-up to the Iraq war—their failure to look more closely at the reasons given for the war, reasons that turned out to be false. Until the NSA wiretapping exposure, I do not think our great newspapers would have won an accolade from James Madison.

Let me end with a quotation from an opinion in one of the greatest victories for the press, the *Pentagon Papers* case.[20] You will remember that the Government tried in 1971 to stop publication by *The New York Times* and then *The Washington Post* of a secret history of the origins of the Vietnam War.

The Supreme Court rejected the government's argument. In a concurring opinion, Justice Hugo L. Black wrote:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . . The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, The New York Times, The Washington Post and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the

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[18] Hamdan v. Rumsfeld, ___ U.S. ___, ___, 126 S. Ct. 2749, 2762-69 (2006).

[19] *Id.* at ___, 126 S. Ct. at 2786.

[20] New York Times Co. v. U.S. (*Pentagon Papers*), 403 U.S. 713 (1971).

> workings of government that led to the Vietnam War, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.[21]

That is the vision of the First Amendment in which I believe: a restraint on government and a responsibility on the press.

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[21] *Id.* at 717 (Black, J. concurring).

# Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans

Ariel Y. Graff*

## I. INTRODUCTION

Massachusetts became the first state to legalize same-sex marriage in November 2003.[1] Following in the wake of an earlier state court decision mandating domestic partnership rights for same-sex couples, the Massachusetts ruling seemed the harbinger of a growing movement in favor of full legal equality for same-sex couples.[2] But rather than serving as a model for other states to emulate, the victory for gay rights in Massachusetts has provoked a flurry of legislative and judicial activity designed to "protect" the traditional definition of marriage as the union of one man and one woman. In the fall of 2004, twelve states passed constitutional amendments designed to eviscerate legal challenges to the denial of a same-sex marriage right.[3] A total of forty-four states now have statutory or constitutional language precluding legal recognition of same-sex marriages.[4]

Proponents of a right to same-sex marriage have argued that these laws violate constitutional guarantees of equal protection and substantive due process by depriving an identifiable class of citizens of the fundamental right to marry the person of their choice. However, such constitutional challenges

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[1] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[2] *See* Baker v. State, 744 A.2d 864 (Vt. 1999).

[3] *See* THE HERITAGE FOUNDATION, MARRIAGE IN THE 50 STATES (2006), http://www.heritage.org/Research/Family/Marriage50States.cfm (last visited September 28, 2006). These state constitutional amendments generally echo the language of the Defense of Marriage Act ("DOMA"), a federal law enacted in 1996 to define "marriage" as "a legal union between one man and one woman as husband and wife," and "spouse" as referring "only to a person of the opposite-sex who is a husband or a wife." 1 U.S.C. § 7 (2005). DOMA provides that these definitions will apply "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States." *Id.*

[4] *See* THE HERITAGE FOUNDATION, *supra* note 3.

to same-sex marriage bans have recently been rejected by the highest state courts in New York,[5] Washington,[6] and New Jersey,[7] while the highest courts of Georgia[8] and Tennessee[9] have recently upheld same-sex marriage bans against procedural challenges. Even Massachusetts may ultimately reverse course, with voters facing a proposed constitutional amendment to prohibit same-sex marriage in 2008.[10] Although legal challenges are still pending in California, Iowa, and Maryland, the recent string of setbacks suggests waning judicial and political support for same-sex marriage.[11]

However, support for same-sex marriage has been building momentum on another front. Increasingly, religious organizations, congregations, and individual spiritual leaders have concluded that their faiths require them to support equal marriage rights for same-sex couples. These beliefs have taken root among an array of religious communities, including mainstream denominations of American Judaism and Christianity. Even within religions that formally oppose same-sex marriage, individuals and organizations continue to agitate for doctrinal change.

This article suggests that as religious support for same-sex marriage increases, a free exercise challenge to same-sex marriage bans might succeed where other constitutional challenges have failed. In *Employment Division, Department of Human Resources of Oregon v. Smith*,[12] the Supreme Court held that free exercise challenges to neutral, generally applicable laws warrant only rational basis review.[13] However, *Smith* identified an exception in cases where a challenged regulation implicates "hybrid-rights" by burdening religious freedom in combination with another constitutionally protected right.[14]

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[5] *See* Hernandez v. Robles, 7 N.Y.3d 338 (2006).

[6] *See* Andersen v. King County, 138 P.3d 963 (Wash. 2006).

[7] *See* Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (holding that although committed, same-sex couples must be afforded the same rights and benefits enjoyed by married, opposite-sex couples, same-sex marriage is not a fundamental right entitled to protection under the liberty guarantee of the New Jersey Constitution).

[8] *See* Perdue v. O'Kelley, 632 S.E.2d 110 (Ga. 2006).

[9] *See* ACLU of Tennessee v. Darnell, 195 S.W.3d 612 (Tenn. 2006).

[10] *See* Patrick Healy, *For Movement, A Key Setback*, N.Y. TIMES, July 7, 2006, at A1.

[11] *See id.; see also* Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003) (constitutional right to marry under Arizona Constitution does not encompass same-sex marriage); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005) (Indiana Constitution does not require recognition of same-sex marriages).

[12] 494 U.S. 872 (1990).

[13] *Id.* Rational basis is an extremely deferential standard of judicial review. Under a rational basis analysis, "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996).

[14] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

Under these circumstances, *Smith* indicates that a challenged regulation must be justified as advancing a compelling governmental interest to withstand strict judicial scrutiny.[15]

Part I of this article explores the Supreme Court's evolving free exercise jurisprudence, focusing on the hybrid rights doctrine articulated in *Smith*. Part II discusses the extent to which same-sex marriage bans burden religious exercise. Part III outlines the contours of potential companion claims for a hybrid rights challenge by assessing the incremental expansion of the fundamental right to marry, and the evolving constitutional approach to claims of discrimination based on sexual orientation. Finally, Part IV concludes that religious exemptions from same-sex marriage bans are required under a hybrid rights analysis.

## II. THE SUPREME COURT'S EVOLVING FREE EXERCISE JURISPRUDENCE

### *A. Early Free Exercise Challenges to Anti-Polygamy Laws*

Two of the Supreme Court's earliest free exercise cases, *Reynolds v. United States*[16] and *Davis v. Beason*,[17] involved religious challenges to anti-polygamy laws. In both cases, the Court acknowledged that the plaintiffs' sincerely held religious beliefs included a duty to practice polygamy.[18] As the Court explained in *Reynolds*, male members of the plaintiff's church were compelled to satisfy this obligation under threat of "damnation in the life to come."[19] However, the Court articulated a narrow understanding of the Free Exercise Clause, explaining that although laws "cannot interfere with mere religious belief and opinions, they may with practices."[20] In the Court's view, requiring religious exemptions from anti-polygamy laws, or other regulations that impede religious conduct, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[21] Asserting that "[g]overnment could exist only in name under such circumstances," the *Reynolds* Court concluded that religious conduct must conform to neutral, generally applicable law.[22]

In *Beason*, the Court reaffirmed the validity of anti-polygamy laws, arguing that "[t]o extend [to religious objectors] exemption from punishment for such

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[15] *See id.*
[16] 98 U.S. 145 (1878).
[17] 133 U.S. 333 (1890).
[18] *See Reynolds*, 98 U.S. at 161; *Beason*, 133 U.S. at 333.
[19] *Reynolds*, 98 U.S. at 161.
[20] *Id.* at 166.
[21] *Id.* at 167.
[22] *Id.*

crimes would be to shock the moral judgment of the community."[23] Expressing doubt that its holding would interfere with religious freedom, the Court asserted that to recognize polygamy as "a tenet of religion is to offend the common sense of mankind."[24] The Court expressed disdain for unfamiliar, minority religions, observing that "[b]igamy and polygamy are crimes by the laws of all *civilized* and *Christian* countries."[25] Non-traditional marital unions are anathema to civilized, Christian traditions because such relationships "tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man."[26] The Court upheld the challenged polygamy ban under rational basis review, arguing that "[i]t was never intended or supposed that the [Free Exercise Clause] could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."[27]

### *B. A Shift to Heightened Scrutiny in Free Exercise Cases*

While the Court applied rational basis review and refused to grant religious exemptions in *Reynolds* and *Beason*, it adopted a radically different approach in *Sherbert v. Verner*.[28] In *Sherbert*, the Court considered a free exercise challenge to South Carolina's denial of unemployment compensation benefits for a Seventh Day Adventist who refused to accept work on Saturdays.[29] In concluding that the denial unconstitutionally burdened the Appellant's free exercise of religion, the Court reasoned that the statute forced her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[30] Like the challenged polygamy laws in *Reynolds* and *Beason*, South Carolina's unemployment compensation policy threatened religious conduct but did not interfere with the freedom of religious belief. However, in a departure from its approach in earlier cases, the *Sherbert* Court applied a strict scrutiny standard of review.[31] Thus, the Court demanded that South Carolina identify a compelling state interest to support its unemployment compensation policy.[32] In the Court's view, South Carolina's asserted

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[23] *Beason*, 133 U.S. at 341.
[24] *Id.* at 342.
[25] *Id.* at 341 (emphases added).
[26] *Id.*
[27] *Id.* at 342.
[28] 374 U.S. 398 (1963).
[29] *Id.* at 399.
[30] *Id.* at 404.
[31] *Id.* at 403.
[32] *Id.*

interests in preventing a deluge of potentially fraudulent unemployment compensation claims, and in not hindering employers from scheduling necessary Saturday work, were insufficient to justify a restriction implicating the free exercise of religion.[33] Reasoning that "[t]he extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences," the Court held that appellant was entitled to an exemption on free exercise grounds.[34] Thus, *Sherbert* stands for the principle that when a neutral, generally applicable law indirectly imposes a substantial burden on religious exercise, the denial of a religious exemption warrants strict scrutiny review.

Consistent with its holding in *Sherbert*, the Court continued to apply strict scrutiny in a series of subsequent free exercise cases. For example, in *Wisconsin v. Yoder*,[35] the Supreme Court strictly scrutinized a free exercise challenge to Wisconsin's compulsory school attendance law.[36] Recognizing that the Amish respondents had a religious obligation to lead a life unencumbered by "worldly influences,"[37] the Court concluded that compulsory school attendance "carries with it a very real threat of undermining the Amish community and religious practice as they exist today."[38] As in *Sherbert*, the Court reasoned that the challenged regulation forced individuals to make an intolerable choice; faced with a law that conflicted with their religion, the Amish respondents could either "abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[39] As the Court explained, this choice reflects "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."[40]

In addition to burdening free exercise, the Court observed that compulsory school attendance also "'unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.'"[41] The Court emphasized that "when the interests of parenthood are combined with a free exercise claim," strict scrutiny review is required to prevent the infringement of constitutional rights.[42] Applying this standard, the

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[33] *Id.* at 407.
[34] *Id.* at 409.
[35] 406 U.S. 205 (1972).
[36] *Id.*
[37] *Id.* at 218.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 233 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)).
[42] *Yoder*, 406 U.S. at 233.

Court concluded that Wisconsin did not have a sufficiently compelling interest to justify its denial of an exemption for Amish children who chose to discontinue public education after the eighth grade.[43]

However, in *Employment Division v. Smith*, the Supreme Court broke with this approach, and declined to strictly scrutinize the application of a state drug law to the sacramental ingestion of peyote, a hallucinogenic drug.[44] Declaring that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,"[45] the Court maintained that strict scrutiny is not required where a "'valid and neutral law of general applicability'" imposes an incidental burden on the free exercise of religion.[46] Justice Scalia's majority opinion echoed the Court's statement in *Reynolds v. United States*, emphasizing that the effect of subjecting neutral, generally applicable laws to strict scrutiny review would be to subordinate the law of the land to the dictates of every individual's professed religious beliefs.[47] Although Justice Scalia acknowledged that this standard might "place at a relative disadvantage those religious practices that are not widely engaged in," he concluded "that [this] unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . ."[48]

The Court in *Employment Division v. Smith* further asserted that a rejection of strict scrutiny was consistent with a proper interpretation of its holdings in *Sherbert* and *Yoder*.[49] Rather than requiring strict scrutiny review of all neutral, generally applicable laws that create a burden on religious exercise, the Court explained that *Sherbert* stands for the limited principle that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[50] Similarly, the Court distinguished and limited its holding in *Yoder* by observing that the compulsory school attendance law at issue in *Yoder* did not implicate "the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with [an]other constitutional protection[], . . . [namely] the right of parents . . . to direct the education of their children."[51] Thus, *Sherbert* and

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[43] *Id.* at 221-25.

[44] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

[45] *Id.* at 878-79.

[46] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

[47] *Smith*, 494 U.S. at 885-86.

[48] *Id.* at 890.

[49] *Id.* at 881-84

[50] *Id.* at 884.

[51] *Id.* at 881. *Contra* William P. Marshall, *In Defense of* Smith *And Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (arguing that the *Smith* Court's "use of

*Yoder* represent two limited exceptions from *Smith*'s general holding. After *Smith*, a free exercise claim triggers strict scrutiny review only where a neutral, generally applicable law authorizes exemptions on the basis of "individualized assessments," or implicates "hybrid rights" by simultaneously burdening religious exercise in combination with another constitutional right.[52]

### *C. Congressional Responses to* Smith*: RFRA & RLUIPA*

In the aftermath of *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA")[53] to "restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[54] To achieve this goal, RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,"[55] unless the government can demonstrate that the burden constitutes the least restrictive means of furthering a compelling governmental interest.[56] Congress intended for RFRA to protect religious liberty against threats emanating from "all Federal [and state] law, and the implementation of that law . . . whether adopted before or after" RFRA's enactment.[57] In adopting RFRA, Congress asserted that Section 5 of the Fourteenth Amendment provided the constitutional authority for it to legislate standards of judicial review in cases of religious discrimination, consistent with its constitutional duty to enforce the rights guaranteed by the Fourteenth Amendment.[58]

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precedent borders on fiction").

[52] *But cf.* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) (suggesting that "the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously"); Jonathan B. Hensley, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 120 (2000) ("[T]he very concept of hybrid rights is logically flawed and ultimately untenable"); William L. Esser IV, Comment, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 243 (1998) ("The hybrid claim is no more than a smoke screen under which the Court hides the wreck of the rapidly sinking Free Exercise Clause."); Eric J. Neal, Comment, *The Ninth Circuit's "Hybrid Rights" Error: Three Losers Do Not Make a Winner in* Thomas v. Anchorage Equal Rights Commission, 24 SEATTLE U. L. REV. 169 (2000) (arguing that lower courts should reject the existence of a hybrid rights doctrine).

[53] 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

[54] *Id.* § 2000bb(b)(1).

[55] *Id.* § 2000bb-1(a).

[56] *Id.* § 2000bb-1(a)-(b).

[57] *Id.* § 2000bb-3(a).

[58] *See id.* § 2000bb(a).

However, in *City of Boerne v. Flores*,[59] the Supreme Court held that Congress had exceeded the scope of its Section 5 enforcement power by applying RFRA to free exercise claims against the states.[60] Congress responded to *Flores* by enacting the more limited Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[61] which mandates strict scrutiny review of free exercise challenges to federal and state laws governing land use or institutionalized persons.[62] However, RFRA continues to require strict scrutiny review of federal laws that burden religious exercise in any context.[63]

### *D. Hybrid Rights in the Wake of* Smith

Although *Employment Division v. Smith* declared that the Free Exercise Clause does not require strict scrutiny review of neutral, generally applicable laws, the Court continued to strictly scrutinize laws that deliberately targeted religious conduct for discriminatory treatment. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[64] the Court determined that a city ordinance regulating the ritual slaughter of animals was not a neutral law of general applicability.[65] It explained that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[66] Although the challenged regulation was facially neutral, the Court concluded that "suppression of the central element of the Santeria worship service was the object of the ordinances."[67] Furthermore, because the ordinance was directed "only against conduct motivated by religious belief," it reflected the "precise evil [that] the requirement of general

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[59] 521 U.S. 507 (1997).

[60] *Id.* at 533-36.

[61] 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

[62] *Id.* For a critical analysis of RLUIPA's constitutionality, see Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 345 (2003); Ariel Y. Graff, Comment, *Calibrating the Balance of Free Exercise, Religious Establishment and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485 (2005); Caroline R. Adams, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361, 2398 (2002).

[63] *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, __ U.S. __, 126 S. Ct. 1211 (2006) (holding that application of Schedule I of federal Controlled Substances Act to church's sacramental use of hoasca, a hallucinogenic tea, violated Religious Freedom Restoration Act).

[64] 508 U.S. 520 (1993).

[65] *Id.* at 537-38.

[66] *Id.* at 532.

[67] *Id.* at 534.

applicability [was] designed to prevent."[68] Applying strict scrutiny, the Court concluded that an intent to discriminate against religion cannot constitute a compelling governmental interest, and held that the challenged regulation violated the Free Exercise Clause.[69]

In a concurring opinion, Justice Souter discussed the scope of free exercise protections in the aftermath of *Smith*.[70] He was particularly critical of *Smith*'s hybrid rights exception, which provided for the continued application of strict scrutiny in cases where a free exercise claimant alleges the infringement of an additional constitutional right.[71] For Justice Souter, the distinction *Smith* draws between pure free exercise claims and hybrid rights claims is logically untenable:[72]

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule .... But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[73]

From this perspective, because creative plaintiffs can generally identify an additional constitutional right that is "implicated" under the facts of any free exercise claim, a literal interpretation of the hybrid rights exception would result in an overbroad application of strict scrutiny review. At the same time, if plaintiffs are required to assert independently viable companion claims in hybrid rights cases, the hybrid rights exception would be meaningless. In *Kissinger v. Board of Trustees*,[74] the Sixth Circuit expressed similar concerns when it described the hybrid rights exception as "completely illogical."[75] Because "the *Smith* Court did not explain how the standards under the Free Exercise Clause would change depending on whether other constitutional rights are implicated," the Sixth Circuit announced that it would not apply strict scrutiny in hybrid rights cases until the Supreme Court provides guidance

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[68] *Id.* at 545-46.

[69] *Id.* at 546-47.

[70] *Id.* at 567 (Souter, J., concurring in part and concurring in the judgment).

[71] *Id.*

[72] *Id.* at 566. *See generally* Steve H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573 (2003); Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith*: Examining How Courts are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649 (2001).

[73] *Lukumi*, 508 U.S. at 567 (Souter, J., concurring in part and concurring in the judgment).

[74] 5 F.3d 177 (6th Cir. 1993).

[75] *Id.* at 180.

that is more explicit.[76] Citing the Sixth Circuit's approach, the Second Circuit has also dismissed the cognizability of a hybrid rights doctrine.[77]

Despite the Sixth and Second Circuits' refusals to identify a cognizable hybrid rights exception to *Smith*, most courts that have considered the issue have acknowledged that hybrid rights claims appear to warrant a heightened standard of judicial review.[78] However, these courts have differed over the degree of constitutional merit that an asserted companion claim must present to fall within the hybrid rights exception.[79] The dominant view, represented by the Ninth[80] and Tenth[81] Circuits maintains that where a party asserts a "colorable," or arguable, hybrid rights claim, then strict scrutiny review applies in evaluating the party's free exercise claim. In essence, this approach involves a two-tiered analysis. First, courts must evaluate the strength of a party's free exercise and companion claims in order to determine if a potentially viable, "colorable" hybrid rights violation has been established. If this threshold analysis supports the conclusion that a challenged law infringes hybrid rights, courts proceed to evaluate a party's free exercise claim according to a strict scrutiny standard of review.

For example, in *Miller v. Reed*,[82] the Ninth Circuit considered an asserted hybrid rights claim involving the free exercise of religion and the constitutional right to travel.[83] Concluding that the plaintiff had failed to establish a plausible violation of the right to travel, the court held that "a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of

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[76] *Id.*

[77] Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003) (citing *Kissinger*, 5 F.3d at 180) ("We too can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated.").

[78] *See* Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998); Reich v. Shiloh True Light Church of Christ, No. 95-2675, 1996 U.S. App. LEXIS 10427 (4th Cir. May 7, 1996); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525 (1st Cir. 1995); Soc'y of Separationists v. Herman, 939 F.2d 1207 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (en banc); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991); Salvation Army v. Dept. of Cmty. Affairs, 919 F.2d 183 (3d Cir. 1990); Hinrichs v. Whitburn, 772 F. Supp. 423 (W.D. Wis. 1991), *judgment aff'd on other grounds*, 975 F.2d 1329 (7th Cir. 1992).

[79] Only the Ninth, Tenth, and First Circuits have had occasion to explore the contours of the hybrid rights doctrine, although the overwhelming majority of circuits have accepted the doctrine's existence. *See supra* note 78.

[80] *See Miller*, 176 F.3d 1202.

[81] *See Swanson*, 135 F.3d 694.

[82] 176 F.3d 1202.

[83] *Id.*

the violation of another alleged fundamental right . . . ."[84] While the Ninth Circuit recognized that the Supreme Court "'has been somewhat less than precise with regard to the nature of hybrid rights,'"[85] it held that in order to assert a valid hybrid claim, "'a free exercise plaintiff must make out a 'colorable claim' that a companion right has been violated . . . .'"[86] The court explained that a "colorable claim" entails "a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits."[87] Unlike Justice Souter, who identified two impractical approaches to the hybrid rights exception, the Ninth Circuit recognized a third possibility. While a companion claim cannot be utterly merit-less, it also need not be independently viable.[88] Instead, a hybrid rights plaintiff must advance a "colorable" companion claim that would not necessarily succeed as an independent cause of action.

Like the Ninth Circuit, the Tenth Circuit, in *Swanson v. Guthrie Independent School District*,[89] held that the hybrid rights exception "requires a colorable showing of infringement of recognized and specific . . . rights" in order to trigger strict scrutiny review.[90] The court emphasized that although "it is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*," simply raising a hybrid rights claim "is not a talisman that automatically leads to the application" of strict scrutiny review.[91] Instead, courts must first ascertain whether the "claimed infringements are genuine[]" in order to determine that a cognizable hybrid rights claim has been established.[92] Only a "colorable" hybrid rights claim can trigger strict scrutiny review of a party's free exercise claim.

This "colorable claim" standard for evaluating the merit of a companion claim in hybrid rights cases best reflects the Court's treatment of *Yoder* in *Smith*.[93] In *Yoder*, the Court recognized that compulsory school attendance

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[84] *Id.* at 1208.

[85] *Id.* at 1207 (quoting Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703 (9th Cir. 1999)).

[86] *Id.*

[87] *Id.*

[88] *Contra* Brown v. Hot, Sexy & Safer Prods. 68 F.3d 525 (1st Cir. 1995) (requiring an independently viable claim to a constitutional right other than free exercise).

[89] 135 F.3d 694 (10th Cir. 1998).

[90] *Id.* at 700.

[91] *Id.* at 699.

[92] *Id.*

[93] *See* Aden and Strang, *supra* note 72, at 600 ("The colorable claim standard, properly applied, appears to most closely approximate the design of Smith."); Santoli, *supra* note 72, at 669 ("The colorable claim theory is perhaps the best interpretation of the hybrid-rights exception because it accords with *Smith* and other free exercise cases that Justice Scalia used to formulate the hybrid-rights exception."); John L. Tuttle, Note, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under* Employment Division v. Smith, 3 AVE MARIA L. REV. 741, 765 (2005) (asserting that "the *Yoder* Court invalidated the

requirements interfere with the freedom of parents to control the upbringing of their children.[94] However, before applying strict scrutiny, the Court evaluated the viability of the respondent's free exercise claim to ensure that the "Amish religious faith and their mode of life are, as they claim, inseparable and interdependent."[95] After determining that the plaintiffs had a legitimate hybrid rights claim, the Court applied strict scrutiny and invalidated the challenged regulation.[96] Thus, unlike circuit courts that have effectively nullified the hybrid rights doctrine by requiring plaintiffs to demonstrate two independently viable claims, the Supreme Court applied strict scrutiny in *Yoder* after identifying two "colorable" claims of infringement.

## III. DO SAME-SEX MARRIAGE BANS BURDEN RELIGIOUS FREEDOM?

### *A. Protection for Sincerely Held Religious Beliefs*

Although many devout Americans may perceive same-sex marriage as fundamentally antithetical to religious values, "[r]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[97] Indeed, "the First Amendment was enacted precisely to protect the right of those whose religious practices are not shared by the majority and may be viewed with hostility."[98] In *Frazee v. Illinois Department of Employment Security*,[99] the Supreme Court considered whether an individual's sincerely held religious belief must be rooted in a "tenet, belief or teaching of an established religious body" to fall within the scope of free exercise protections.[100] The Court evaluated its prior free exercise cases, and concluded that no precedent "suggest[s] that unless a claimant belongs to a

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mandatory school attendance law as applied to the Amish explicitly because it burdened their right to direct the upbringing of their children and violated the Free Exercise clause"). *Contra* Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77 (2004/2005)(endorsing an independently viable constitutional claim standard).

[94] *See* Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972).

[95] *Id.* at 215.

[96] *Id.* at 234-35.

[97] Thomas v. Review Bd. Of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981).

[98] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488; *see also* Marc L. Rubinstein, *A Doctrinal Approach to the Argument that Anti-Gay-Rights Initiatives Violate the Establishment Clause*, 46 HASTINGS L. J. 1585, 1613-17 (1995) (arguing that no legitimate secular purpose for legislation limiting gay-rights is plausible).

[99] 489 U.S. 829 (1989).

[100] *Id.*

sect . . . his belief, however sincere, must be deemed a purely personal preference rather than a religious belief."[101] While it emphasized the "difficulty of distinguishing between religious and secular convictions and in determining whether a belief is sincerely held,"[102] the Court "reject[ed] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[103] Although an individual's "membership in an organized religious denomination . . . would simplify the problem of identifying sincerely held religious beliefs," free exercise protections are not restricted to organized religions.[104]

Thus, the legitimacy of a free exercise claimant's religious beliefs is evaluated on an individualized basis. Courts will recognize an individual's beliefs as constitutionally protected religious exercise if the individual can demonstrate that his or her religious beliefs are sincerely held. If same-sex marriages are impelled by individuals' sincerely held religious beliefs, then those marriages fall within the ambit of constitutionally protected religious freedom.[105]

### *B. Same-Sex Marriage as a Religious Requirement*

Much of the organized political opposition to same-sex marriage has been spearheaded by traditionalist religious organizations, which perceive a need to protect a definition of marriage that is as old as the book of Genesis itself. But religious approaches to same-sex marriage are by no means monolithic.[106] Indeed, numerous religious organizations have endorsed same-sex marriage to varying degrees.[107] Although an asserted religious belief in same-sex marriage does not need to be sanctioned by an official religious body to merit constitutional protection, the fact that religious organizations have expressed support for same-sex marriage is compelling evidence of the sincerity of such beliefs.

A resolution under debate by the Committee on Jewish Law and Standards[108] stakes out one of the strongest positions in support of same-sex

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[101] *Id.* at 833.

[102] *Id.*

[103] *Id.* at 834.

[104] *Id.*

[105] *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993).

[106] *See generally* Mark Strasser, *Same-sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 604-10 (2002) (discussing the lack of unanimity in religious views concerning the permissibility of same-sex marriage).

[107] *See infra* notes 108-32 and accompanying text.

[108] The Committee on Jewish Law & Standards is the central authority for Jewish law and tradition within Conservative Judaism. *See* The Rabbinical Assembly, Contemporary Halakhah, http://www.rabbinicalassembly.org/law/contemporary_halakhah.html ("The Committee on

marriage as an affirmative religious value.[109] It begins by recognizing homosexuality as an immutable aspect of individual identity, rather than an expression of personal preference or conscious choice.[110] From this premise, the Rabbinic authors of the resolution reason that "for the contemporary *poseik* [Rabbinic legal authority] to possess this information, to hear the distress of gay and lesbian Jews eager to observe the Torah, and simply to state that nothing can be done is to ignore the halakhic [Jewish-legal] principle of human dignity."[111] Thus, the exclusion of homosexuals from full participation in Jewish communal life constitutes an intolerable affront to fundamental religious norms respecting human dignity. Marriage is a central dimension of Jewish life, and same-sex couples who are denied the opportunity to marry are thereby prevented from living a fully Jewish existence.[112]

For the Rabbinic authors of this responsum, this interference with Jewish living, and religious "obligations to safeguard the dignity of gay and lesbian Jews" cannot be mitigated by the "spurious ideals of: celibacy, which is impossible for many people; conversion therapy, which has been discredited by the psychological profession; or surreptitious sexual behavior, which is dangerous on many levels."[113] Instead, respect for human dignity requires an accommodation that permits "gay or lesbian Jew to live openly and honestly within the Jewish community."[114] It is only "[w]hen gay and lesbian Jews are finally welcomed to come out of the closet and take their rightful place in our community, [that] we will have safeguarded their dignity as individuals, and our dignity as a community."[115] The responsum concludes with the following declarations:

> Halakhah [Jewish Law] is not indifferent to decisions made by gay and lesbian Jews about their intimate relationships. Surely it is better for gay and lesbian Jews to establish monogamous relationships with other Jews and thereby to establish stable Jewish households. Surely promiscuity is no more acceptable

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Jewish Law and Standards sets halakhic policy for Rabbinical Assembly rabbis and for the Conservative movement as a whole.").

[109] *See* Rabbis Elliot N. Dorff, Daniel S. Nevins & Avram I. Reisner, *Homosexuality, Human Dignity & Halakhah: A Combined Responsum for the Committee on Jewish Law & Standards* (pending resolution, vote scheduled for Dec. 2006) (on file with author) [hereinafter *Combined Responsum*].

[110] *Id.* at IV.E ("[W]e acknowledge the lessons of modern science and psychology in teaching that homosexual orientation is not an individual decision but rather a core component of human identity often established by childhood.").

[111] *Id.* (emphasis in original).

[112] *See* ELLIOT N. DORFF & ARTHUR I. ROSETT, A LIVING TREE: THE ROOTS & GROWTH OF JEWISH LAW 442 (1987) (discussing the role of marriage in Jewish life).

[113] *Combined Responsum*, *supra* note 109, at IV.E.

[114] *Id.*

[115] *Id.*

> among homosexuals than it is among heterosexuals. Surely the establishment of family units is central to the preservation of human dignity. For all of these reasons, we favor the establishment of committed and loving relationships for gay and lesbian Jews. The celebration of such a union is appropriate with blessings over wine and [other appropriate rituals].[116]

Other branches of American Judaism have embraced similar positions. In a policy paper outlining Reform Judaism's approach to same-sex marriage, the Central Conference of American Rabbis ("CCAR")[117] urged that "all rabbis, regardless of sexual orientation, be accorded the opportunity to fulfill the sacred vocation they have chosen."[118] Moreover, the CCAR acknowledged that for some, "marriage is arguably the best and most proper framework within which the adult Jew whose natural desire for intimacy is with members of the same gender can conduct his or her relationships."[119] Although a majority of Rabbis declined to personally endorse same-sex marriage, the CCAR expressed its collective commitment to "enabling gays and lesbians to live full Jewish lives within our communities."[120] Similarly, "[m]ost Reconstructionist rabbis today perform same-sex Jewish weddings" and the Reconstructionist movement opposes "religious second-class citizenship for gay and lesbian Jews."[121] Reconstructionist religious school curricula include issues relating to "the gay and lesbian family" and the Reconstructionist movement "retain[s] an unwavering commitment to forming inclusive communities, welcoming to gay, lesbian, bi-sexual and transgendered Jews."[122]

Several Christian denominations have also recognized the religious value and spiritual dignity that characterizes many same-sex relationships. Quakers were among the first Christian denominations to declare that "the gift of spiritual union is as strong and valuable to our community in same-sex couples as it is in opposite-sex couples."[123] Similarly, the United Church of Christ

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[116] *Id.*

[117] Reform Judaism is the largest Jewish movement in North America, with more than 900 congregations and 1.5 million members. Reform Judaism, http://rj.org (last visited Nov. 11, 2006). The CCAR is the largest association of Reform Rabbinic leaders. *See* Religious Tolerance, Judaism and Homosexuality: Reform Judaism, http://religioustolerance.org/hom_jref.htm.

[118] *See* CENTRAL CONFERENCE OF AMERICAN RABBIS, CCAR RESPONSA, ON HOMOSEXUAL MARRIAGE (2004), http://data.ccarnet.org/cgi-bin/respdisp.pl?file=8&year=5756 (last visited Sept. 28, 2006).

[119] *Id.*

[120] *Id.*

[121] Joshua Lesser, *"Gay Judaism" and the Struggle for Inclusion*, RECONSTRUCTIONISM TODAY, Autumn 2003, http://www.jrf.org/rt/2003/gay_judaism.htm.

[122] Jewish Reconstructionist Federation, Frequently Asked Affiliation Questions, http://www.jrf.org/recon/affiliateFAQ.html#ra10/ (last visited Sept. 28, 2006).

[123] *See* Philadelphia Yearly Meeting of the Religious Society of Friends, Quakers, South

("UCC") maintains that "the Bible affirms and celebrates human expressions of love and partnership, calling us to live out fully that gift of God in responsible, faithful, committed relationships that recognize and respect the image of God in all people."[124] This religious call to marry adheres with equal force to "[all] couples regardless of gender."[125] Indeed, "after prayerful biblical, theological, and historical study," the UCC's leadership body urged all member congregations to adopt "Wedding Policies that . . . do not discriminate against couples based on gender."[126]

Unitarian Universalists not only support same-sex marriage, but also teach that opposition to full equality for homosexuals is prohibited on religious grounds: "it is the presence of love and commitment that we value; it is homophobia that is the sin, not homosexuality."[127] Consistent with this perspective, the Unitarian Universalist Association has urged its member congregations "to proclaim the worth of marriage between any two committed persons and to make this position known in their home communities."[128]

Additionally, individual organizations within less accommodating religious traditions continue to agitate for greater openness and doctrinal change within their respective communities. These include the Al-Fatiha Foundation, an organization of American Muslims,[129] Lutherans Concerned/North America,[130] DignityUSA, a national Catholic organization,[131] and the Alliance of Baptists.[132] Thus, there is ample evidence to support the claim that members of many religions sincerely believe that their faiths require the provision of same-sex marriages for their homosexual coreligionists.

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Central Yearly Meeting of Friends Minute on Same Sex Marriage (Apr. 2004), http://www.pym.org/pm/more.php?id=1847_0_45_56_M.

[124] United Church of Christ, General Synod, In Support of Equal Marriage Rights for All (Adopted Oct. 2005), http://www.ucc.org/synod/resolutions/gs25-7.pdf.

[125] *Id.*

[126] *Id.*

[127] Press Release, Unitarian Universalist Ass'n, Sinkford Lobbies House of Representatives on Marriage Amendment (July 12, 2006), *available at* http://www.uua.org/president/060711_ftm.html.

[128] Unitarian Universalist Ass'n, Support of the Right to Marry for Same-Sex Couples, http://www.uua.org/actions/immediate/96same-sex.html (last visited Nov. 21, 2006).

[129] *See* Al-Fatiha Foundation, http://www.al-fatiha.org (last visited Nov. 21, 2006).

[130] Press Release, Lutherans Concerned/North America, Lutheran Alliance Remains Focused on the Full Participation of Gays and Lesbians in the Life of the Lutheran Church (Jan. 13, 2005), *available at* http://www.lcna.org/lcna_news/2005-01-13.shtm.

[131] Press Release, DignityUSA, DignityUSA Urges Washington State Supreme Court to Uphold Lower Court Rulings Affirming Marriage Equality (Mar. 1, 2005), *available at* http://www.dignityusa.org/news/050301seattle.html.

[132] The Alliance of Baptists, Statement on Same Sex Marriage (Apr. 17, 2004), *available at* http://www.allianceofbaptists.org/sssm-2004.htm.

### *C. Same-Sex Marriage Bans as a Burden on Religious Freedom*

Several statements of religious support for same-sex marriage equate same-sex marriage bans with a state imposed burden on religious freedom. For example, in an open letter to the Roman Catholic Bishops of Massachusetts, the Religious Coalition for the Freedom to Marry, an interfaith coalition of ministers, rabbis and religious leaders, explained that "[t]aking away civil marriage rights from committed, loving gay and lesbian couples would deny us the right to practice our beliefs."[133] Similarly, in an advertisement produced under the auspices of the Coalition, more than seventy Rabbis concluded that any law denying "same-sex couples civil marriage rights would be a violation of our religious freedom."[134] However, the legal basis for this assertion is not immediately clear. While same-sex marriage bans prohibit the government from extending legal recognition to same-sex marriages, they neither prohibit the religious celebration of same-sex marriage ceremonies, nor do they deprive same-sex couples of the freedom to believe that their marriage is valid for religious purposes. The Supreme Court itself has long distinguished between the religious and civil institutions of marriage, explaining that "marriage is often termed . . . a civil contract, . . . and does not require any religious ceremony for its solemnization."[135] Nevertheless, the refusal to validate religious same-sex marriages under state laws constitutes a burden on religious exercise for at least two reasons.

To understand why this is so, it is important to briefly discuss the legal implications of a civil marriage license. In the United States, marriage licenses are awarded by individual states in accordance with the laws of each state.[136]

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[133] Letter from Religious Coal. for the Freedom to Marry Bd. to Cardinal O'Malley and the Roman Catholic Bishops of Massachusetts (2005), *available at* http://www.rcfm.org/lettertorcbishops.htm ("By proclaiming homosexuality and same-sex unions to be universally immoral and worthy of second-class status under state law, you are sending a message that our faith communities are immoral. We urge you to stop trying to make your religious definition of marriage and family the law of our Commonwealth."); *see also* David A. J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 508 (1994) (arguing that such initiatives are an embodiment of "unjust sectarian religious intolerance" for homosexuals); Rubinstein, *supra* note 98, at 1592 (suggesting that such initiatives are impermissibly motivated by the religious purposes of certain fundamentalist Christian groups and therefore "should not pass muster under the Establishment Clause").

[134] Religious Coal. for the Freedom to Marry, Civil Marriage is a Civil Right, *available at* http://www.rcfm.org/docs/rabbiad.pdf (advertisement sponsored by over seventy Rabbis and other members of the Massachusetts Jewish community).

[135] Maynard v. Hill, 125 U.S. 190, 210 (1888).

[136] *See* Pennoyer v. Neff, 95 U.S. 714, 734-35 (1878) (explaining that every state has the "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved").

Although the Full Faith and Credit Clause of the Federal Constitution requires that "full faith and credit shall be granted in each state to the public acts, records, and judicial proceedings of every other state,"[137] the federal Defense of Marriage Act ("DOMA") creates an exception that permits states to disregard the validity of a same-sex marriage license granted by a sister state.[138] This has significant legal implications, as state validation of a marriage triggers the application of state and federal laws governing married individuals. The grant of a civil marriage license implicates between 170 and 350 legal rights and responsibilities under the laws of various states,[139] and more than 1,100 additional legal interests under federal law.[140] These marriage rights pertain to an individual's legal status in many categories of interaction with the government, including:

> Social Security and Related Programs, Housing, and Food Stamps; Veterans' Benefits; Taxation; Federal Civilian and Military Service Benefits; Employment Benefits and Related Laws; Immigration and Naturalization; Trade, Commerce, and Intellectual Property; Financial Disclosure and Conflict of Interest; Crimes and Family Violence; Loans, Guarantees, and Payments in Agriculture; and Federal Natural Resources and Related Laws.[141]

It is the denial of marriage rights pertaining to eligibility for public benefits that constitutes the first of two potentially unconstitutional burdens on religious exercise. The Supreme Court has held that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."[142] Put otherwise, the government may not exclude members of any faith "because of their faith, or lack of it, from receiving the benefits of public welfare legislation," without infringing the Free Exercise Clause.[143]

However, when same-sex couples obtain religious marriages in accordance with the precepts of their religion, they are effectively excluded from the

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[137] U.S. CONST. art. IV, § 1.

[138] 28 U.S.C. § 1738C (Supp. 2006) ("No state . . . shall be required to give effect to any public act . . . of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . .").

[139] *See, e.g.*, Partners Task Force for Gay and Lesbian Couples, Marriage Benefits Lost, http://www.buddybuddy.com/mar-list.html (listing state marriage benefits).

[140] *See* U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT 1 (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

[141] *Id.* app. 1, at 3-10.

[142] Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981).

[143] *Id.* at 717-18 ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

receipt of public benefits because of their faith. For example, the introduction to DOMA explicitly states that the Act is rooted in an understanding of marriage as the "union for life of one man and one woman in the holy estate of matrimony."[144] DOMA and other same-sex marriage bans are designed to "protect" and perpetuate the traditional institution of marriage by rewarding opposite-sex couples with rights and benefits,[145] while simultaneously stigmatizing and excluding same-sex couples by denying their eligibility to partake of those rights and benefits. As a result, same-sex couples who seek to marry for religious reasons are faced with a stark choice: If they decide to follow the precepts of their faith and enter into a religiously sanctioned same-sex marriage, they are rendered ineligible to receive the benefits of public welfare legislation for married couples. To the extent that the law thereby withholds marriage benefits from those same-sex couples who sincerely believe in a religious imperative to accept their homosexual identity and marry an individual of the same sex, it imposes a constitutionally significant burden on religious exercise.

On a second, less direct, level, the refusal to extend civil recognition to religious same-sex marriages pits religious freedom against the powerful, coercive influence of legally enshrined social opprobrium. As discussed above, a major factor underlying religious support for same-sex marriage is a belief in the need to safeguard the essential dignity of all human beings, regardless of sexual orientation. Yet, this religious message of tolerance and respect is directly contradicted by the enforcement of same-sex marriage bans. No amount of religious encouragement and acceptance of same-sex marriage can overcome the unambiguously stigmatizing message of same-sex marriage bans. The religious message of tolerance, respect, and encouragement for same-sex marriage is reduced to a nullity by marriage restrictions that explicitly deny their validity and social significance. Where religion declares that same-sex couples are entitled to marry and be treated with the same measure of respect as opposite-sex couples, the law interjects the inescapable declaration that same-sex marriages need not be acknowledged, let alone respected. By imposing marriage restrictions that explicitly contradict and undermine the purpose of religious same-sex marriages, the marriage bans plainly impose a burden on religious exercise. As a Quaker organization explains, by repudiating the significance of religious same-sex marriages, "the

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[144] H.R. REP. NO. 104-664, at 12 (1996).

[145] *See* Hernandes v. Robles, 7 N.Y.3d 338, 359 (2006) (describing "marriage and its attendant benefits" as an "inducement" for opposite-sex couples to "make a solemn, long-term commitment to each other"); Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 868 (8th Cir. 2006) (asserting that the rational intent of traditional marriage laws is "to encourage heterosexual couples to bear and raise children in committed marriage relationships").

state places a burden on the affected couples and their families and on our community as a whole as we support them."[146]

### *D. A History of Unsuccessful Free Exercise Challenges to Same-Sex Marriage Bans*

Although same-sex marriage bans appear to burden religious freedom, free exercise challenges to such bans have fared poorly in the courts. In 1997, the Eleventh Circuit rejected a Reconstructionist Jewish woman's claim that the Free Exercise Clause protects same-sex marriage as a form of religious exercise.[147] Without providing factual support for its claim, the court asserted that the "Plaintiff's religion requires a woman neither to 'marry' another female--even in the case of lesbian couples--nor to marry at all."[148] Moreover, the court thought it significant that "no federal appellate court or state supreme court has recognized the federal rights of same-sex marriage claimed by Plaintiff."[149] The majority also expressed "doubt that a facially neutral" policy "which adversely impacts on the exercise of religion either constitutes a violation of the Free Exercise Clause or requires heightened scrutiny."[150] In contrast, a concurring opinion recognized that the plaintiff's same-sex "wedding ceremony was an exercise of her religion" because "she participated in a 'wedding' ceremony that was in accordance with her sincere religious beliefs."[151] Similarly, a dissenting opinion emphasized that Reconstructionist Judaism "regards same-sex marriages as acceptable and desirable in preference to couples living together without marriage."[152]

Yet, even if a majority of the Eleventh Circuit had concluded that the same-sex marriage at issue was a form of religious exercise, the Supreme Court's general holding in *Smith* would bar strict scrutiny review of a neutral, generally applicable marriage regulation that indirectly burdens religious exercise.[153] Absent reason to believe that same-sex marriage bans reflect a governmental intent to discriminate against religion, under *Smith*'s general holding, such free-exercise challenges merit only rational basis review. Thus,

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[146] Philadelphia Yearly Meeting of the Religious Society of Friends, Quakers, *supra* note 123.

[147] *See* Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc).

[148] *Id.* at 1099. In fact, Reconstructionist Judaism is committed to enabling gays and lesbians to live fully Jewish lives. *See supra* notes 121-22 and accompanying text.

[149] *Id.* at 1099 n.2.

[150] *Id.* at 1111 n.27.

[151] *Id.* at 1118 (Tjoflat, J., concurring).

[152] *Id.* at 1120 (Godbold, J., dissenting).

[153] *See also* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996) (holding that a law, which prohibited religiously motivated discrimination against prospective tenants on the basis of marital status, was religiously neutral and generally applicable).

in *Jones v. Hallahan*,[154] the Kentucky Court of Appeals rejected a free-exercise challenge to a municipality's refusal to issue a same-sex marriage license.[155] Observing that "marriage has always been considered as the union of a man and a woman,"[156] the court concluded that a "claim of religious freedom cannot be extended to make the professed [religious] doctrines superior to the law of the land."[157]

The courts in *Shahar* and *Jones* rejected free exercise challenges to same-sex marriage bans after identifying a rational basis to support the government's denial of a same-sex marriage right. However, if proponents of a free exercise right to same-sex marriage can persuade courts to evaluate their claims under a more favorable strict scrutiny standard of review, these outcomes might be reversed. In the context of a free exercise challenge to the federal Defense of Marriage Act, strict scrutiny review would be required by the Religious Freedom Restoration Act, which applies whenever religious exercise is burdened by a federal law.[158] However, the Supreme Court has held that RFRA is invalid as applied to the states.[159] Nevertheless, a hybrid rights claim is one strategy for triggering strict scrutiny review of state laws that burden religious freedom by prohibiting recognition of religiously mandated same-sex marriages.

## IV. TOWARDS A COLORABLE COMPANION CLAIM: DUE PROCESS AND EQUAL PROTECTION

As discussed above, free exercise challenges to religiously neutral, generally applicable laws are evaluated under the highly deferential standards of rational basis review. However, in hybrid rights cases, where a free exercise claim is coupled with an additional, "colorable" constitutional claim, courts apply the more exacting standards of strict scrutiny in assessing the free exercise component of the hybrid claim. The purpose of the following section is to outline colorable companion claims to accompany a free exercise challenge to the constitutionality of same-sex marriage bans. Claims based on fundamental rights and equal protection are almost certainly colorable, as courts in Massachusetts, New York, and Washington State have found them sufficiently meritorious to survive motions for dismissal and summary judgment.

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[154] 501 S.W.2d 588 (Ky. 1973).

[155] *Id.* at 589.

[156] *Id.*

[157] *Id.* at 590.

[158] *See supra* Part II.C.

[159] *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997); *supra* Part II.C.

### A. Marriage, Procreation, and the Freedom to Choose a Spouse

#### 1. Marriage is a fundamental right

It is well-settled that all individuals possess a fundamental right to marry. As the Supreme Court has emphasized, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[160] In *Skinner v. Oklahoma*,[161] the Court addressed the profound importance of marriage as a means of effectuating the fundamental right to procreate.[162] Recognizing that procreation is "one of the basic civil rights of man,"[163] the Court held that a state cannot deprive its citizens of the capacity to enjoy this fundamental freedom by mandating the forced surgical sterilization of prisoners.[164] Because "[m]arriage and procreation are fundamental to the very existence and survival of the race,"[165] a state cannot absolutely and irreversibly deprive an individual of procreative liberty, an important component of the fundamental right to marry.

The Supreme Court has also suggested that the right to marry cannot be conditioned on an applicant's willingness or ability to care for his or her offspring. In *Zablocki v. Redhail*,[166] the Court invalidated a law requiring individuals who owed child support payments to seek court approval before marrying.[167] Emphasizing that "the right to marry is of fundamental importance for all individuals,"[168] the Court reasoned that "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[169]

Taken together, *Skinner* and *Zablocki* suggest that the right to marry is derived from the fundamental right to procreate. However, in *Turner v. Safely*,[170] the Court recognized that individuals' fundamental freedom to marry is not limited to the procreative context, but rather exists as an independent constitutional right.[171] In *Turner*, the Court held that prison inmates have a

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[160] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[161] 316 U.S. 535 (1942).

[162] *Id.*; *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a state statute criminalizing the use of contraceptives by married couples violates fundamental privacy rights).

[163] *Skinner*, 316 U.S. at 541.

[164] *Id.*

[165] *Id.*

[166] 434 U.S. 374 (1978).

[167] *Id.* at 387.

[168] *Id.* at 384.

[169] *Id.* at 386.

[170] 482 U.S. 78 (1987).

[171] *Id.* at 95-97.

right to marry during the period of their incarceration.[172] Although incarceration separates prisoners from their spouses, the Court identified three "important and significant aspect[s] of the marital relationship" that continue to merit constitutional protection despite this physical separation and the impossibility of procreation in the prison context.[173] First, the Court recognized that, like all marriages, inmate marriages "are expressions of emotional support and public commitment."[174] These transcendent emotional and interpersonal features of marriage persist despite the nature of imprisonment. Second, the Court explained that because "many religions recognize marriage as having spiritual significance . . . the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication."[175] Individuals' religious beliefs about marriage are distinct from physical aspects of the marriage relationship, and inmates can enjoy the spiritual benefits of marriage in isolation. Finally, beyond the emotional and religious attributes of marriage, the Court acknowledged that "marital status often is a pre-condition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock)."[176] In sum, the Court concluded that these emotional, spiritual, and financial attributes of marriage "are sufficient to form a constitutionally protected marital relationship in the prison context," despite the impossibility of procreation.[177]

### 2. *Equal protection and the freedom to select a spouse*

In addition to expanding the scope of the fundamental right to marry, the Supreme Court has applied the Equal Protection Clause in holding that the right to select a spouse cannot be constrained by discriminatory governmental classifications. In *Loving v. Virginia*,[178] the Court invalidated anti-miscegenation laws, explaining that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination[.]"[179] The State of Virginia argued that its miscegenation statutes did not

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[172] *Id.*

[173] *Id.* at 96.

[174] *Id.* at 95.

[175] *Id.* at 96.

[176] *Id.*

[177] *Id.*

[178] 388 U.S. 1; *see also* Perez v. Lippold, 198 P.2d 17, 29 (Cal. 1948) (en banc) (explaining that miscegenation laws "violate the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups").

[179] *Loving*, 388 U.S. at 12.

discriminate because they were applied equally to "both the white and the Negro participants in an interracial marriage."[180] From Virginia's perspective, a discriminatory classification is one that penalizes a discrete category of citizens, but a classification that applies to all citizens equally is, by definition, non-discriminatory. However, the Supreme Court rejected this contention, holding that "the fact of equal application does not immunize the [anti-miscegenation] statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."[181] This is particularly true when such classifications are applied to restrict the "fundamental freedom" to marry.[182] The Court concluded by declaring that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[183]

### *B. Constitutionally Protected Intimate Associations*

In *Roberts v. Jaycees*,[184] the Court recognized that, beyond the marriage context, there are "certain kinds of personal bonds" that warrant constitutional protection.[185] By "[p]rotecting these relationships from unwarranted state interference" the Court "safeguards the ability independently to define one's identity that is central to any concept of ordered liberty."[186] The Court noted that the Constitution does not extend its protection to all forms of association. Instead, the Court explained that protected intimate associations are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusions from others in critical aspects of the relationship."[187] Under this standard, "a

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[180] *Id.* at 8.

[181] *Id.* at 9.

[182] *Id.* at 12.

[183] *Id.*

[184] 468 U.S. 609 (1984).

[185] *Id.* at 618-19. *See generally* Collin O'Connor Udell, *Intimate Associations: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 233 (1998) (exploring the "multifaceted confusion that has plagued the lower court's treatment of" *Roberts*' intimate association doctrine).

[186] *Roberts*, 468 U.S. at 619; *see also* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("[M]atters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."); Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (discussing the Court's "equality-based and relationally situated theory of substantive liberty").

[187] *Roberts*, 468 U.S. at 620.

broad range of human relationships . . . may make greater or lesser claims to constitutional protection from particular incursions by the State."[188] Consequently, courts must evaluate the characteristics of a particular association in order to "locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[189] If a court determines that an asserted relationship reflects the distinctive characteristics of an intimate association, the Constitution constrains governmental power from interfering with that relationship absent a compelling justification.

In *Board of Directors of Rotary International v. Rotary Club of Duarte*,[190] the Supreme Court reiterated that, under *Roberts*, "the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships."[191] Furthermore, constitutional protection is not "restricted to relationships among family members."[192] Rather, the First Amendment protects intimate relationships that "presuppose 'deep attachments and commitments to the necessary few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life.'"[193]

In contrast to protected intimate associations, marriage involves more than the mere freedom from unwarranted government intrusion.[194] For example, marriage entails the right to access a range of governmental benefits that are inapplicable to other types of protected intimate associations. However, an animating theme in the Court's discussion of intimate association in *Roberts* and *Rotary* is the recognition that the freedom to find meaning and self-definition through intimate, sustaining personal relationships is protected by the Constitution. Heightened constitutional protections are required to safeguard this "intrinsic element of personal liberty" against undue governmental interference.[195]

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[188] *Id.*

[189] *Id.*

[190] 481 U.S. 537 (1987).

[191] *Id.* at 544.

[192] *Id.* at 545.

[193] *Id.* (quoting *Roberts*, 468 U.S. at 619-20).

[194] *See* Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 870 (8th Cir. 2006) (holding that a same-sex marriage ban does not infringe associational freedoms protected by the First Amendment because such a ban does not "directly and substantially interfere with appellees' ability to associate in lawful pursuit of a common goal, and . . . it seems exceedingly unlikely it will prevent persons from continuing to associate") (internal quotation marks omitted).

[195] *Roberts*, 468 U.S. at 620.

### C. Romer *and* Lawrence*: Prohibiting Discrimination Based on Sexual Orientations*

In *Romer v. Evans*,[196] the Supreme Court held that a Colorado constitutional amendment, which effectively repealed state provisions barring discrimination on the basis of sexual orientation, violated the Equal Protection Clause.[197] Although the State argued that the amendment was nondiscriminatory and merely "puts gays and lesbians in the same position as all other persons,"[198] the Court reasoned that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[199] The Court explained that, at a minimum, equal protection provides that "a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," because "class legislation is obnoxious to the prohibitions of the Fourteenth Amendment."[200] Under the majority opinion in *Romer*, the Equal Protection Clause prohibits burdensome legislation targeted at homosexuals as a class.

In *Lawrence v. Texas*,[201] the Supreme Court further expanded the scope of constitutional protection for homosexuals and same-sex relationships. It did so by invalidating a state criminal law that prohibited intimate sexual conduct between two males.[202] The Court explained that anti-sodomy laws "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[203] This conclusion is based on more than simple respect for individual autonomy or freedom of choice. Instead, it reflects the Court's broader acknowledgment that same-sex relationships involve more than physical intimacy; like other protected relationships, intimate same-sex relationships can be a profound, sustaining influence in an individual's life. As the Court explained "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," and worthy of constitutional protection.[204]

The *Lawrence* Court made it clear that the Constitution will not sanction laws that aim solely to stigmatize and devalue same-sex relationships. By

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[196] 517 U.S. 620 (1996).
[197] *Id.* at 635.
[198] *Id.* at 627.
[199] *Id.* at 633.
[200] *Id.* at 635.
[201] 539 U.S. 558 (2003).
[202] *Id.* at 578.
[203] *Id.* at 567.
[204] *Id.*

criminalizing homosexual conduct, the State impermissibly "demeans the lives of homosexual persons."[205] A law relegating same-sex relationships to second-class status is a "declaration [that] in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[206] After *Lawrence*, the Constitution will not allow a popular majority to "use the power of the State to enforce [its] views on the whole society," at the expense of a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[207]

The *Lawrence* Court concluded by observing that its holdings make two propositions "abundantly clear":[208]

> First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."[209]

These statements call into question the continued legitimacy of same-sex marriage bans. Indeed, Justice Scalia's dissenting opinion acknowledged that the majority's holding "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."[210] Although Justice O'Conner suggested that "other [rational] reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group," she did not suggest that those reasons amount to a compelling government interest.[211]

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[205] *Id.* at 575.

[206] *Id.* at 567.

[207] *Id.* at 571.

[208] *Id.* at 578.

[209] *Id.* at 578-79 (footnotes and citations omitted).

[210] *Id.* at 604 (Scalia, J., dissenting); *see also* Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage,* 117 HARV. L. REV. 2684, 2693-94 (2004) (arguing that same-sex marriage bans are "incongruous with *Lawrence*'s admonition 'against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries'" (quoting *Lawrence*, 539 U.S. at 567)); Tribe, *supra* note 186, at 1945 (arguing that same-sex marriage "is bound to follow" from the Court's holding in *Lawrence*). *Contra* Richard G. Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, 16 REGENT U. L. REV. 121 (2003-2004) (claiming that *Lawrence* has not altered the traditional legal definition of marriage as the union of one man and one woman).

[211] *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment).

### *D. Articulating a Colorable Challenge to Same-Sex Marriage Bans*

Early challengers of same-sex marriage bans were unable to persuade courts that the fundamental right to marry is broad enough to embrace the notion of same-sex marriage. A number of courts reasoned that because the traditional definition of marriage has always been limited to one man and one woman, the fundamental freedom to marry must be similarly constrained. For example, in *Singer v. Hara*,[212] the Washington Court of Appeals noted that the "definition of marriage as the legal union of one man and one woman" is "so obvious as not to require recitation."[213] From this perspective, the traditional understanding of marriage demonstrates that "same-sex relationships are outside of the proper definition of marriage."[214] If same-sex marriage is excluded from the definition of "marriage," same-sex marriage bans do not restrict the fundamental right to marry and therefore do not trigger strict scrutiny review.

New York's highest court recently adopted this reasoning when it applied a rational basis standard after holding that same-sex marriage does not fall within the definition of the fundamental right to marry.[215] In contrast to traditional marriages, the court reasoned that the right to marry someone of the same-sex "is not 'deeply rooted'; it has not even been asserted until relatively recent times."[216] Rather than restricting the freedom to marry, the New York court held that same-sex marriage bans merely implicate same-sex couples'

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[212] 522 P.2d 1187 (Wash. Ct. App. 1974).

[213] *Id.* at 1191-92.

[214] *Id.*; *see also* Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971) ("The law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman."); Jones v. Hallahan, 501 S.W.2d 588, 589-90 (Ky. 1973) ("[I]n all cases, however, marriage has always been considered as the union of a man and a woman . . . the relationship proposed [by a same-sex couple] does not authorize the issuance of a marriage license because what they propose is not a marriage"); Baehr v. Lewin, 74 Haw. 530, 556, 852 P.2d 44, 57 (1993) ("[The] right to same-sex marriage is [not] so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions.").

[215] *See* Hernandez v. Robles, 7 N.Y.3d 338, 363 (2006).

[216] *Id.* at 362 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); *see also Glucksberg*, 521 U.S. 702. In *Glucksberg*, the Supreme Court reasoned that because "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. . . . [T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." *Id.* at 728. This reasoning may raise doubts about the Court's readiness to identify a fundamental right to same-sex marriage, particularly because forty-four states now have statutory or constitutional language endorsing traditional marriage. *See* MARRIAGE IN THE 50 STATES, *supra* note 3. However, Professor Tribe argues that *Glucksberg* merely reflects Chief Justice Rehnquist's "gambit toward hacking away not just at substantive due process but also at the nature of liberty itself." Tribe, *supra* note 186, at 1923.

"access to a State-conferred benefit that the Legislature has rationally limited to opposite-sex couples."[217] By framing the issue as a restriction on access to state benefits, rather than as a restriction on the fundamental right to marry, the New York court was free to apply rational basis review.[218]

While the New York court was technically correct in describing the relative novelty of same-sex marriages, it nevertheless seems clear that "traditional" definitions of marriage do not define the boundaries of the constitutional marriage right.[219] "Until well into the nineteenth century, for example, marriage was defined by the doctrine of coverture, according to which the wife's legal identity was merged into that of her husband, whose property she became."[220] As in the case of anti-miscegenation laws, where "state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law."[221] With same-sex marriage bans in effect, individuals in same-sex relationships are "excluded from the full range of human experience and denied full protection of the laws."[222] For such individuals, "the right to marry means little if it does not include the right to marry the person of one's choice."[223] Unless prohibitions against same-sex marriage can be shown to further some rational, non-discriminatory governmental purpose, "neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same-sex and their families are deemed less worthy of social and legal protection than couples of the opposite-sex and their families."[224] While states have a legitimate interest in protecting family

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[217] *Hernandez*, 7 N.Y.3d at 363.

[218] *See id.*; *see also* FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

[219] *Cf.* Andersen v. King County, 138 P.3d 963, 979 (Wash. 2006) ("[A]lthough marriage has evolved, it has not included a history and tradition of same-sex marriage in this nation.").

[220] *Hernandez*, 7 N.Y.3d at 385 (Kaye, C.J., dissenting).

[221] *See* Baker v. State, 744 A.2d 864, 885 (Vt. 1999).

[222] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 957 (Mass. 2003). Empirical research confirms that, throughout the world, "married individuals consistently report greater subjective well-being than never-married individuals, who in turn report greater subjective well-being than" divorced, separated, or widowed individuals. *See* Ed Diener et al., *Similarity of the Relations Between Marital Status and Subjective Well-Being Across Cultures*, 31 J. OF CROSS-CULTURAL PSYCH. 419, 419 (2000) (based on a study of 59,169 persons in 42 nations).

[223] *Goodridge*, 798 N.E.2d at 958; *see also Litigating the Defense of Marriage Act*, *supra* note 210, at 2692 (*Loving* "broadened the content of the fundamental right to marry to encompass not only the decision whether to marry but also the unencumbered choice of whom to marry."); Mark Strasser, Lawrence, *Same-Sex Marriage and the Constitution: What is Protected and Why?*, 38 NEW. ENG. L. REV. 667, 676-79 (2004).

[224] *Goodridge*, 798 N.E.2d at 973.

relationships, "[r]ecognizing the right of an individual to marry a person of the same-sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race."[225]

However, a number of courts have defended same-sex marriage bans by asserting that opposition to same-sex marriage is rooted in indisputable biological realities, rather than public animus for homosexuals. By positing that marriage rights derive from the constitutional right to procreate, these courts have argued that there is no basis to demand an extension of the marriage right to a class of people who will never be able to procreate under any system of laws.[226] This perspective finds support in the Supreme Court's opinion in *Skinner*, which itself suggested a link between marriage and procreation.[227]

Yet this distinction is largely illusory, as any "attempt to isolate procreation as 'the source of a fundamental right to marry,' overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing."[228] In *Turner*, the Supreme Court identified several constitutionally protected aspects of marriage that are independent of procreation.[229] More generally, opposite-sex couples are free to "marry for reasons unrelated to procreation," even if they "never

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[225] *Id.* at 965.

[226] *See* Hernandez v. Robles, 7 N.Y.3d 338, 370 (2006) ("The binary nature of marriage—its inclusion of one woman and one man—reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and female."); Andersen v. King County, 138 P.3d 963, 969 (Wash. 2006), (using the highly deferential rational basis standard of review, "the legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children by encouraging families where children are reared in homes headed by the children's biological parents").

[227] Baehr v. Lewin, 74 Haw. 530, 553, 852 P.2d 44, 56 (1993) (concluding that the Supreme Court "was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental"); *id.* at 594, 852 P.2d at 73 (Heen, J., dissenting) ("Marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race." (quoting Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974))); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.").

[228] *Goodridge*, 798 N.E.2d at 962.

[229] *See* Turner v. Safley, 482 U.S. 78, 85 (1987). *Contra Andersen*, 138 P.3d at 979 ("We do not agree that the Court in *Turner* intended its analysis to mean that marriage as a fundamental right is no longer anchored in the tradition of marriage as between a man and a woman.").

intend to have children," or are physically "incapable of having children."[230] At the same time, many same-sex couples are willing to adopt and raise children, or even to use surrogate sperm or egg donors as an alternative to traditional methods of procreation. Particularly because same-sex couples are free to adopt and raise children,[231] the "continued maintenance of a caste-like system" that denies legal recognition for same-sex families "is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children, and it primary focus, in the context of family law where children are concerned, on 'the best interests of the child.'"[232] To the extent that the State's interest in recognizing marriage relationships "is predicated on the belief that legal support of a couple's commitment provides stability for the individuals, their family, and the broader community,"[233] governmental interests in supporting marriage adhere with equal force regardless of a couple's gender configuration. Indeed, same-sex couples' willingness "to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit."[234]

Arguing against this view, the New York court proposed that a state legislature could rationally find that "unstable relationships between people of the opposite-sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships would help children more."[235] But even if childrearing is more common among unstable opposite-sex couples than in it is among unstable same-sex couples, this observation does not support the notion that the exclusion of same-sex couples advances the state's interest in promoting stable households. The court's second suggestion, that the "[l]egislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father," is an even less persuasive justification for upholding same-sex marriage

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[230] Baker v. State, 744 A.2d 864, 881 (Vt. 1999).

[231] According to the 2000 U.S. Census, thirty-three percent of female same-sex couple households and twenty-two percent of male same-sex couple households reported at least one child under the age of eighteen living in the home. TAVIA SIMMONS & MARTIN O'CONNELL, CENSR-5, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 at 10 (2003), *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf.

[232] *Goodridge*, 798 N.E.2d at 972.

[233] *Baker*, 744 A.2d at 889.

[234] *Goodridge*, 798 N.E.2d at 965.

[235] Hernandez v. Robles, 7 N.Y.3d 338, 359 (2006); *see also* Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 868 (8th Cir. 2006) (asserting that the rational intent of traditional marriage laws is "to encourage heterosexual couples to bear and raise children in committed marriage relationships").

bans.[236] First, the claim is at odds with the findings of the American Psychological Association, which supports parenting by same-sex couples.[237] Second, it does not explain how the state's interest is promoting stable homes for children can be advanced by preventing the many same-sex couples who are currently raising children from having their marriage validated by the state. "The State's interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses."[238]

## V. ASSESSING THE HYBRID CLAIM

Part I of this article described the scope of free exercise protections that the Supreme Court adopted in *Smith*. Under *Smith*'s general holding, a neutral law of general applicability that indirectly burdens religious exercise is valid under the Free Exercise Clause. However, *Smith* recognized an exception for hybrid rights claims, providing that where a challenged law infringes free exercise rights in combination with an additional constitutional right, the Free Exercise Clause requires proof that the burdens are imposed in furtherance of a compelling governmental interest. Part II asserted that same-sex marriage bans burden religious exercise, but noted that courts have uniformly rejected the claim that the Free Exercise Clause requires religious exemptions for individuals whose religious beliefs include support for same-sex marriage. As neutral, generally applicable laws, same-sex marriage bans do not unconstitutionally infringe free exercise rights under *Smith*. Finally, Part III began by reviewing the scope of the fundamental right to marry, as well as the Supreme Court's holdings in *Roberts*, *Rotary*, *Romer*, and *Lawrence*, to outline the foundation for a "colorable" challenge to same-sex marriage ban based on theories of equal protection and fundamental rights. Although courts have rejected these claims under rational basis review, if a viable hybrid rights claim can be established, the refusal to grant religious exemptions from same-sex marriage bans is unlikely to survive strict judicial scrutiny.

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[236] *Hernandez*, 7 N.Y.3d at 359.

[237] The American Psychological Association explicitly supports parenting by same-sex couples:

> WHEREAS There is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.
>
> WHEREAS Research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.

Am. Psychological Ass'n, Policy Statement on Sexual Orientation, Parents, & Children 2 (2004) (citations omitted) *available at* http://www.apa.org/pi/lgbc/policy/parentschildren.pdf.

[238] *Hernandez*, 7 N.Y.3d at 393 (Kaye, C.J., dissenting).

To withstand strict scrutiny under the hybrid rights exception to *Smith*, a law that compromises religious freedom in combination with another constitutional right must be justified as advancing a compelling governmental interest. In light of the Court's discussion in *Romer* and *Lawrence*, it is unlikely that the government can identify a compelling interest that might justify the refusal to provide an exemption from same-sex marriage bans for same-sex couples that marry because of their religious beliefs. Under *Lawrence*, "the promotion of majoritarian sexual morality is not even a *legitimate*" justification for the infringement of equal protection rights.[239] Thus, any justifications based on mere moral disapproval or societal animus for same-sex relationships cannot withstand rational basis review, let alone strict scrutiny. Although Justice O'Conner suggested that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group," she did not suggest that those reasons amount to a compelling government interest.[240]

The New York Court of Appeals suggested one such reason when it held that concern for child welfare is a rational, non-morality based justification for limiting marriage licenses to opposite-sex couples. While the court agreed that moral disfavor or "ignorance and prejudice against homosexuals" are unconstitutional bases for the perpetuation for same-sex marriage bans, it determined that the legislature could distinguish between same-sex and opposite-sex marriage applicants based on its rational perception of a greater need to produce stability in opposite-sex than in same-sex relationships.[241] Similarly, the court thought that the legislature could act on the "rational" belief that "it is better, other things being equal, for children to grow up with both a mother and a father."[242] But the court was also careful to emphasize that "rational basis scrutiny is highly indulgent towards the State's classifications. Indeed, it is a 'paradigm of judicial restraint.'"[243]

In contrast, to withstand the heightened scrutiny that applies in hybrid rights cases, a court must determine that a challenged law serves a compelling state interest. To be sure, the promotion of child welfare is not only a rational government interest--it is also a compelling one. But there is no evidence of a compelling interest in promoting child welfare by maintaining an exceptionless ban on same-sex marriages. Indeed, the New York court acknowledged that existing scientific studies have "detected no marked differences" between children raised by same-sex or opposite-sex parents, and thought it rational to believe that children benefit from having opposite-sex parents only "[i]n the

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[239] Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

[240] *Id.* at 585 (O'Connor, J., concurring in the judgment).

[241] *Hernandez*, 7 N.Y.3d at 360-61.

[242] *Id.* at 359.

[243] *Id.* at 365 (citations omitted).

absence of conclusive scientific evidence" to the contrary.[244] Thus, without further proof, the court was unwilling to declare that no rational legislature could find a connection between a general ban on same-sex marriage and the State's legitimate interests in promoting child welfare.

However, as the Supreme Court explained in *Yoder*:

> [w]here fundamental claims of religious freedom are at stake . . . we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.[245]

In the case of same-sex marriage bans, there is no evidence that a religious exemption would impede the state objectives of ensuring child welfare. If same-sex couples are already free to raise children, and if there is no evidence that children are harmed by growing up with same-sex parents, it seems impossible to conclude that a free exercise exemption to same-sex marriage bans would impede the fulfillment of compelling state interests.[246] Indeed, the existence of any impediment is at most a speculative, if not an entirely irrational, assumption. Consequently, even if courts continue to find that same-sex marriage bans are justified by rational governmental interests, they are unlikely to find that those interests are sufficiently compelling to overcome religious freedom in a hybrid rights case.[247]

If a hybrid rights challenge to same-sex marriage bans were successful, state governments would be required to provide religious exemptions from same-sex marriage bans.[248] However, an unsympathetic court could reject a hybrid rights theory for at least two reasons. First, a court might follow the minority

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[244] *Id.* at 360.

[245] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (citations omitted).

[246] *But see* Bronson v. Swensen, 394 F. Supp. 2d 1329, 1332 (D. Utah 2005) ("[T]he State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.")(citations omitted). *Contra* James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521 (2002) (exploring the legal, philosophical, and sociological distinctions between same-sex marriage, bigamy, and polygamy).

[247] *But cf.* Richard A. Vasquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 240-46 (2001-2002) (arguing that bigamy prohibitions would survive even the strictest level of contemporary constitutional scrutiny).

[248] These exemptions would only be available to those individuals whose sincere religious beliefs call upon them to practice same-sex marriage. Recognition of a religious right to marry a partner of the same-sex would "reflect[] nothing more than the governmental obligation of neutrality in the face of religious differences." Sherbert v. Verner, 374 U.S. 398, 409 (1963) (citation omitted). Thus, treating religious same-sex marriages on the same terms as traditional marriages would not implicate governmental "establishment" of religion.

approach of the Sixth and Second Circuits and decline to apply strict scrutiny to hybrid rights claims until the Supreme Court clarifies the scope of the hybrid rights doctrine. If the Supreme Court does provide such clarification, Justice Scalia's articulation of hybrid rights in *Smith* is sufficiently ambiguous for the Court to affirm the doctrine's existence, while nevertheless defining its contours so as to preclude a free exercise challenge to same-sex marriage bans. Although most circuit courts have concluded that hybrid rights claims trigger strict scrutiny, the lack of clarity surrounding the doctrine might allow a court to reject its application in the context of same-sex marriage bans.

Second, even a court that applies strict scrutiny to hybrid claims might conclude that same-sex marriage bans do not impose a constitutionally significant burden on religious exercise. As discussed in part II.B above, it is clearly possible for gay and lesbian individuals of many faiths to sincerely believe that their religion impels them to marry a person of the same-sex. However, a court could find that this belief is not unconstitutionally burdened by a ban that applies only to civil marriage licenses.

Public attitudes regarding same-sex marriage and the desire to avoid undue interference with the legislative process might influence a court's willingness to mandate religious exemptions from same-sex marriage bans.[249] As recent state constitutional amendments suggest, many Americans are not prepared to accept, let alone tolerate, the notion of same-sex marriage. Yet, "[t]he history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded.'"[250] Just as courts once argued that anti-miscegenation laws served an important, nondiscriminatory public purpose, unborn generations of Americans may ultimately reflect upon same-sex marriage bans with similar measures of shame and disbelief. Although "times can blind us to certain truths[,] . . . later generations can see that laws once thought necessary and proper in fact serve only to oppress."[251] As the Constitution endures, "persons in every generation can invoke its principles in their own search for greater freedom."[252] Free exercise of religion and the hybrid rights doctrine are potential bases upon which the constitutional definition of marriage might one day be expanded.

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[249] *See* Andersen v. King County, 138 P.3d 963, 969 (Wash. 2006) ("[W]hile same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it.").

[250] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 966 (Mass. 2003) (citing United States v. Virginia, 518 U.S. 515, 557 (1996)).

[251] Lawrence v. Texas, 539 U.S. 558, 579 (2003).

[252] *Id.*

# Reinsurance Intermediaries: Law and Litigation

Douglas R. Richmond*

## I. INTRODUCTION

"Reinsurance is essentially insurance for insurance companies."[1] When procuring reinsurance, an insurance company—the "cedent" or "ceding company"—pays a premium to a reinsurer in return for the reinsurer's promise to indemnify it for all or some portion of the cedent's exposure on policies that it has issued to its insureds.[2] Reinsurance agreements are strictly contracts of indemnity between a reinsurer and a cedent.[3] Absent a rare "cut through" endorsement or clause, which entitles a policyholder to seek payment from the reinsurer in the event the ceding insurer becomes insolvent and is unable to pay claims, the reinsurer generally is not directly liable to the ceding company's insureds.[4] Indeed, in most cases the reinsurer has no relationship or contact with the cedent's insureds.[5] Policyholders typically do not know of the existence of reinsurance or of the application of reinsurance proceeds to their claims.[6]

Reinsurance takes two broad forms. "Facultative reinsurance" involves the reinsurer agreeing to indemnify the ceding insurer for all or part of the risk assumed under a single insurance policy.[7] The reinsurer has the option of

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[1] Employers Reinsurance Corp. v. Mid-Continent Cas. Co., 358 F.3d 757, 761 (10th Cir. 2004); *see also* Covington v. Am. Chambers Life Ins. Co., 779 N.E.2d 833, 836 n.1 (Ohio Ct. App. 2002) ("Reinsurance is insurance for insurance companies.").

[2] Cont'l Cas. Co. v. Nw. Nat'l Ins. Co., 427 F.3d 1038, 1040 (7th Cir. 2005); Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 760 N.E.2d 319, 322 (N.Y. 2001).

[3] Travelers Indem. Co. v. Scor Reinsurance Co., 62 F.3d 74, 76 (2d Cir. 1995); Unigard Sec. Ins. Co. v. N. River Ins. Co., 4 F.3d 1049, 1054 (2d Cir. 1993); Mich. Twp. Participating Plan v. Fed. Ins. Co., 592 N.W.2d 760, 764 (Mich. Ct. App. 1999) (quoting 1 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 9:9 (3d ed. 1996)).

[4] JOHN S. DIACONIS & DOUGLAS W. HAMMOND, REINSURANCE LAW § 1:2 (2005).

[5] *Unigard*, 4 F.3d at 1054.

[6] Koken v. Legion Ins. Co., 831 A.2d 1196, 1234 (Pa. Commw. Ct. 2003), *aff'd sub nom.* Koken v. Villanova Ins. Co., 878 A.2d 51 (Pa. 2005).

[7] Commercial Union Ins. Co. v. Swiss Reinsurance Am. Corp., 413 F.3d 121, 123 (1st Cir. 2005); *Cont'l Cas. Co.*, 427 F.3d at 1040; Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am., 419 F.3d 181, 184 n.3 (2d Cir. 2005).

accepting or rejecting any risk offered to it.[8] "Treaty reinsurance" refers to a reinsurer's contractual commitment to assume the ceding insurer's risk, typically on a quota share or excess of loss basis, for a stated period.[9] Once the terms of the treaty have been negotiated, all policies falling within the treaty are covered until the treaty is terminated.[10] Both facultative and treaty reinsurance can be structured in various ways.[11] Additionally, in their efforts to meet the needs of particular ceding insurers, reinsurers have developed blended or hybrid forms of both facultative and treaty reinsurance.[12]

Regardless of whether it is facultative, treaty, or a hybrid, reinsurance serves several important purposes. First, it expands an insurance company's underwriting capacity, allowing the company to accept new risks and to insure risks that otherwise would exceed its capacity.[13] By allowing insurers to accept business they might otherwise be forced to decline, reinsurance increases competition in the marketplace, and thus benefits the insurance-buying public.[14] Second, reinsurance helps insurers stabilize their operating results.[15] It does this by controlling an insurer's exposure on a particular risk, by controlling accumulated losses, and by allowing the insurer to move into new lines of business.[16] Third, reinsurance protects insurers against catastrophic losses attributable to disasters such as earthquakes and hurricanes.[17] Without reinsurance, a catastrophic loss or a series of such losses might plunge an insurance company into insolvency,[18] seriously harming policyholders and potentially straining state insurance guaranty associations. Fourth, reinsurance provides a financing tool for insurers by reducing a

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[8] Sumitomo Marine & Fire Ins. Co., Ltd.–U.S. Branch v. Cologne Reinsurance Co. of Am., 552 N.E.2d 139, 142 (N.Y. 1990).

[9] ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW 1054 (3d ed. 2002).

[10] RUTH GASTEL, INS. INFO. INST., REINSURANCE: FUNDAMENTALS AND CURRENT ISSUES 10-11 (1983) [hereinafter INS. INFO. INST., REINSURANCE].

[11] *See* Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 760 N.E.2d 319, 322-23 (N.Y. 2001) (discussing the "common variations" of quota share and excess of loss reinsurance).

[12] DIACONIS & HAMMOND, *supra* note 4, § 1:4.3.

[13] Donaldson v. United Cmty. Ins. Co., 741 So. 2d 676, 679 (La. Ct. App. 1999); Koken v. Legion Ins. Co., 831 A.2d 1196, 1234 (Pa. Commw. Ct. 2003), *aff'd sub nom.* Koken v. Villanova Ins. Co., 878 A.2d 51 (Pa. 2005).

[14] INS. INFO. INST., REINSURANCE, *supra* note 10, at 10-11.

[15] *Donaldson*, 741 So. 2d at 679.

[16] INS. INFO. INST., REINSURANCE, *supra* note 10, at 11-12. "Lacking experience in a particular area, a company [taking on new lines of business] may have an inadequate data base from which to calculate proper rates and to establish appropriate underwriting policies." *Id.* at 12. Reinsurance allows a company to transfer at least some of the associated risk. *Id.*

[17] *Id.* at 12; Employers Reinsurance Corp. v. Mid-Continent Cas. Co., 358 F.3d 757, 761 (10th Cir. 2004).

[18] DIACONIS & HAMMOND, *supra* note 4, § 1:3.

potential drain on their "policyholder surplus,"[19] which "is a key measure of [an insurer's] financial health."[20]

An insurance company seeking to reinsure may deal directly with a reinsurer or it may employ the services of a reinsurance intermediary.[21] Reinsurance intermediaries play "a vital role in many reinsurance transactions."[22] As the designation "intermediary" suggests, they are "'middlemen' in reinsurance transactions."[23] They may be compensated for their services either through commissions paid by reinsurers, or by way of fees paid by ceding companies.[24] By engaging an intermediary, the ceding insurer lessens any burdens that accompany direct communications and negotiations with reinsurers' marketing staffs and underwriters in the procurement process. Rather than dealing with various business development people and underwriters at multiple reinsurers, an insurer employing an intermediary generally deals only with the intermediary, thereby simplifying matters.

Intermediaries also provide considerable expertise and valuable services that go well beyond streamlining the purchasing process. They assist insurers in conceiving and structuring reinsurance programs, identifying and approaching reinsurance markets, negotiating the terms of treaties and facultative agreements, drafting and suggesting contract language, placing coverage, assisting with claims processing and administration, providing accounting services, providing underwriting advice, assisting with claim reserving, offering actuarial analysis, providing catastrophe and financial modeling, collecting and transmitting funds between the ceding company and its reinsurers, and more.[25] A reinsurance intermediary's role "is much more complicated and sophisticated" than an ordinary retail insurance broker's.[26]

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[19] At its most fundamental level, "policyholder surplus" may be defined as the amount by which an insurer's assets exceed its liabilities. *Glossary of Reinsurance Terms*, *in* REINSURANCE 779 (Robert W. Strain ed., rev. ed. 1997) [hereinafter *Glossary*].

[20] INSURANCE INFO. INST., REINSURANCE, *supra* note 10, at 14.

[21] Marc J. Pearlman & Jason P. Minkin, *The Role of the Reinsurance Intermediary: Duties and Liabilities*, 13 COVERAGE 3 (2003). A ceding company may have more than one intermediary serving it, as where a United States intermediary engages a London-based intermediary to assist in placing reinsurance in the London market. *See, e.g.*, J.M.P.H. Wetherell v. Sentry Reinsurance, Inc., 743 F. Supp. 1157, 1160 (E.D. Pa. 1990).

[22] Debra J. Hall, *The Emerging Regulation of Reinsurance Intermediaries*, 42 DRAKE L. REV. 859, 859 (1993).

[23] Stephen G. Schwab et al., *Caught Between Rocks and Hard Places: The Plight of Reinsurance Intermediaries Under U.S. and English Law*, 16 MICH. J. INT'L L. 485, 491 (1995).

[24] DIACONIS & HAMMOND, *supra* note 4, § 4:1.

[25] *See* Pearlman & Minkin, *supra* note 21, at 4 (listing some of these services); Leo T. Heifetz, *The Role of the Intermediary*, *in* INS. INFO. INST., REINSURANCE, *supra* note 10, at 24-27 (identifying some of these capabilities).

[26] Francis v. United Jersey Bank, 392 A.2d 1233, 1236 (N.J. Super. Ct. Law Div. 1978).

Additionally, reinsurers engage intermediaries. First, they may do so when reinsuring their own risks. The reinsurance of reinsurance agreements is referred to as "retrocession," with the ceding reinsurer referred to as the "retrocedent" and the assuming reinsurer termed the "retrocessionaire."[27] Second, a reinsurer may engage an intermediary to develop business for it, generally granting the intermediary specified underwriting authority.[28]

Inasmuch as reinsurance is a multi-billion dollar industry and intermediaries often play key roles in reinsurance transactions, one would expect reinsurance intermediaries' duties and potential liabilities to be well-defined through litigation. By way of analogy, insurance agents and brokers are frequent litigation targets,[29] and there is a robust body of case law governing their duties. But analogizing reinsurance intermediaries to insurance agents and brokers is not always apt. Although reinsurance disputes are increasingly litigated in federal and state courts, it has traditionally been true—and it remains true today—that those in the reinsurance industry avoid litigation.[30] Most reinsurance disputes are resolved through arbitration and negotiation. Accordingly, some aspects of reinsurance law are not richly developed.[31] This is the situation with the law governing reinsurance intermediaries, even though they arbitrate disputes less frequently than do some other industry players simply because they are not a party to many agreements containing arbitration clauses, and thus lack the ability in many cases to compel arbitration.[32] Regardless, the dearth of case law addressing reinsurance intermediaries' duties is unfortunate in light of the fact that reinsurance intermediaries have become subject to "unprecedented scrutiny" by regulators and others.[33]

This article discusses critical issues affecting reinsurance intermediaries and those with whom they deal. Section II examines agency principles in the

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[27] *See* Compagnie De Reassurance D'Ile de France v. New England Reinsurance Corp., 57 F.3d 56, 62 (1st Cir. 1995).

[28] *See, e.g.*, Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co., 376 F.3d 664, 668-69 (7th Cir. 2004) (discussing agreement between intermediary and retrocessionaire); *see also* 1A LEE R. RUSS ET AL., COUCH ON INSURANCE § 9:2 (3d ed. 2005) (noting that intermediaries are often used by reinsurers "who are seeking new business").

[29] Douglas R. Richmond, *Insurance Agent and Broker Liability*, 40 TORT TRIAL & INS. PRAC. L.J. 1, 2 (2004).

[30] Jonathan F. Bank & Peter R. Chaffetz, *Educating the Court About the Business of Reinsurance*, BRIEF, Fall 1994, at 8, 8.

[31] *See* Med. Ins. Exch. of Cal. v. Certain Underwriters at Lloyd's, London, No. C 05-2609 PJH, 2006 WL 463531, at *13 (N.D. Cal. Feb. 24, 2006) (noting prevalence of arbitration and corresponding lack of reinsurance case law); *see also* Bank & Chaffetz, *supra* note 30, at 8 (asserting that "there is no consistent body of case law on many reinsurance issues").

[32] *See, e.g.*, Mut. Benefit Life Ins. Co. v. Zimmerman, 783 F. Supp. 853, 867 (D.N.J. 1992) (finding that intermediaries lacked standing to compel arbitration).

[33] Schwab et al., *supra* note 23, at 487.

reinsurance context. Section III looks at common scenarios in which reinsurance intermediaries face potential liability.

## II. AGENCY AND REINSURANCE

In insurance, it is important to classify intermediaries because their classification determines to whom they may owe duties and the scope of those duties.[34] These classifications are also important when it comes to imputing an intermediary's acts or knowledge to one of the parties to the transaction.[35] Determining an intermediary's role and duties is equally important in reinsurance, but there are contextual differences. In insurance, "agent" and "broker" are terms of art; people understand that an agent is employed by an insurer or exclusively contracted to an insurer for the purpose of representing that company in dealing with third parties,[36] while a broker generally is deemed to be the insured's agent.[37] In reinsurance, on the other hand, the designation "intermediary" is about as specific as role identification gets; the demarcation of responsibilities that the terms "agent" or "broker" connote in insurance transactions does not exist.[38] Although commentators sometimes attempt to distinguish "reinsurance intermediaries" and "reinsurance brokers," such distinctions are unhelpful and unclear, and these terms are interchangeable.[39] In any event, it is important in reinsurance as elsewhere to remember that agency relationships depend on facts, not labels.[40]

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[34] Richmond, *supra* note 29, at 2.

[35] *See, e.g., Med. Ins. Exch. of Cal.*, 2006 WL 463531, at *17 (determining that a reinsurance intermediary was the ceding insurer's agent and accordingly imputed the intermediary's knowledge to the insurer); *see also* Richmond, *supra* note 29, at 2-3.

[36] Richmond, *supra* note 29, at 3.

[37] United Fire & Cas. Ins. Co. v. Garvey, 419 F.3d 743, 746 (8th Cir. 2005) (discussing Missouri law).

[38] *But see* Matthew S. Marrone, *Can You Blame the Court? Defending the Insurance Broker*, FOR THE DEF., Jan. 2006, at 18, 19 (asserting that insurance agents' and brokers' roles are blurred).

[39] Pearlman & Minkin, *supra* note 21, at 3.

[40] *See* Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs., 388 F. Supp. 2d 292, 302 (S.D.N.Y. 2005); Wesley v. Schaller Subaru, Inc., 893 A.2d 389, 400 (Conn. 2006) (citing and quoting various authorities for the proposition that the existence of an agency relationship is a question of fact); Font v. Stanley Steemer Int'l, Inc., 849 So. 2d 1214, 1216 (Fla. Dist. Ct. App. 2003) (discussing agency and explaining that "the nature of the parties' relationship is not determined by the descriptive labels employed by the parties themselves"); State *ex rel.* Medlin v. Little, 703 N.W.2d 593, 597 (Neb. 2005) ("Whether an agency relationship exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to describe their relationship.").

Agency relationships often are creatures of contract, but that is not necessarily so.[41] Agency relationships are consensual, and are created "when one person manifests an intention that another shall act in his behalf and the other person consents to represent him."[42] "[N]o formality is required to create an agency [relationship]"; any oral or written statement by the principal will suffice, as will conduct by the principal indicating an intention to appoint an agent.[43] Agency is never presumed.[44] The party asserting an agency relationship bears the burden of proving its existence.[45] Some jurisdictions require proof of agency by clear and convincing evidence,[46] while others apply a preponderance of the evidence standard.[47]

### *A. The Development of Agency Law in Reinsurance and Basic Principles*

Reinsurance intermediaries are agents; the question is for whom.[48] The leading case on agency as it relates to reinsurance intermediaries is *Hartford Fire Insurance Co. v. Francis (In re Pritchard & Baird, Inc.)*.[49] That case arose out of the bankruptcy of Pritchard & Baird, Inc., a major reinsurance intermediary. Pritchard & Baird collapsed when the founder's sons, Charles H. Pritchard, Jr. and William Pritchard, who "were extremely incompetent businessmen and . . . almost totally devoid of any sense of self-restraint or business morality," looted it.[50]

As a reinsurance intermediary, Pritchard & Baird collected premiums from Hartford Fire Insurance Co. ("Hartford") to be paid to Hartford's reinsurers in

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[41] WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 34 (3d ed. 2001).

[42] *Id.*

[43] *Id.*

[44] Verstichele v. Marriner, 882 So. 2d 1265, 1271 (La. Ct. App. 2004); Argabright v. Rodgers, 659 N.W.2d 369, 371-72 (N.D. 2003); Huynh v. Nguyen, 180 S.W.3d 608, 622 (Tex. App. 2005); Franks v. Indep. Prod. Co., 96 P.3d 484, 490 (Wyo. 2004) (quoting Krier v. Safeway Stores 46, Inc., 943 P.2d 405, 411 (Wyo. 1997)).

[45] Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co., 376 F.3d 664, 672 (7th Cir. 2004) (discussing Illinois law); Lincoln Log Home Enters., Inc. v. Autrey, 836 So. 2d 804, 806 (Ala. 2002) (quoting *Ex parte* Wild Wild West Social Club, Inc., 806 So. 2d 1235 (Ala. 2001)); Urias v. PCS Health Sys., Inc., 118 P.3d 29, 36 (Ariz. Ct. App. 2005); Lee v. Duncan, 870 A.2d 1, 5 (Conn. App. Ct. 2005); Aladdin Constr. Co. v. John Hancock Life Ins. Co., 914 So. 2d 169, 177 (Miss. 2005).

[46] *See, e.g.*, Bichelmeyer Meats v. Atl. Ins. Co., 42 P.3d 1191, 1196 (Kan. Ct. App. 2001); *Argabright*, 659 N.W.2d at 371-72.

[47] *See, e.g.*, Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc., 759 N.E.2d 174, 181 (Ill. App. Ct. 2001).

[48] *Sphere Drake*, 376 F.3d at 675-76.

[49] 8 B.R. 265 (D.N.J. 1980).

[50] Francis v. United Jersey Bank, 392 A.2d 1233, 1236 (N.J. Super. Ct. Law Div. 1978).

connection with a number of facultative agreements.[51] Pritchard & Baird did not transmit the premiums to Hartford's reinsurers.[52] Some reinsurers threatened Hartford with cancellation if they did not receive premiums they were owed, while others bypassed the threat stage and cancelled their coverage for non-payment of premiums.[53] To avoid cancellation of its reinsurance where that was threatened, and to restore coverage where cancellation had occurred, Hartford paid additional premiums.[54] When Pritchard & Baird filed for bankruptcy, the nature of its role in relation to Hartford and the reinsurers became important.[55] If Pritchard & Baird was Hartford's agent, then Hartford had a claim against the bankruptcy estate for the premiums that it transmitted to Pritchard & Baird but which Pritchard & Baird never disbursed to the reinsurers.[56] If, on the other hand, Pritchard & Baird was the reinsurers' agent, then Hartford's payment of its premiums to Pritchard & Baird would be payment to the reinsurers.[57] In that case, the reinsurers would have a claim against the bankruptcy estate for the missing premiums.[58] The bankruptcy trustee thus faced multiple competing claims related to the same financial obligation.[59]

The bankruptcy court declared that Pritchard & Baird was Hartford's agent "for all purposes alleged including the receipt and transmission of all premium and loss monies relating to such facultative reinsurance placements."[60] Hartford appealed to the district court.[61] The district court found that the conduct of Hartford, Pritchard & Baird and the reinsurers "clearly indicate[d]" that Pritchard & Baird was Hartford's agent.[62] As the court explained:

> P&B would secure reinsurers who would accept reinsurance on terms and conditions set by Hartford. All final decisions were made by Hartford. In securing reinsurance, P&B sought the best price available for Hartford.
>
> Further, the agency relationship is seen by the actual authority Hartford delegated to P&B in collecting and transmitting monies on its behalf. Hartford, in making premium money payments to the reinsurers, would draw a check payable to the order of P&B. The check represented payments due on one or more facultative reinsurance risks. P&B would then, on behalf of Hartford, draw

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[51] *In re Pritchard & Baird*, 8 B.R. at 267.
[52] *Id.*
[53] *Id.* at 269 (quoting bankruptcy court findings).
[54] *Id.* (quoting bankruptcy court findings).
[55] *Id.*
[56] *Id.* at 267.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 267-68 (footnote omitted).
[61] *Id.* at 268.
[62] *Id.* at 269-70.

> up statements to each individual reinsurer indicating the amount due them on each facultative risk and each facultative reinsurance certificate. The statement would also reflect the amount deducted as P&B's brokerage fee. P&B would then draw a check on its own account, payable to the order of the reinsurer and forward it on to them.
>
> In contrast, the reinsurers would not make loss claims checks payable to P&B but would make them payable to the order of Hartford. This is a clear indication that in treating or dealing with P&B, the reinsurers did not delegate to P&B any authority whatsoever to act as its agent.[63]

One of Hartford's reinsurers, California Union, argued that Pritchard & Baird was a dual agent.[64] California Union contended that Pritchard & Baird was Hartford's agent for the purpose of transmitting premium payments to its reinsurers, but was the reinsurers' agents for purposes of transmitting payments for losses to Hartford.[65] The court rejected this argument based on the manner in which the respective payments were made.[66] It was clear, the court reasoned, that the reinsurers exercised no control over Pritchard & Baird and that Pritchard & Baird never consented to their control.[67] There could be no agency in the absence of control and, therefore, the district court affirmed the bankruptcy court's decision.[68]

*In re Pritchard & Baird* has received scholarly criticism.[69] These criticisms center on the court's finding of control based on the record developed in the bankruptcy court.[70] Specifically:

> Without the right to control there can be no agency. Yet all the facts cited by both courts in support of their findings of control seemed to prove one thing and one thing only—that the reinsured exercised complete control over contract terms and that P&B was given no discretion to bind the reinsured. Of course, the exact same thing can be said about reinsurers with absolute certainty. They also exercised complete control over contract terms by virtue of their power to refuse to accept the reinsurance and P&B had no power to commit reinsurers to any terms or conditions. Thus, if the power of control over the terms by which they became contractually bound is the measure, both reinsured and reinsurers had the necessary control. But certainly that is not the measure. The control necessary to establish an agency is "the right to control the conduct of the agent with

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[63] *Id.* at 270.

[64] *Id.* at 271.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See, e.g.*, John M. Sheffey, *Reinsurance Intermediaries: Their Relationship to Reinsured and Reinsurer*, 16 FORUM 922, 929 (1981).

[70] *Id.* (footnote omitted).

> respect to matters entrusted to him." Proof that the supposed principal reserved to himself the right to make all final decisions is not proof of such control.[71]

This criticism is misplaced. First, the right to control another's conduct—though critical to assessing tort liability based on the doctrine of respondeat superior—does not solely determine agency in all contexts. The identity of the party who calls an intermediary into action and the identity of the party whose interests an intermediary represents in a transaction are also factors in determining the intermediary's agency.[72] In *In re Pritchard & Baird,* it clearly was Hartford that called Pritchard & Baird into action for purposes of procuring reinsurance, and there was evidence that could cause a court to conclude that Pritchard & Baird was representing Hartford's interests when it came to transmitting premiums to reinsurers.[73]

Second, the right to control is best discussed in the context of masters and servants rather than principals and agents. The distinguishing characteristic of an agent is his ability to bind his principal contractually.[74] It is possible to be an agent without being a servant. Indeed, an agent may be an independent contractor.[75] For example, a real estate agent may be authorized to make a contract for the sale of her principal's land, but she does not work for the principal physically, nor does the principal control her daily activities.[76] Likewise, an attorney-client relationship clearly is an agency relationship,[77] yet it is equally clear that clients do not control their lawyers' daily activities.[78]

Third, even in the master-servant context, the right to control

> does not mean that the master must stand over the servant and constantly give directions; it means only that the relation presupposes the right of the master to

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[71] *Id.* (footnote omitted).

[72] Royal Maccabees Life Ins. Co. v. Malachinski, 161 F. Supp. 2d 847, 851-52 & n.2 (N.D. Ill. 2001) (listing factors that determine intermediary's role under Illinois law).

[73] *See In re Pritchard & Baird,* 8 B.R. at 268-69 (quoting bankruptcy court findings).

[74] Petersen v. U.S. Reduction Co., 641 N.E.2d 845, 851 (Ill. App. Ct. 1994).

[75] Majorowicz v. Allied Mut. Ins. Co., 569 N.W.2d 472, 476 (Wis. Ct. App. 1997).

[76] GREGORY, *supra* note 41, at 113.

[77] Wentland v. Wass, 25 Cal. Rptr. 3d 109, 116 (Cal. Ct. App. 2005) (quoting Schafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 131 Cal. Rptr. 2d 777 (Cal. Ct. App. 2003)); Seaboard Sur. Co. v. Boney, 761 A.2d 985, 992 (Md. Ct. Spec. App. 2000); Multilist Serv. of Cape Girardeau, Mo., Inc. v. Wilson, 14 S.W.3d 110, 114 (Mo. Ct. App. 2000); Crane Creek Ranch, Inc. v. Cresap, 103 P.3d 535, 537 (Mont. 2004); Daniel v. Moore, 596 S.E.2d 465, 469 (N.C. Ct. App. 2004) (quoting Johnson v. Amethyst Corp., 463 S.E.2d 397, 400 (N.C. Ct. App. 1995)); State *ex rel.* Okla. Bar Ass'n v. Taylor, 4 P.3d 1242, 1253 n.39 (Okla. 2000); McBurney v. Roszkowski, 875 A.2d 428, 437 (R.I. 2005) (quoting State v. Cline, 405 A.2d 1192, 1199 (R.I. 1979)); Hill & Griffith Co. v. Bryant, 139 S.W.3d 688, 696 (Tex. App. 2004); *Majorowicz,* 569 N.W.2d at 476.

[78] *See* State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 627 (Tex. 1998) (noting that a lawyer is an independent contractor with respect to the day-to-day details of law practice).

> have the work executed in such a manner as he directs and the correlative duty on the part of the servant to perform as expressly or impliedly directed by the master.[79]

That was the case in Hartford's relationship with Pritchard & Baird.

It is perhaps fairer to criticize the *In re Pritchard & Baird* court for easily rejecting the possibility of dual agency. To be sure, the reinsurers did not make a good case for dual agency. California Union's argument that Pritchard & Baird served as Hartford's agent for purposes of transmitting premiums to the reinsurers and the reinsurers' agent for purposes of transmitting loss payments was doomed to failure based on the facts in the record, and it did not advance the reinsurers' cause in any event.[80] But a persuasive argument could be made that Pritchard & Baird was the reinsurers' agent for purposes of collecting Hartford's premiums, especially since Pritchard & Baird deducted the commissions owed it by the reinsurers from the funds sent it by Hartford before passing the remainder on as premium payment.[81] Pritchard & Baird could have compatibly served as Hartford's agent for negotiating and procuring reinsurance coverage while serving as the reinsurers' agent for the purpose of collecting premiums. There would be no conflict of interest between these dual roles.[82]

It is possible, of course, that the *In re Pritchard & Baird* court correctly rejected dual agency. It may be that the court had evidence before it that it did not mention in its decision. The court's reasoning in rejecting dual agency in its opinion, however, is unsatisfying.

Criticisms of the decision aside, courts have followed *In re Pritchard & Baird* to hold that a reinsurance intermediary is a ceding insurer's agent.[83] It is now the general rule that a reinsurance intermediary is the cedent's agent.[84] General rules have exceptions, of course. For one thing, the decision in *In re Pritchard & Baird* spawned changes to the intermediary clauses found in many reinsurance agreements. Typical intermediary clauses now provide in pertinent part: "Payment by the Company to the Intermediary shall be deemed to constitute payment to the Reinsurers. Payment by the Reinsurers to the Intermediary shall be deemed to constitute payment to the Company to the

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[79] GREGORY, *supra* note 41, at 114.

[80] Hartford Fire Ins. Co. v. Francis (*In re* Pritchard & Baird, Inc.), 8 B.R. 265, 271 (D.N.J. 1980) (rejecting California Union's argument).

[81] *See id.* at 269 (discussing transmittal of funds).

[82] *See* Marrone, *supra* note 38, at 19 (discussing dual agency); Richmond, *supra* note 29, at 9 (noting that prohibitions on dual agency are intended to prevent conflicts of interest).

[83] *See, e.g.*, Calvert Fire Ins. Co. v. Unigard Mut. Ins. Co., 526 F. Supp. 623, 638-39 (D. Neb. 1980); Wright v. Sullivan Payne Co., 839 S.W.2d 250, 253 (Ky. 1992).

[84] Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co., 376 F.3d 664, 676 (7th Cir. 2004).

extent that such funds are actually received by the Company."[85] Thus, a reinsurance intermediary is now a reinsurer's agent for the purpose of transmitting premium payments, which means that an intermediary generally will be a dual agent.[86]

For another thing, the question of agency requires case-specific inquiry.[87] Each case "must be evaluated in light of applicable statutes, regulations, contract wording, and the factual circumstances surrounding the reinsurance relationship."[88] In any given case, an intermediary may be the reinsurer's agent in connection with key transactions.[89] The starting point in any agency analysis should always be the parties' relevant contracts.[90]

### *B. The Effect and Importance of Agency*

Determining agency is important because an agent is able to contractually bind its principal. A principal is bound by the acts of its agent when the agent is acting pursuant to the principal's grant of "actual" authority, regardless of whether principal knows of the agent's actions.[91] Actual authority depends on the principal consenting to the agent acting on its behalf.[92] Actual authority may be either express or implied.[93] "Express authority" is that authority explicitly granted by a principal to an agent.[94] "Implied authority" is actual

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[85] U.S. Int'l Reinsurance Co. v. Saturn Intermediaries, Ltd., No. 91 C 3739, 1992 WL 51694, at *1 (N.D. Ill. Mar. 9, 1992) (quoting intermediary clause in reinsurance contract).

[86] *See, e.g.*, P.F.C. Mgmt. Corp. v. Chomat (*In re* Chomat), 216 B.R. 681, 684 (Bankr. S.D. Fla. 1997) (finding at best a dual agency, with the intermediary "the agent of the [p]laintiff for the purpose of finding, placing and purchasing reinsurance, but the agent of the reinsurers for the purpose of collecting and remitting funds").

[87] *See Sphere Drake*, 376 F.3d at 675-76 (applying precedent and stating facts supporting agency in case at bar); Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs., 388 F. Supp. 2d 292, 302 (S.D.N.Y. 2005) ("Thus, whether an agency exists hinges predominantly on the facts and circumstances of a particular case."); Philan Ins. Ltd. v. Frank B. Hall & Co., 748 F. Supp. 190, 197 (S.D.N.Y. 1990) (stating that "the specific factual situation demonstrating the parties' intent determines whether the intermediary acts as agent of the ceding insurer or of the reinsurer"); Capitol Indem. Corp. v. Stewart Smith Intermediaries, Inc., 593 N.E.2d 872, 876 (Ill. App. Ct. 1992) (discussing further a plaintiff's need to plead specific facts from which an agency relationship may be inferred).

[88] Pearlman & Minkin, *supra* note 21, at 5.

[89] *See, e.g.*, Arkwright-Boston Mfrs. Mut. Ins. Co. v. Calvert Fire Ins. Co., 887 F.2d 437, 439 (2d Cir. 1989) (involving jury finding that intermediary was reinsurer's agent for purpose of collecting cedent's premiums).

[90] *See In re Chomat*, 216 B.R. at 684 (discussing reinsurance treaty); Mut. Benefit Life Ins. Co. v. Zimmerman, 783 F. Supp. 853, 866 (D.N.J. 1992) (examining management agreement).

[91] Branscum v. Am. Cmty. Mut. Ins. Co., 984 P.2d 675, 680 (Colo. Ct. App. 1999).

[92] GREGORY, *supra* note 41, at 36.

[93] *Id.* at 39.

[94] Nelson v. Anderson Lumber Co., 99 P.3d 1092, 1098 (Idaho Ct. App. 2004); Amcore

authority "that is inherent in an agent's position."[95] Implied authority is sometimes called "incidental authority," because it refers to the agent's authority to do things incidental to his express authority.[96]

A principal also is bound by the actions of its agent taken with the principal's "apparent authority."[97] As with actual authority, the principal need not know of the agent's acts to be bound by them if they fall within the agent's apparent authority.[98] An agent's apparent authority is determined by the principal's acts or conduct;[99] an agent's actions or representations to a third party cannot be the basis for apparent authority.[100] For a principal to be liable on an apparent authority theory, the plaintiff must prove that it detrimentally relied on the agent's apparent authority.[101] The plaintiff must also prove that its reliance was justifiable or reasonable.[102]

Actual and apparent authority may overlap.[103] An agent generally has both actual and apparent authority because the principal has manifested its assent to the agent and to third parties. An agent's actual and apparent authority bind the principal equally.[104]

Finally, a principal may be bound by an agent's unauthorized acts if it ratifies them.[105] "Ratification" occurs where a principal knows of an agent's unauthorized actions and then approves or affirms them.[106] A principal must

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Bank, N.A. v. Hahnaman-Albrecht, Inc., 759 N.E.2d 174, 181 (Ill. App. Ct. 2001).

[95] *Amcore Bank*, 759 N.E.2d at 182-83.

[96] GREGORY, *supra* note 41, at 40.

[97] Ellingwood v. N.N. Investors Life Ins. Co., 805 P.2d 70, 75 (N.M. 1991); Wynn v. Avemco Ins. Co., 963 P.2d 572, 574 (Okla. 1998).

[98] Branscum v. Am. Cmty. Mut. Ins. Co., 984 P.2d 675, 680 (Colo. Ct. App. 1999).

[99] Kay v. Danbar, Inc., 132 P.3d 262, 270 (Alaska 2006); Premium Cigars Int'l, Ltd. v. Farmer-Butler-Leavitt Ins. Agency, 96 P.3d 555, 565 (Ariz. Ct. App. 2004) (quoting Curran v. Indus. Comm'n, 752 P.2d 523 (Ariz. Ct. App. 1988)); Corrington Park Assocs., L.L.C. v. Barefoot, Inc., 983 S.W.2d 210, 212 (Mo. Ct. App. 1999); Groob v. KeyBank, 843 N.E.2d 1170, 1179 (Ohio 2006); Roberson v. S. Finance of S.C., Inc., 615 S.E.2d 112, 115 (S.C. 2005); Wayne Duddlesten, Inc. v. Highland Ins. Co., 110 S.W.3d 85, 92 (Tex. App. 2003).

[100] Huynh v. Nguyen, 180 S.W.3d 608, 623 (Tex. App. 2005); *see, e.g.*, Bodell Constr. Co. v. Stewart Title Guar. Co., 945 P.2d 119, 124 (Utah Ct. App. 1997).

[101] Amstar Ins. Co. v. Cadet, 862 So. 2d 736, 742 (Fla. Dist. Ct. App. 2003); Hutton v. Am. Gen. Life & Accident Ins. Co., 909 So. 2d 87, 94 (Miss. Ct. App. 2005).

[102] Henry v. Flagstaff Med. Ctr., Inc., 132 P.3d 304, 306 (Ariz. Ct. App. 2006) (referring to "reasonable" reliance); D.S.A. Fin. Corp. v. County of Cook, 801 N.E.2d 1075, 1081-83 (Ill. App. Ct. 2003) (referring to "justifiable" reliance); Am. Income Life Ins. Co. v. Hollins, 830 So. 2d 1230, 1237 (Miss. 2002) (referring to "reasonable" reliance).

[103] GREGORY, *supra* note 41, at 36.

[104] Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc., 759 N.E.2d 174, 183 (Ill. App. Ct. 2001) ("A principal is bound equally by the authority that he actually gives his agent and by that he appears to give.").

[105] GREGORY, *supra* note 41, at 81.

[106] *Id.*

know all of the material facts surrounding an agent's unauthorized acts, and have the opportunity to either accept or reject the benefits of the transaction, before it can be deemed to have ratified the agent's actions.[107]

Some of these principles are illustrated in *Houston Casualty Co. v. Certain Underwriters at Lloyd's London.*[108] In that case, Houston Casualty Co. ("HCC") insured Beech Holdings Corp. and related entities.[109] HCC engaged Fenchurch Insurance Brokers, Ltd., to secure reinsurance for a portion of the Beech risk.[110] Fenchurch secured reinsurance through a Lloyd's of London syndicate, but there was confusion about whether a key clause—a so-called LSW 507 clause governing the basis of loss on damaged vehicles and the adjustment of certain claims—should have been included in the agreement.[111] Fenchurch played a major role in creating and perpetuating this confusion.[112] There was no doubt that the LSW clause or a similar clause was not included in the reinsurance agreement or the underlying Beech policy. The absence of the clause became an issue when the London underwriters balked at paying a large claim. HCC sued them for breach of contract, bad faith and various Texas Insurance Code violations, and the underwriters counterclaimed for reformation and recission.[113]

The underwriters' reformation argument was based on mutual mistake and, because HCC and the underwriters never communicated directly, it depended on the underwriters' showing that Fenchurch was HCC's agent.[114] The underwriters further needed to demonstrate that Fenchurch's communications in negotiating the reinsurance coverage were made within the scope of its authority as HCC's agent.[115] HCC denied that Fenchurch's representations regarding the LSW 507 clause were authorized, arguing that Fenchurch was only authorized to obtain reinsurance that fully followed the settlements made under the Beech policy.[116]

The court found that Fenchurch was HCC's agent.[117] It then found that Fenchurch's representations to the underwriters were made with actual authority, explaining that:

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[107] Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co., 376 F.3d 664, 677 (7th Cir. 2004) (quoting *Amcore Bank*, 759 N.E.2d at 185).

[108] 51 F. Supp. 2d 789 (S.D. Tex. 1999).

[109] *Id.* at 792.

[110] *Id.*

[111] *Id.* at 793-94.

[112] *See id.* at 793-94.

[113] *Id.* at 794.

[114] *Id.* at 799.

[115] *Id.*

[116] *See id.* at 800.

[117] *Id.*

> Fenchurch was HCC's reinsurance broker. Even if it is accepted that Fenchurch's authority was limited to "obtain[ing] a reinsurance policy that fully 'followed the settlements'" of the underlying policy [as HCC argued], surely it is the case that representations regarding the terms and conditions of precisely that underlying policy are authorized. . . . HCC cannot escape liability on the basis that it did not authorize Fenchurch's *specific representations*. . . . *"[S]ince the principal has selected the agent to act in a venture in which the principal is interested, it is fair, as between him and a third person, to impose upon him the risk that the agent might exceed his instructions."*[118]

Ultimately, the court concluded that Fenchurch had materially misrepresented key matters to the underwriters and that the underwriters were entitled to avoid the reinsurance agreement.[119]

In *Brougher Agency, Inc. v. United Home Life Insurance Co.*,[120] United Home Life Insurance Co. ("UHL") provided group life insurance coverage on policies drafted and sold by its general agent, Brougher.[121] When UHL sought to reinsure those risks, it turned again to Brougher, which negotiated treaties with Lloyd's of London underwriters.[122] When the underwriters denied coverage under the treaties, UHL sued Brougher and Lloyd's on a variety of theories. Key to all of UHL's claims was its allegation that Brougher was the underwriters' agent.[123] An arbitration panel found that Brougher was not the underwriters' agent, such that critical statements attributed to Brougher could not be imputed to the underwriters.[124] The Indiana Court of Appeals affirmed this determination.[125]

Undeterred, UHL contended that Brougher had made material misrepresentations while acting "as its intermediary, not its agent," such that those misrepresentations could be imputed to the underwriters.[126] The court concluded that this argument failed "the 'straight face' test," because it merely restated UHL's flawed agency theory.[127]

In 2004, the Seventh Circuit addressed a number of agency issues in *Sphere Drake Insurance Ltd. v. American General Life Insurance Co.*[128] Sphere

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[118] *Id.* at 800-01 (citations and footnote omitted) (final quotation quoting Standard Distribs. v. FTC, 211 F.2d 7, 15 (2d Cir. 1954)).

[119] *Id.* at 802-05.

[120] 622 N.E.2d 1013 (Ind. Ct. App. 1993).

[121] *Id.* at 1015.

[122] *Id.*

[123] *See id.*

[124] *Id.* at 1016-17.

[125] *Id.* at 1017.

[126] *Id.*

[127] *Id.*

[128] 376 F.3d 664 (7th Cir. 2004).

Drake did business as a retrocessionaire.[129] In January 1997, it negotiated with John Whitcombe of Euro International Underwriting ("EIU") regarding EIU underwriting business for Sphere Drake.[130] The parties formalized their agreement under a binding authority, which limited the amount of annual gross estimated premium that EIU was allowed to write for Sphere Drake.[131] In January 1997, EIU's premium limit was $4 million.[132] Sphere Drake increased EIU's limit to $7 million in March 1997, and by December 1997, it had authorized EIU to write $12 million in annual premiums.[133]

In February 1998, Whitcombe tried to get Sphere Drake to increase EIU's premium limit to $16 million, but Sphere Drake refused.[134] In June 1998, Whitcombe met with Sphere Drake's CEO, Michael Watson, about increasing EIU's authority.[135] Watson told him that the responsible Sphere Drake underwriter, Vic Broad, would make any decision with respect to increases.[136] Whitcombe would later claim that Watson had agreed in principle to increase EIU's premium limit to $20 million, although he acknowledged that Broad had to approve any increase.[137] A few days later, Watson wrote Whitcombe to tell him that he had asked Broad to address relevant underwriting issues, but that EIU should continue doing business as it had been.[138]

EIU continued to write retrocessional contracts for Sphere Drake, and by mid-1998 it had accepted twenty-four contracts totaling just over $14.4 million in gross estimated premium.[139] Of those contracts, twenty-three were brokered through two affiliated reinsurance intermediaries collectively referred to as Stirling Cooke.[140] Stirling Cooke had a copy of EIU's binding authority with Sphere Drake reflecting the March 1997 premium limit of $7 million.[141]

In mid-1998, WEB Management LLC, acting on behalf of All American Life Insurance Co., engaged Stirling Cooke to procure retrocessional coverage for All American's participation in a reinsurance contract issued to Unicare Insurance.[142] Stirling Cooke approached EIU on All American's behalf.[143] On

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[129] *Id.* at 668.
[130] *Id.*
[131] *Id.* at 669.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* at 670.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*

June 29, 1998, EIU agreed on Sphere Drake's behalf to provide All American with the desired coverage.[144] The associated "Unicare slip"[145] involved premium of just over $6.2 million that was to be counted against EIU's 1998 premium limit.[146] The actual premium turned out to be just under $5 million.[147] EIU had clearly exceeded its underwriting authority regardless.[148]

About the same time, Sphere Drake became concerned that EIU might be exceeding its underwriting authority.[149] It therefore audited EIU, and in an August 5, 1998 report, Sphere Drake's auditors stated that EIU had exceeded its premium cap.[150] Two days later, Watson told Whitcombe that EIU had exceeded the premium cap and to stop underwriting.[151]

In December 1998, Stirling Cooke, on All American's behalf, requested that Sphere Drake post a letter of credit covering incurred losses on the Unicare retrocession.[152] Sphere Drake declined the request pending a review of EIU's underwriting authority.[153] It reiterated its position in January 1999 and, in March 1999, sought to rescind the Unicare retrocession and return the premium.[154] When All American rejected the offer, Sphere Drake refused to pay any related claims.[155] All American sued.[156] The district court granted summary judgment for Sphere Drake, "holding that EIU overstepped its authority in writing the Unicare retrocession and that Stirling Cooke knew EIU lacked authority to write the risk."[157] Therefore, EIU lacked either actual or apparent authority to bind Sphere Drake on the Unicare retrocession.[158] The district court further held that Sphere Drake had not ratified EIU's conduct regarding the Unicare retrocession.[159] All American then appealed.[160]

The *Sphere Drake* court first addressed whether EIU had the actual authority to bind Sphere Drake to the Unicare retrocession.[161] It was clear that EIU did

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[144] *Id.*

[145] "A reinsurance slip is a contract, in abbreviated form, between the reinsured and the retrocessionaire." *Id.* at n.4.

[146] *Id.* at 670.

[147] *Id.* at 671.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* at 668.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

not have authority to bind the Unicare retrocession, inasmuch as it would cause EIU to grossly overstep its $12 million annual premium limit.[162] All American offered no evidence that Sphere Drake ever increased EIU's authority above $12 million.[163]

The court next examined EIU's apparent authority.[164] To prevail on this theory, All American needed to prove that (1) Sphere Drake consented to or knowingly acquiesced in EIU's activities; (2) based on Sphere Drake's and EIU's actions, it reasonably concluded that EIU was Sphere Drake's agent; and (3) it justifiably and detrimentally relied on EIU's apparent authority.[165] The court addressed these elements in order.[166]

With respect to the first element, the evidence revealed that Sphere Drake did not knowingly acquiesce in EIU's exercise of authority.[167] Sphere Drake had specifically capped EIU's authority to agree to premiums at $12 million, and it did not learn of the cost of the Unicare retrocession or that EIU had exceeded the annual premium limit until after EIU signed the Unicare retrocession.[168] Furthermore, in a periodic report provided in May 1998, EIU had represented to Sphere Drake that it was within its underwriting limits.[169] This misrepresentation made it impossible for Sphere Drake to knowingly acquiesce in EIU's actions.[170]

Second, it was unreasonable for All American to conclude that EIU was authorized to bind Sphere Drake to the Unicare retrocession.[171] This was because:

> All American had the means to determine the extent of EIU's authority. Stirling Cooke . . . All American's agent . . . knew that EIU's authority to accept business for Sphere Drake was limited by a premium cap contained in the binding authority. In fact, by February 28, 1997, Stirling Cooke had obtained a copy of the binding authority showing a premium limit of $7 million (there [was] no evidence that Stirling Cooke knew that Sphere Drake increased the premium limit to $12 million). Equally significant, it had knowledge that EIU had already written premiums in excess of $7 million (and, in fact, $12 million). Indeed, prior to placing the Unicare retrocession, Stirling Cooke had placed 1998 contracts with EIU with premiums to Sphere Drake totaling over $14 million.

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[162] *Id.* at 672.

[163] *Id.*

[164] *Id.*

[165] *Id.* (quoting Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc., 759 N.E.2d 174, 183 (Ill. App. Ct. 2001)).

[166] *Id.*

[167] *Id.*

[168] *Id.* at 673.

[169] *Id.*

[170] *Id.*

[171] *Id.*

> Whether it knew the exact limit or not, a reasonable broker in Stirling Cooke's situation who knew about the limit in the binding authority would have investigated what the dollar limit was. We cannot therefore say that it exercised due diligence or that it was reasonable to believe that EIU had the authority to bind Sphere Drake at the time it signed the retrocession.[172]

All American argued that it acted reasonably and that it had no obligation to ascertain the limits of EIU's authority before agreeing to the retrocession, asserting that a third party has no duty to inquire into an agent's specific authority and that a principal cannot escape liability by way of undisclosed or secret limits on its agent's authority.[173] This argument failed because EIU's authority constraints were neither undisclosed nor secret.[174] To the contrary, Stirling Cooke knew that EIU was operating under a premium cap—it just did not know whether the cap was $7 million or $12 million, either of which the Unicare retrocession caused it to exceed.[175]

All American retreated to industry custom in an effort to establish that it had acted reasonably.[176] "[S]everal witnesses testified that the normal practice is that a broker such as Stirling Cooke does not have a duty to determine if there is a premium cap or to monitor the amount of gross premium written by an underwriter like EIU."[177] This sometimes makes sense; a ceding company or intermediary may not know of an underwriter's premium cap and likely would not know about the underwriter's other business.[178] In this case, however, Stirling Cooke knew of EIU's premium cap. Moreover, Stirling Cooke only had to track the business that it placed with EIU to know that the Unicare retrocession would cause EIU to exceed that cap.[179]

Finally, All American contended that public policy militated against requiring it to monitor EIU's actions.[180] This argument fell flat. One who deals with an agent takes the risk of ascertaining both agency and the scope of the agent's authority.[181] Stirling Cooke knew that EIU was constrained by a premium limit and that its own business with EIU exceeded that limit. There was no burden associated with ascertaining EIU's exact limit; "a simple phone

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[172] *Id.* at 674.

[173] *Id.* (quoting Yellow Mfg. Acceptance Corp. v. Voss, 303 N.E.2d 281, 283-84 (Ind. Ct. App. 1973), and citing Am. Ins. Co. v. Meyer Steel Drum, Inc., No. 88 C 0005, 1990 WL 92882, at *4 n.4 (N.D. Ill. June 27, 1990)).

[174] *See id.* at 674-75.

[175] *See id.*

[176] *Id.* at 675.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* (quoting Ernst v. Searle, 22 P.2d 715, 717-18 (Cal. 1933)).

call" to either EIU or Sphere Drake "would have done the trick."[182] Any reliance on EIU's authority was therefore unreasonable and would not support a finding of apparent authority.[183]

Alternatively, All American contended that Stirling Cooke's knowledge could not be imputed to it "because Stirling Cooke acted 'as a neutral reinsurance intermediary between the parties, rather than as any party's agent.'"[184] The court disagreed, observing that a reinsurance intermediary is an agent, and that the question is for whom the intermediary is acting.[185] After noting the general rule that a reinsurance intermediary is considered to be the cedent's agent,[186] the court easily determined as a matter of fact that Stirling Cooke was All American's agent:

> Here, there is not the slightest doubt that Stirling Cooke was acting for All American. WEB (an admitted agent of All American) authorized Stirling Cooke to place the Unicare retrocession on All American's behalf. In fact, All American admits that Stirling Cooke entered into and negotiated the retrocession for it, and it points to no evidentiary basis for finding that Stirling Cooke was not its agent.[187]

Because Stirling Cooke was All American's agent, its lack of diligence in determining the limit of EIU's underwriting authority defeated All American's apparent authority claim.[188]

Given that All American could not satisfy either of the first two factors necessary to establish EIU's apparent authority, the court declined to analyze the detrimental reliance requirement.[189] That did not dispose of the case, however, because All American argued that Sphere Drake had ratified EIU's conduct by waiting until March 1999 to rescind the Unicare retrocession even though it knew in August 1998 that EIU had exceeded its premium cap.[190]

Ratification requires that the principal have full factual knowledge and the option of accepting or rejecting the benefit of the challenged transaction, and it may be inferred from the principal's long-term acquiescence to the benefits of an unauthorized transaction after it receives notice of the deal.[191] The key

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[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* (quoting Capitol Indem. Corp. v. Stewart Smith Intermediaries, Inc., 593 N.E.2d 872, 876 (Ill. App. Ct. 1992)).

[186] *Id.* at 676.

[187] *Id.* (footnote omitted).

[188] *Id.*

[189] *Id.*

[190] *Id.* at 676-77.

[191] *Id.* at 677 (quoting Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc., 759 N.E.2d 174 (Ill. App. Ct. 2001); Stathis v. Gelderman, Inc., 692 N.E.2d 798 (Ill. App. Ct. 1998)).

inquiry here was whether Sphere Drake repudiated the Unicare retrocession within a reasonable time.[192] The *Sphere Drake* court concluded that it had.[193]

EIU's May 1998 report to Sphere Drake—which preceded the Unicare retrocession—wrongly indicated that EIU was within its premium limits.[194] Sphere Drake nonetheless audited EIU because of problems with an unrelated matter known as the "Versace claim."[195] Although the August 5, 1998 audit report revealed that EIU had exceeded its underwriting authority and Watson told Whitcombe to stop underwriting two days later, Sphere Drake did not consider the auditors' report conclusive.[196] It did not have sufficient information to know the order in which EIU had accepted various contracts and thus it did not know which to rescind.[197] Additionally, it wanted to investigate possible collusion between EIU and Stirling Cooke.[198] Sphere Drake did not conclude its investigation until March 1999, when it attempted to rescind the Unicare retrocession.[199]

The Seventh Circuit concluded that these facts did not support a finding of ratification.[200] They established only that Sphere Drake was reasonably and timely investigating EIU's actions at a critical juncture.[201]

Of course, while a principal's actual knowledge is essential to ratification, a principal "'whose ignorance or mistake was the result of gross or culpable negligence in failing to learn the facts will be estopped as if he had full knowledge of the facts.'"[202] This drew attention to Broad, the Sphere Drake underwriter responsible for binding authority.[203] Sphere Drake acknowledged that Broad did not possess great organizational skill,[204] and that he should have been more careful in dealing with EIU.[205] But, while Broad had not diligently monitored EIU's activities, it remained true that EIU's May 1998 report had misrepresented its premium numbers, and that Sphere Drake could not determine whether and how EIU had exceeded its premium limit until it completed its investigation.[206] The court accordingly rejected this aspect of All

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[192] *Id.*
[193] *Id.* at 678.
[194] *Id.* at 677.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.* at 678.
[200] *Id.*
[201] *Id.*
[202] *Id.* (quoting 18 Ill. Law & Prac. *Estoppel* § 23, at 84 (1956)).
[203] *Id.*
[204] *See id.* (stating that Watson "described Broad as a 'seat of the pants underwriter'").
[205] *Id.*
[206] *Id.* (quoting district court opinion).

American's ratification argument, as well as All American's arguments that Sphere Drake should be estopped from denying coverage or had waived its ability to do so.[207]

The *Sphere Drake* court affirmed the district court's grant of summary judgment to Sphere Drake.[208] Sphere Drake's liability on the Unicare retrocession was limited to returning to All American the premiums it had already paid.[209]

As the foregoing cases illustrate, agency determinations are important in a variety of contexts. In *Medical Insurance Exchange of California v. Certain Underwriters at Lloyd's, London*,[210] the issue was whether an intermediary's knowledge could be imputed to the ceding insurer.[211] In that case, an insurer, Medical Insurance Exchange of California ("MIEC"), engaged a reinsurance intermediary, Carvill, to procure excess of loss reinsurance.[212] Litigation erupted when the reinsurers disputed coverage under two reinsurance contracts, and the language of the arbitration provisions in those contracts quickly became an issue.[213] The parties' arguments centered on their intent with respect to the arbitration provisions, with MIEC contending that because the lead underwriter never communicated its intent regarding the provisions, it was not bound by the reinsurers' urged interpretation.[214] Unfortunately for MIEC, Carvill clearly knew the reinsurers' intent.[215] "Thus, even though Carvill may not have communicated the lead underwriter's intent to MIEC, MIEC [was] still bound by Carvill's knowledge because Carvill was acting as MIEC's agent during the time the contract[s] [were] being negotiated."[216]

### *C. Reflections On Reinsurance Agency*

Some commentators lament courts' application of agency principles to reinsurance transactions, reasoning that the term "intermediary" connotes something other than a normal agency relationship.[217] They would replace agency principles with a liability regime grounded in "fairness" or "fair dealing,"[218] which allegedly finds support in various reinsurance doctrines or

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[207] *Id.* at 678-79.

[208] *Id.* at 679.

[209] *Id.*

[210] No. C 05-2609 PJH, 2006 WL 463531 (N.D. Cal. Feb. 24, 2006).

[211] *Id.* at *2.

[212] *Id.* at *4.

[213] *Id.* at *3.

[214] *Id.* at *13-*17.

[215] *Id.* at *17.

[216] *Id.*

[217] Sheffey, *supra* note 69, at 930-31.

[218] *See id.* at 934-38 (relating to reinsurance intermediary insolvency).

reinsurance contract provisions, such as *uberrima fides*,[219] the "follow the fortunes" doctrine,[220] "errors and omissions" clauses,[221] and "honorable undertaking" clauses.[222] This approach is supposedly more desirable than established agency principles when it comes to assigning responsibility for an intermediary's actions.[223]

There is nothing to commend this alternative approach. First, all of the bases for this approach are either express reinsurance contract provisions, or, in the case of *uberrima fides*, inhere in the contract. Reinsurance intermediaries are not parties to the agreements that they negotiate.[224] None of these duties or promises applies to them. Second, insofar as assigning responsibility for an intermediary's actions goes, agency law does that fairly. If the concern is that an intermediary's violation of his duties will leave an innocent principal responsible to a third party, that overlooks the fact that the principal has a number of remedies available to him.[225] Depending on the circumstances and facts, the principal might sue the intermediary for breach of contract or in tort, might deny the agent compensation or seek restitution, might seek to rescind the transaction at issue, or might seek to reform related agreements. Third, this approach was first advanced in the immediate wake of *In re Pritchard & Baird*,[226] before the intermediary clause was revised to allocate responsibility for an insolvent intermediary's failure to transmit premium payments. To the extent this approach is geared toward achieving fairness in that situation, it is obsolete. Parties now contractually allocate that risk of loss, and even

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[219] *Id.* at 934-35. *Uberrima fides*, or utmost good faith, is a duty owed by ceding insurers and reinsurers to one another. DIACONIS & HAMMOND, *supra* note 4, § 1:9.1. The duty is reciprocal. *Id.*

[220] The follow the fortunes doctrine obligates a reinsurer to indemnify a cedent for payments made by the cedent to or on behalf of its insured if they are made in good faith and are reasonably within the coverage of the underlying policy. DIACONIS & HAMMOND, *supra* note 4, § 1:9.2. "The reinsurer is not permitted to second-guess the ceding insurer's reasonable liability determinations or decisions to waive possible defenses when those determinations are made in good faith." *Id.* (footnote omitted).

[221] An "errors and omissions" clause provides that "inadvertent delays, errors or omissions" by either party to a reinsurance contract will not relieve the other party of liability that would have attached had the event not occurred, so long as the problem is promptly rectified. *Id.* ch. 1 app. 1A, at 1A–14 (providing sample reinsurance treaty).

[222] An "honorable undertaking" clause is intended to convey that the agreement should be liberally construed to effectuate the parties' intent. *Glossary*, *supra* note 19, at 767-68.

[223] *See* Sheffey, *supra* note 69, at 934.

[224] DIACONIS & HAMMOND, *supra* note 4, § 4:1 (footnote omitted).

[225] *See* GREGORY, *supra* note 41, at 144-50 (discussing remedies).

[226] Hartford Fire Ins. Co. v. Francis (*In re* Pritchard & Baird, Inc.), 8 B.R. 265 (D.N.J. 1980). *See* discussion of this case *supra* notes 49-84 and accompanying text.

advocates of the fairness approach acknowledge that voluntary allocation is better than leaving the matter to undirected judicial resolution.[227]

Sometimes a party argues against applying agency law on the basis that reinsurance intermediaries are neutral go-betweens rather than agents, as All American did in *Sphere Drake*.[228] This argument is specious. Again, agency relationships depend on facts, not labels.[229] Beyond that, and by way of analogy, an insurance broker may be described as an "independent middleman,"[230] yet a broker typically is an agent of the insured.[231] The fact that reinsurance intermediaries are not beholden to particular reinsurers is no basis to reject agency law.

Occasionally, commentators describe reinsurance intermediaries as independent contractors,[232] thereby suggesting that they are not agents. The independent contractor label should fool no one. The fact that reinsurance intermediaries may be independent contractors as to their daily activities does not prevent them from being agents for many purposes.[233]

Finally, some attention must be paid to entities like EIU in the *Sphere Drake* case—intermediaries engaged by reinsurers to develop or underwrite business for them. Whether designated as a managing general agent ("MGA"), managing general underwriter ("MGU"), reinsurance manager, or something else, they clearly are the agents of the companies for which they develop business, underwrite coverage, manage claims, and the like.[234]

## III. REINSURANCE INTERMEDIARY LIABILITY

Reinsurance intermediaries, as agents, owe clients duties of loyalty and obedience.[235] They also owe clients duties of security and accounting.[236] Assuming that a court would treat a reinsurance intermediary as a fiduciary to its client—agency relationships typically being fiduciary relationships—the intermediary must act solely for the principal's benefit in all matters related to

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[227] *See* Sheffey, *supra* note 69, at 940.

[228] Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co., 376 F.3d 664, 675 (7th Cir. 2004).

[229] *See supra* note 40 and accompanying text.

[230] Electro Battery Mfg. Co. v. Commercial Union Ins. Co., 762 F. Supp. 844, 848 (E.D. Mo. 1991) (discussing Missouri law).

[231] JERRY, *supra* note 9, at 260.

[232] DIACONIS & HAMMOND, *supra* note 4, § 1:8.1 (footnote omitted).

[233] *See* Capitol Indem. Corp. v. Stewart Smith Intermediaries, Inc., 593 N.E.2d 872, 876 (Ill. App. Ct. 1992).

[234] *See* 14 ERIC MILLS HOLMES & L. ANTHONY SUTIN, HOLMES' APPLEMAN ON INSURANCE 2D § 105.2, at 213 (2000) (discussing managing general agents).

[235] GREGORY, *supra* note 41, at 142-44.

[236] Pearlman & Minkin, *supra* note 21, at 6.

the agency.[237] Reinsurance intermediaries clearly owe their principals a duty of care when acting for them.[238] Intermediaries breaching any of these duties may be liable to their principals in contract or tort.[239]

Some courts and commentators suggest that a reinsurance intermediary owes a "duty of utmost good faith to each of the parties of the reinsurance relationship,"[240] but this position is surely wrong in the absence of exceptional circumstances. Each party to a reinsurance contract owes a duty of utmost good faith to the other.[241] Reinsurance intermediaries are not parties to reinsurance treaties or facultative agreements.[242] In the same vein, an insurance agent typically does not owe a duty of good faith and fair dealing to an insured because the agent is not a party to the contract and the insurer's implied duty of good faith and fair dealing is non-delegable.[243] The same is true for brokers.[244] Assuming that the reinsurance duty of utmost good faith is non-delegable—as it must be—there is no principled reason to treat reinsurance intermediaries differently than insurance intermediaries when discussing similar implied duties.[245]

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[237] GREGORY, *supra* note 41, at 140.

[238] *See* Ins. Co. of Ireland v. Mead Reinsurance Corp., No. 88 CIV. 8779 (PKL), 1994 WL 605987, at *9 (S.D.N.Y. Nov. 4, 1994) (suggesting that intermediary might be liable for failing to communicate accurately reinsurers' warranty requests or cedent's responses); J.M.P.H. Wetherell v. Sentry Reinsurance, Inc., 743 F. Supp. 1157, 1176-77 (E.D. Pa. 1990) (alleging intermediary's failure to communicate concerning coverage, to confirm coverage, and to obtain alternative coverage).

[239] *See, e.g.*, Societa Italiana Assicurazioni Transporti v. Keith Bell Assocs., Inc., 627 N.Y.S.2d 380, 381 (N.Y. App. Div. 1995) (holding intermediary liable to client for negligently misusing reinsurance facility and for failing to send documents to reinsurers).

[240] Commonwealth Ins. Co. v. Thomas A. Greene & Co., 709 F. Supp. 86, 88 (S.D.N.Y. 1989) (applying New York law); *see also* Pearlman & Minkin, *supra* note 21, at 5 (calling intermediaries' "duty of utmost good faith" "well established," but citing only *Commonwealth*).

[241] DIACONIS & HAMMOND, *supra* note 4, § 1:9.1.

[242] *Id.* § 4:1 (footnote omitted).

[243] Cary v. United of Omaha Life Ins. Co., 68 P.3d 462, 466 (Colo. 2003); Wathor v. Mut. Assurance Adm'rs, Inc., 87 P.3d 559, 562 (Okla. 2004).

[244] St. Paul Reinsurance Co. v. Club Servs. Corp., 30 F. App'x 834, 836 (10th Cir. 2002) (applying Oklahoma law in case involving insurance brokers).

[245] Insureds cannot premise bad faith claims on conduct by agents or insurers occurring before they purchase their policies, because the implied duty of good faith and fair dealing depends on an underlying contractual relationship. Azar v. Prudential Ins. Co. of Am., 68 P.3d 909, 925 (N.M. Ct. App. 2003). Likewise, a reinsurance intermediary should not be held to owe a duty of utmost good faith in connection with its activities before a reinsurance contract exists. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Heath Fielding Ins. Broking, Ltd., No. 91 CIV. 0748 (MJL), 1993 WL 187778, at *8 (S.D.N.Y. May 25, 1993) (finding that reinsurance intermediary could not be liable for bad faith in negotiations occurring before contract existed).

And what exceptional circumstances might justify deviating from the position that an intermediary does not owe a duty of utmost good faith? Well, an insurance agent, adjuster or third-party administrator ("TPA") may be liable for breaching a duty of good faith owed to an insured where he performs many of the insurer's tasks and shares in the insurer's risk of loss.[246] Thus, it would seem that a reinsurance intermediary may owe a duty of utmost good faith to the party for which it is not an agent when it performs many of the tasks of a reinsurer and shares in the risk of loss. An MGA, MGU or reinsurance manager might satisfy these requirements. Alternatively, a statute might impose a duty of utmost good faith on reinsurance intermediaries.

A reinsurance intermediary cannot owe a duty of utmost good faith and fair dealing to the reinsurer with whom she negotiates for a cedent. There, the intermediary is the cedent's agent and must keep the cedent's interests paramount. This does not mean, however, that the intermediary may lie to the reinsurer or carelessly represent facts; those misrepresentations may be imputed to the cedent, such that the cedent may be found to have breached its duty of utmost good faith.[247] On the right facts, an intermediary might be liable for fraud.[248]

Intermediaries' duties may be affected by overlapping relationships, as *Lumbermens Mutual Casualty Co. v. Franey Muha Alliant Insurance Services*[249] illustrates. In that case, the intermediary had an agency agreement with the insurance company serving as a reinsurer.[250] As a result of that contract and the associated on-going relationship, it arguably owed the reinsurer fiduciary duties connected to the negotiation of a quota share reinsurance treaty for a ceding surety.[251] In the absence of that separate agency relationship, the intermediary never would have faced potential liability to the reinsurer associated with its assumption of an undesirable risk under the treaty. Although this case is unusual, it illustrates the need to carefully scrutinize intermediaries' roles and relationships when attempting to assess liability.

Intermediaries may be variously liable to their clients. This Part examines three common claims against reinsurance intermediaries: (a) failing to place coverage; (b) failing to advise or explain; and (c) placing coverage with an

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[246] *Cary*, 68 P.3d at 469; *Wathor*, 87 P.3d at 563.

[247] *See, e.g.*, Reliance Ins. Co. v. Certain Member Cos., 886 F. Supp. 1147, 1152-55 (S.D.N.Y. 1995) (involving intermediaries who failed to disclose that client was ceding 100 percent of risk on a marine cargo policy).

[248] *See, e.g.*, Anglo-Iberia Underwriting Mgmt. Co. v. Lodderhose, 224 F. Supp. 2d 679, 684-87 (S.D.N.Y. 2002) (applying New York law).

[249] 388 F. Supp. 2d 292 (S.D.N.Y. 2005).

[250] *Id.* at 295-96.

[251] *Id.* at 306-07.

insolvent reinsurer. It concludes by briefly examining the need for expert testimony in disputes involving reinsurance intermediaries.

### *A. Intermediary Liability for Failing to Place Coverage*

A reinsurance intermediary's most basic duty on behalf of a cedent is to place the desired coverage, or, in reinsurance vernacular, to "effect the desired cession."[252] Depending on the facts, an intermediary who fails to place coverage may be liable for negligence, fraudulent or negligent misrepresentation, breach of contract, or breach of fiduciary duty.[253] *Northwestern National Insurance Co. v. Marsh & McLennan, Inc.*,[254] is an illustrative case.

*Northwestern National* arose out of Great Lakes Chemical Corporation's efforts to self-insure.[255] Northwestern aided Great Lakes' efforts by issuing it a $500,000 fronting policy.[256] For two years, Niagara Insurance Co. reinsured Northwestern's entire risk on the Great Lakes policy.[257] In two other years, Niagara reinsured the first $100,000 of Northwestern's potential liability, but retroceded the remainder to Republic Insurance Co.[258] Because of their differing language, the Republic policies did not cover Northwestern to the same extent that its policy covered Great Lakes.[259] The Niagara policies indemnified Northwestern for defense costs that it paid on Great Lakes' behalf, but the Republic policies did not, meaning that Northwestern assumed risk well above its policies' $500,000 liability limits.[260] Northwestern's reinsurance intermediary, Sutton, had supposedly promised to procure reinsurance that would cover all costs incurred by Northwestern in connection with the Great Lakes fronting policy, including defense costs.[261]

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[252] *See* DIACONIS & HAMMOND, *supra* note 4, § 4:4.

[253] *See, e.g.*, Conwed Corp. v. Employers Reinsurance Corp., 816 F. Supp. 1360, 1362-64 (D. Minn. 1993) (discussing negligence, negligent misrepresentation, and breach of fiduciary duty); Nw. Nat'l Ins. Co. v. Marsh & McLennan, Inc., 817 F. Supp. 1424, 1430-34 (E.D. Wis. 1993) (involving breach of contract and unsuccessful negligent misrepresentation claim).

[254] 817 F. Supp. 1424 (E.D. Wis. 1993).

[255] *Id.* at 1426.

[256] *Id.*

> A front is established when a licensed carrier issues a policy to a company and the company promises, in return, to assume whatever risk the carrier has assumed under the policy or to reimburse the carrier for whatever amounts it is required to pay out under the policy. In addition, the company agrees to pay the carrier a fronting service fee far below the cost of an actual insurance premium.

*Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.* at 1426-27.

[261] *Id.* at 1427.

Northwestern incurred substantial defense costs that Republic refused to pay.[262] Had Northwestern anticipated incurring these costs, it would have charged Great Lakes far more than it did.[263] Sutton knew that Northwestern entered into the fronting arrangement assuming that it would face no associated risk.[264] Northwestern sued Sutton and the brokerage firms for which he worked during the relevant time period, Reliable and Marsh & McLennan.[265] The plaintiff and the defendants ultimately filed cross-motions for summary judgment.[266]

Northwestern first alleged that Sutton committed negligent misrepresentations when he told it that the Republic policy would require an amendatory endorsement to resolve the defense cost discrepancy and that he and Marsh & McLennan would address the issue, and later when he promised to clear up the defense cost issue and resolve it to Northwestern's satisfaction.[267] The court rejected this theory, concluding that both statements related to future events rather than referring to pre-existing facts, which required evidence that Sutton knew of contrary facts when he made the statements.[268] Northwestern had no such evidence, entitling the defendants to summary judgment on this claim.[269]

The next issue was whether Sutton "was contractually bound to procure complete reinsurance, including coverage for defense costs, for Northwestern."[270] This was open to debate, as the court explained:

> There [was] no doubt that a contractual relationship of some kind existed between Sutton and Northwestern. For their work on Northwestern's behalf, Sutton and the other defendants received a commission that was deducted from the fronting fee paid Northwestern. The problem, however, [was] that Sutton's contractual obligations were never expressly defined. Northwestern [said] Sutton assumed responsibility not only for making recommendations with respect to reinsurance, but also for finally implementing those recommendations. Sutton maintain[ed], by contrast, that his job was merely to advise and, perhaps, to intermediate; Northwestern was ultimately responsible for obtaining adequate reinsurance for itself.
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> Northwestern [did] not really claim that some particular correspondence or conversation established Sutton's obligation to procure complete reinsurance. The parties' sole express agreement is the agency agreement between Reliable

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[262] *Id.* at 1429.
[263] *Id.*
[264] *Id.*
[265] *Id.* at 1426.
[266] *Id.*
[267] *Id.* at 1430.
[268] *Id.*
[269] *Id.*
[270] *Id.* (footnote omitted).

> and Northwestern, and that agreement speaks only in general terms; it does not identify Sutton's obligations with respect to the fronting arrangement. The extent of those obligations, however, is said to be proved by the parties' course of dealings.[271]

The parties' course of dealings established a contract that required Sutton to ensure that Northwestern "incurred no risk as a result of its role in the fronting arrangement."[272] Sutton designed Great Lakes' self-insurance program and arranged for Northwestern to be the fronting carrier, knowing that Northwestern never intended to incur any risk.[273] Sutton served as Northwestern's expert advisor and implemented his own advice. Typically, he "would identify an issue of concern, propose a solution, request Northwestern's approval and comments, and then do what was necessary to resolve the issue accordingly."[274] Northwestern dealt exclusively with Sutton on Great Lakes matters.[275]

In sum, it was clear that Northwestern compensated Sutton not just for serving as an advisor or conduit for reinsurance related communications, but also to take those measures necessary to resolve issues of concern.[276] Prominent among Northwestern's concerns was the avoidance of all liability arising out of the Great Lakes fronting arrangement.[277] Thus, when the differences between the Republic policies and the Niagara policies left Northwestern with a reinsurance coverage gap, Sutton was bound to solve the problem.[278]

After tackling several other issues, the court found for Northwestern on its breach of contract claims.[279] It ordered the parties either to stipulate to damages, or for Northwestern to timely submit a proposed accounting.[280]

In *Northwestern National,* Republic justifiably declined to indemnify Northwestern for defense costs because its contracts did not obligate it to and responsibility for that lack of coverage clearly rested with Sutton. That is not always the case. A reinsurer may decline to indemnify its cedent for improper reasons. A cedent may not accurately communicate its reinsurance needs or expectations when consulting with an intermediary, or it may reject an intermediary's recommendations to its ultimate detriment. Although

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[271] *Id.* at 1431.
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.* at 1432.
[277] *Id.* at 1431.
[278] *Id.* at 1432.
[279] *Id.* at 1434.
[280] *Id.*

reinsurance intermediaries certainly "should understand the needs of reinsureds and the requirements of . . . reinsurers in order to properly formulate and communicate proposed cession terms,"[281] the mere fact that a loss is not covered in whole or part does not compel the conclusion that the intermediary procuring the reinsurance is to blame. A plaintiff must always prove all elements of its causes of action.[282]

### *B. Failure to Advise or Explain*

Insurance brokers generally have no duty to advise insureds about the adequacy of coverage they purchase, or about coverage options.[283] A broker owes an insured a duty to procure the coverage specifically requested and, once that is accomplished, the broker owes no further duties.[284] A broker may, of course, assume additional duties.[285] Additionally, a broker may incur additional duties by sharing a special relationship with an insured.[286] When evaluating the existence of a special relationship, courts often consider whether the broker (1) exercises broad discretion in serving the insured's needs; (2) counsels the insured about specialized coverage; (3) holds himself out as an expert (coupled with the insured's reliance on his expertise); and (4) is compensated beyond ordinary commissions for his advice.[287]

Looking now at reinsurance intermediaries, it seems likely that in many cases they will have duties to advise cedents about reinsurance issues or to explain issues. In most cases these duties will arise because intermediaries voluntarily assume them.[288] It is the rendering of expert advice and the provision of specialized services going well beyond the mere procurement of coverage that many reinsurance intermediaries tout in selling their services. Of course, intermediaries that assume duties must perform them satisfactorily. In *National American Insurance Co. v. Ruckversicherungs-Aktiengesellschaft*,[289] for example, the court found that when an intermediary

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[281] DIACONIS & HAMMOND, *supra* note 4, § 4:4.2, at 4–10.

[282] *See, e.g.*, Brougher Agency, Inc. v. United Home Life Ins. Co., 622 N.E.2d 1013, 1017 (Ind. Ct. App. 1993) ("Since . . . [the intermediary] was not [the reinsurers'] agent, an element of [the cedent's] actual fraud claim is negated. Because a party need only demonstrate the failure of one element of a claim, we find that [the reinsurers were] entitled to summary judgment . . . as a matter of law.").

[283] Richmond, *supra* note 29, at 24.

[284] *Id.* at 26.

[285] *Id.*

[286] *Id.* at 27.

[287] *Id.*

[288] *See, e.g.*, Nat'l Am. Ins. Co. v. Ruckversicherungs-Aktiengesellschaft, No. CIV-04-1436-M, 2005 WL 2035042, at *4 (W.D. Okla. Aug. 23, 2005).

[289] No. CIV-04-1436-M, 2005 WL 2035042 (W.D. Okla. Aug. 23, 2005).

volunteered to advise the cedent on the terms of some reinsurance contracts, it had "a duty to exercise due care in the giving of that advice."[290]

As for special relationships, again, many intermediaries want them. Special relationships often are crucial to maintaining business and to generating additional revenue. Intermediaries prefer to be clients' trusted advisors rather than mere vendors.

### *C. Reinsurer Insolvency*

Insurance company insolvencies are sufficiently frequent to be a serious concern in all corners of the insurance and reinsurance industries.[291] Not surprisingly, then, an intermediary's duty to exercise reasonable care and diligence when procuring reinsurance includes a duty to determine whether the reinsurers with which a cedent's coverage might be placed are capable of meeting their financial obligations.[292] Intermediaries generally satisfy this duty by reviewing information provided by state insurance departments and by companies that rate insurers' financial standing or strength, such as A.M. Best and Standard & Poor's.[293] A.M. Best is the most notable rating organization.[294]

A.M. Best rates insurance companies' financial strength as A++ and A+ (Superior), A and A- (Excellent), B++ and B+ (Very Good), B and B- (Fair), C++ and C+ (Marginal), C and C- (Weak), D (Poor), E (Under Regulatory Supervision) and F (In Liquidation).[295] According to A.M. Best, a company graded "B" or below is "vulnerable to adverse changes in underwriting and economic conditions."[296] Standard & Poors rates insurers from "AAA" (extremely strong financial security characteristics) to "CC" (extremely weak financial security characteristics), further assigning an "R" rating to insurers

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[290] *Id.* at *4.

[291] Richmond, *supra* note 29, at 36. It is further worth noting here that it is common for an insurance company to function as both an insurer and a reinsurer. *See* Sevigny v. Employers Ins. of Wausau, 411 F.3d 24, 25 (1st Cir. 2005) (explaining that two insurers functioned as such and as reinsurers).

[292] DIACONIS & HAMMOND, *supra* note 4, § 4:4.1; Pearlman & Minkin, *supra* note 21, at 7.

[293] A.M. Best bases its financial strength ratings on comprehensive evaluations of insurers' balance sheets, operating performance and business profiles. *A.M. Best Ratings & Analysis*, http://www.ambest.com/ratings/methodology (last visited Jan. 9, 2006). Standard & Poor's rates insurance companies' financial strength based on information furnished by rated organizations or obtained from other reliable sources. *Insurer Financial Strength Rating Definitions*, http://www2.standardandpoors.com (last visited Jan. 9, 2006).

[294] *See* Spires v. Acceleration Nat'l Ins. Co., 417 F. Supp. 2d 750, 755 (D.S.C. 2006) (quoting expert witness's report).

[295] *Guide to Best's Financial Strength Ratings*, http://www.ambest.com/ratings/guide.asp (last visited Jan. 9, 2006).

[296] *Guide to Best's Financial Strength Ratings*, http://www.ambest.com/ratings/guide.pdf (last visited Jan. 9, 2006).

that face regulatory actions related to solvency.[297] An insurer that Standard & Poor's rates as "BB" (marginal financial security characteristics) or lower is regarded as having vulnerabilities that may outweigh its strengths.[298] Intermediaries invite trouble by placing coverage with insurance companies that A.M. Best or Standard & Poor's consider vulnerable and, on the other side of the coin, insulate themselves against liability by placing coverage with reinsurers that these companies deem secure.[299] If an intermediary learns that an insurance company with which coverage might be placed is financially vulnerable, he has a duty to communicate that to his client.[300] An insured or cedent may knowingly opt for coverage with a carrier that has only a fair likelihood of meeting its financial obligations because it has no other options and needs whatever protection it can obtain.

Some commentators suggest that a reinsurance intermediary has "an ongoing duty to monitor the solvency and financial condition of [a] reinsurer even after the reinsurance coverage is placed and to report on any developments otherwise impacting the reinsurer's solvency and ability to provide reinsurance coverage,"[301] a position that others brand "conjecture" and consider unsupported by case law.[302] The latter position is by far the better one. The general rule is that an intermediary's conduct is judged at the time coverage is procured, not at some later time when a reinsurer is unable to meet its financial obligations.[303] The only exception to this rule is the situation where an intermediary knows or reasonably should know at the time coverage is procured that the insurer, while then solvent, presents an unreasonable risk of insolvency in the future.[304] Such situations are very rare. Overall, at this time, reinsurance intermediaries' duties match those of insurance brokers.[305]

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[297] *See Insurer Financial Strength Rating Definitions*, http://www2.standardandpoors.com (last visited Jan. 9, 2006).

[298] *Id.*

[299] *See* Wyrick v. Hartfield, 654 N.E.2d 913, 915 (Ind. Ct. App. 1995) (holding that insurance broker exercised reasonable care by placing coverage with insurer that was rated A+ by A.M. Best and AAA by Standard & Poor's).

[300] *See* AYH Holdings, Inc. v. Avreco, Inc., 826 N.E.2d 1111, 1131-33 (Ill. App. Ct. 2005) (involving wholesale insurance broker); Carter Lincoln-Mercury, Inc. v. EMAR Group, Inc., 638 A.2d 1288, 1297 (N.J. 1994) (discussing insurance brokers).

[301] Pearlman & Minkin, *supra* note 21, at 7-8.

[302] DIACONIS & HAMMOND, *supra* note 4, § 4:4.1.

[303] Master Plumbers Ltd. Mut. Liab. Co. v. Cormany & Bird, Inc., 255 N.W.2d 533, 535 (Wis. Ct. App. 1977).

[304] *AYH Holdings*, 826 N.E.2d at 1132 (citing Higginbotham & Associates, Inc. v. Greer, 738 S.W.2d 45, 46 (Tex. App. 1987); 43 AM. JUR. 2d *Insurance* § 169, at 217-18 (2003); 44 C.J.S. *Insurance* § 215, at 408-10 (1993)).

[305] *See, e.g.*, Acadiana Shrimpers, Inc. v. Phoenix Fire & Marine Ins. Co., 640 So. 2d 800, 803 (La. Ct. App. 1994) (finding that broker was not liable for placing coverage with insolvent insurer because the insurer was solvent at the time coverage was obtained).

Of course, large intermediary organizations typically have market security committees that continuously monitor the financial stability of the insurers and reinsurers with which they do business, a practice that reduces their professional liability risk while simultaneously providing significant value to their clients. These committees typically monitor insurers' ratings (such as those provided by A.M. Best and Standard & Poor's), and apply and examine other financial criteria to companies with which their firms do business. They then determine which insurers are suitably secure to place clients' business with, and prohibit their brokers from insuring or reinsuring clients with companies deemed to be unsatisfactory. Unfortunately, no matter how cautious and diligent these committees may be, they do not have the access to information that state regulators enjoy and their ability to ensure the financial strength of the markets with which they place clients' risks is accordingly limited.

The leading case on reinsurance intermediaries' duties with respect to placing coverage with insolvent reinsurers is *Cherokee Insurance Co. v. E.W. Blanch Co.*[306] Cherokee was a property and casualty insurer.[307] Blanch was its main reinsurance intermediary.[308] Their relationship worked as follows:

> Representatives of Blanch would visit Cherokee annually to analyze the company's reinsurance needs for the coming year. Blanch would then work out an agreed reinsurance program with Cherokee, circulate a description of the program to potential reinsurers, and advise Cherokee of the companies with which it proposed to place reinsurance. Blanch typically told Cherokee that the reinsurers it was proposing appeared to offer "good" or "acceptable" security, but Cherokee would be asked to contact Blanch with any questions or comments it might have. Cherokee's silence was assumed to mean approval. Blanch would negotiate reinsurance contracts (or "treaties") with companies participating in the program and would submit contracts signed by such companies for signature by Cherokee.
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> Blanch's compensation for its services came not from Cherokee, but from commissions on the insurance ceded by Cherokee. Blanch viewed Cherokee as its client, however, and it [was] clear that Blanch considered itself to be working for Cherokee, not for the reinsurers.
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> In a promotional brochure circulated to clients (including Cherokee) . . . Blanch described its role as an "all encompassing" one that included "providing sound counsel, designing and negotiating reinsurance programs, and placing reinsurance with strong, responsive insurance markets." (In this context a "reinsurance market" means an individual reinsurer.) The brochure went on to say that "[t]hese programs are monitored on a continuous basis with subsequent

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[306] 66 F.3d 117 (6th Cir. 1995).

[307] *Id.* at 118.

[308] *Id.* at 119.

recommendations for changes which not only reflect clients' needs but also reflect availability of new coverages in the reinsurance marketplace."[309]

Blanch monitored individual reinsurers' financial strength through its market security committee.[310] The committee maintained a list of approved insurers with which Blanch employees were allowed to place business.[311] The committee based its approval decisions on companies' A.M. Best rating, certain financial ratios developed by the National Association of Insurance Commissioners, the companies' annual reports, and the reputations of the companies' staffs.[312] Other intermediaries based their market security decisions on similar information.[313]

Unfortunately, three companies with which Blanch placed Cherokee's reinsurance became insolvent and defaulted on their obligations to Cherokee.[314] At the time Blanch's market security committee approved doing business with the three, all of them appeared to be excellent or superior markets based on all of the standard measures.[315] Even Cherokee's expert witness would eventually testify "that he was aware of no one in the entire insurance industry who was predicting future financial trouble for any of the companies" at the time Blanch placed Cherokee's reinsurance with them.[316]

Cherokee sued Blanch when the insolvent reinsurers defaulted on their obligations, alleging that Blanch breached its "duty to exercise reasonable prudence, diligence and care in selecting financially sound reinsurers and in monitoring their financial stability."[317] Blanch prevailed at summary judgment and Cherokee appealed.[318]

On appeal, the Sixth Circuit assumed that intermediaries have a duty to exercise reasonable care in selecting reinsurers they recommend to clients.[319] Cherokee acknowledged the general rule that intermediaries are not guarantors of the solvency of the insurers with which they place coverage.[320] Cherokee instead contended that because "'the task of the reinsurance broker is much more complicated and sophisticated than that of the ordinary retail insurance broker,'" views held by other intermediaries, information in the trade press at

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[309] *Id.* at 119-20.
[310] *Id.* at 120.
[311] *Id.*
[312] *Id.*
[313] *Id.* at 122.
[314] *Id.* at 120.
[315] *Id.*
[316] *Id.* at 121.
[317] *Id.* at 119.
[318] *Id.* at 117-18.
[319] *Id.* at 122.
[320] *Id.*

relevant times, and its own unqualified expert's unproven method of determining insurers' market risk created a genuine issue of material fact precluding summary judgment.[321] The court disagreed, concluding that Blanch had complied with "customary industry standards" when it placed the insolvent carriers on its approved list and when it placed Cherokee's reinsurance.[322]

The *Cherokee* court next considered whether a jury might be permitted to find Blanch negligent even though it complied with industry standards.[323] This inquiry was triggered by the testimony of Cherokee's expert, Bernard Webb, and the novel methodology he used years after the reinsurers became insolvent to evaluate the reasonableness of Blanch's market security determinations.[324]

The court determined that the use of Webb's methodology was not so imperative that it could be held to overcome Blanch's compliance with industry standards.[325] To the extent Webb's methodology employed detailed financial analyses, "Blanch had no reason to doubt that [those calculations were] being performed by state regulators—armed with investigatory powers not available to private brokers—and by the A.M. Best Company."[326] Furthermore, there was evidence that A.M. Best attempted to analyze some of the factors that Webb considered important.[327] The court therefore affirmed summary judgment for Blanch.[328]

The *Cherokee* decision illustrates several rules governing the conduct of reinsurance intermediaries and insurance brokers alike. First, insofar as insolvency related claims go, intermediaries' conduct is judged at the time they place coverage.[329] To hold otherwise is to transform them into industry police without related compensation or the tools to fulfill that role. Second, intermediaries are not guarantors of insurance companies' solvency.[330] Third, intermediaries are justified in relying on the opinions of rating agencies and regulators when attempting to evaluate the financial security of the companies with which they place clients' coverage.[331] Rating agencies and state regulators are positioned to evaluate insurance companies' financial stability; intermediaries are not.[332] Unlike state regulators, intermediaries "have no

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[321] *Id.* at 122-23 (quoting Francis v. United Jersey Bank, 392 A.2d 1233, 1236 (N.J. Super. Ct. Law Div. 1978)).

[322] *Id.* at 123.

[323] *Id.*

[324] *See id.*

[325] *Id.* at 123-24.

[326] *Id.* at 124.

[327] *Id.*

[328] *Id.*

[329] *See id.* at 123 & n.5.

[330] *See id.* at 122.

[331] *See id.* at 124.

[332] *Id.* at 123.

authority to audit the books of reinsurance markets, and can hardly be expected to detect false reporting or other fraudulent activity."[333] Furthermore, these principles hold true where the intermediary employs a market security committee that monitors the financial strength of the insurers and reinsurers with which the intermediary has relationships.[334]

### *D. Expert Testimony*

A recurring issue in cases involving alleged misconduct by insurance agents and brokers is whether expert testimony is required to prove that the intermediary's conduct fell below the applicable standard of care. Courts generally hold that expert testimony is not required.[335] But courts' rejection of the need for expert testimony in insurance agent and broker cases should not be read too broadly.[336] The cases rejecting an alleged need for expert testimony typically involve routine transactions and errors that are within jurors' common understanding, such as a retail broker's failure to procure coverage that the insured clearly requested.[337] Expert testimony may be

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[333] *Id.* at n.5.

[334] *Id.* at 123.

[335] *See, e.g.*, Johnson & Higgins of Alaska, Inc. v. Blomfield, 907 P.2d 1371, 1374 (Alaska 1995) (holding that expert testimony was not required where broker failed to procure coverage requested); CIGNA Prop. & Cas. Cos. v. Zeitler, 730 A.2d 248, 261 (Md. Ct. Spec. App. 1999) (finding that expert testimony was not required where broker failed to procure coverage requested); Lovett v. Bradford, 676 So. 2d 893, 895 (Miss. 1996); Fillinger v. Nw. Agency, Inc., 938 P.2d 1347, 1355 (Mont. 1997) ("[T]he determination of whether an insurance agent reasonably fulfilled his or her duty and procured the coverage requested is easily within the common experience and knowledge of lay jurors. No expert testimony is required as there are no technical insurance issues beyond the understanding of the trier of fact."); Greenblatt v. Kissel, 2005 WL 3747582, at *3 (N.J. Super. Ct. App. Div. Feb. 9, 2006) (determining that expert testimony was not required where issue was broker's procurement of coverage and transmittal of related notices to wrong address); Indus. Dev. Assocs. v. F.T.P., Inc., 591 A.2d 682, 684 (N.J. Super. Ct. App. Div. 1991) ("Where a broker fails to meet the established minimum standards, expert testimony is not necessary to establish the culpability of the broker."); Erler v. Aon Risk Servs., Inc. of the Carolinas, 540 S.E.2d 65, 69 (N.C. Ct. App. 2000) (rejecting need for expert testimony because broker's negligent misrepresentation concerning coverage was "an issue which the jury, based on 'common knowledge and experience,' would be able to decide"); AAS-DMP Mgmt., L.P. Liquidating Trust v. Acordia Nw., Inc., 63 P.3d 860, 865 (Wash. Ct. App. 2003).

[336] Some courts do require expert testimony on the subject of an insurance agent's or broker's professional standard of care. *See, e.g.*, Spires v. Acceleration Nat'l Ins. Co., 417 F. Supp. 2d 750, 754 (D.S.C. 2006) (applying South Carolina law).

[337] These cases stand in stark contrast to a case where, for example, a global brokerage helps an international firm structure and place a multi-million dollar, multi-layered liability insurance program, perhaps with both foreign and domestic insurance markets participating. In short, many insurance transactions involving brokers are far different from the purchase of a common

required where an agent's or broker's alleged errors involve "technical insurance issues,"[338] where the agent's or broker's "professional skills and expertise are involved in the breach,"[339] where the agent's or broker's alleged errors relate to complex business transactions,[340] or where the intermediary's conduct is "simply too esoteric to be understood by the average layperson."[341] In *Himmelreich v. Adams Abstract Associates*,[342] for example, the court held that expert testimony was required to determine whether a title insurance agent's conduct fell below the standard of care because the use of title insurance in real estate transactions is not within jurors' common knowledge.[343]

Turning now to reinsurance, it is clear that:

> Reinsurance can present a myriad of obstacles to those who are not specialists in this area. There are numerous terms which are confusing both in meaning and application. Further, there are complex factual scenarios involving multiple layers of insurers and which are often further complicated by the insolvency of one or more of the insurers.[344]

Additionally, a reinsurance intermediary's role "is much more complicated and sophisticated" than an ordinary retail insurance broker's, with which most jurors are familiar.[345] It is therefore reasonable to argue that a plaintiff suing a reinsurance intermediary requires expert testimony to prove its case. Likewise, a good argument can be made that expert testimony is unnecessary only where the intermediary's misconduct is so obvious that jurors can recognize it without expert assistance, or where an intermediary disobeys a client's specific instructions.[346] Of course, even if a court determines that expert testimony is not required, a party will want to consider whether such testimony will assist the jury. Whether expert testimony is required and whether it is helpful are separate issues.

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coverage from a local retail broker, the scenario familiar to most jurors.

[338] *See Fillinger*, 938 P.2d at 1355-56.

[339] Casas v. Farmers Ins. Exch., 130 P.3d 1201, 1208 (Kan. Ct. App. 2005).

[340] *See* Humiston Grain Co. v. Rowley Interstate Transp. Co., 512 N.W.2d 573, 575-76 (Iowa 1994).

[341] AMH Appraisal Consultants, Inc. v. Argov Garish P'ship, 919 So. 2d 580, 582 (Fla. Dist. Ct. App. 2006) (alleging that broker failed to note that appraisal value was too low).

[342] 59 Pa. D. & C.4th 382 (Pa. Com. Pl. 2002).

[343] *Id.* at 392-93 (quoting Storm v. Golden, 538 A.2d 61, 64-65 (Pa. Super. Ct. 1988)).

[344] 1A RUSS ET AL., *supra* note 28, § 9:1.

[345] Francis v. United Jersey Bank, 392 A.2d 1233, 1236 (N.J. Super. Ct. Law Div. 1978).

[346] *Cf.* Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 788 N.E.2d 522, 536 (Mass. 2003) (explaining that insured suing insurer for negligently conducting its defense must support its case with expert testimony except where the alleged misconduct is so gross or obvious that jurors can rely on their common knowledge to infer negligence); Frullo v. Landenberger, 814 N.E.2d 1105, 1109 (Mass. App. Ct. 2004) (stating two exceptions to general rule that expert testimony is required to establish standard of care in legal malpractice cases).

## IV. CONCLUSION

Reinsurance intermediaries play important roles in many reinsurance transactions. Reinsurance intermediaries are agents; the question in any given transaction is for whom. In many cases they will be dual agents. Regardless, it is appropriate to characterize them as agents and to analyze their duties and liabilities in accordance with settled agency law. Attempts to replace agency law with some other liability regime are unwise and unnecessary.

Insofar as duties go, reinsurance intermediaries, like all agents, owe their principals duties of loyalty and obedience. They also owe their clients duties of security and accounting, and, of course, a duty of care when acting for them. These duties are discussed in relatively few cases, but that may change. Increasingly, those in the reinsurance industry are resolving their disputes through litigation.[347] Although it is unlikely that reinsurance intermediaries will be found to owe new duties beyond those discussed in this article, it is reasonable to think that their established duties may be more fully developed and explained. That is a good thing, even if increased litigation generally is not.

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[347] Kevin T. Merriman & Carrie P. Parks, *The Gentlemen's Disagreement: Recent Trends in Reinsurance Law*, FOR THE DEF., May 2006, at 33, 38.

# Compelled Expression of the Religiously Forbidden: Pharmacists, "Duty to Fill" Statutes, and the Hybrid Rights Exception

"The Supreme Court has been somewhat less than precise with regard to the nature of hybrid rights."
Judge Diarmuid O'Scannlain[1]

## I. INTRODUCTION

In February 2005, two women in Chicago unsuccessfully attempted to have prescriptions for emergency contraceptives ("EC") filled at a pharmacy.[2] Although this was not the first time that pharmacists in the United States had refused to fill prescriptions for emergency contraceptives,[3] this particular incident set off a public and policy reaction that continues to the present.[4] At least two states—Illinois and California—have acted to require pharmacies to dispense emergency contraceptives when presented with a valid, lawful prescription.[5] These laws are known as "duty to fill" laws.[6] Four other states —Arkansas, Georgia, Mississippi, and South Dakota—have passed legislation protecting the right of pharmacists to refuse to dispense EC for moral, ethical, or religious reasons.[7] At least eighteen other states have considered legislation on both sides of this issue.[8] The 109th Congress also considered legislation

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[1] Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703 (9th Cir.), *withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *and rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

[2] NARAL PRO-CHOICE AMERICA FOUNDATION, GUARANTEE WOMEN'S ACCESS TO PRESCRIPTIONS 2 (2006), *available at* http://www.prochoiceamerica.org/assets/files/Birth-Control-Pharmacy-Access.pdf [hereinafter NARAL].

[3] *Id.* at 2-3. Prior to the Chicago incident, there had been at least three other reported instances of pharmacists refusing to dispense EC. *Id.* At least two of these explicitly were for moral or religious reasons. *Id.* NARAL Pro-Choice America reports that an additional incident took place after the Chicago incident. *Id.* at 1.

[4] *See infra* Part II.A.

[5] *See* ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2006); CAL. BUS. & PROF. CODE § 733(a)-(b) (West Supp. 2006).

[6] *See Freedom of Conscience for Small Pharmacists: Hearing before the H. Comm. on Small Business*, 109th Cong. 2 (2005) (written testimony of the American Pharmaceutical Association), *available at* http://www.aphanet.org/AM/Template.cfm?Section=Federal_Government_Affairs&CONTENTID=3582&TEMPLATE=/CM/ContentDisplay.cfm [hereinafter *Freedom of Conscience Hearing*].

[7] GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: EMERGENCY CONTRACEPTION (2006), http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf (last visited Oct. 12, 2006).

[8] *See infra* notes 31 and 33 and accompanying text.

that would require pharmacies to dispense emergency contraceptives when presented with a valid, lawful prescription.[9]

Some pharmacists object on religious grounds to dispensing EC.[10] They believe that life begins at the moment of fertilization.[11] Based on this belief, they believe there is a possibility that EC, by preventing the implantation of a fertilized egg,[12] makes them complicit in abortion.[13]

This paper argues that pharmacists who object on religious grounds to dispensing EC can make a successful hybrid rights free exercise claim for an exemption from "duty to fill" laws. The hybrid rights doctrine is an exception to the general Free Exercise Clause rule that a religious exemption is not required from a neutral, generally applicable law.[14] The doctrine requires strict scrutiny of laws that implicate a constitutional right in addition to the Free Exercise Clause.[15] This paper will argue that "duty to fill" laws implicate the right of objecting pharmacists to be free from compelled expression, in that such laws compel them to express a message that EC is appropriate for patient use.[16] When joined with a free exercise claim, the compelled expression claim requires that "duty to fill" statutes be subject to strict scrutiny. It is a test these laws do not pass.[17]

Part II of the paper provides background on the controversy over pharmacists refusing to dispense EC and explains how different states and Congress have responded. Part II also discusses how EC works and why some religions and their adherents believe that it can cause an abortion. Part II concludes by outlining how the hybrid rights exception works and how different federal courts of appeals have applied it, and closely examines one leading case applying the doctrine—*Thomas v. Anchorage Equal Rights Commission*.[18]

Part III explains why pharmacists who refuse, for religious reasons, to dispense EC may regard "duty to fill" laws as infringing their free exercise of religion. Part III also analyzes whether such laws infringe their rights against compelled expression. Part III closes by applying strict scrutiny to "duty to fill" laws.

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[9] Access to Legal Pharmaceuticals Act, S. 809, 109th Cong. (2005).

[10] *See infra* Part II.B.3.

[11] *See infra* note 56.

[12] *See infra* notes 52-54 and accompanying text.

[13] *See infra* notes 56-67 and accompanying text.

[14] *See infra* notes 68-76 and accompanying text.

[15] *See infra* notes 78-79 and accompanying text.

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

[17] *See infra* Part III.C.

[18] 165 F.3d 692 (9th Cir.), *withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *and rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

Part IV argues that pharmacists who object, on religious grounds, to dispensing EC can make a successful hybrid rights claim under the "colorable claim" approach adopted in the Ninth and Tenth Circuit Courts of Appeals, and that "duty to fill" laws that are unconstitutional as applied to them.

Part V discusses the recent approval of over-the-counter status for Plan B, a form of emergency contraceptive, for women aged eighteen years and older and the continued relevance of the discussion in this paper.

## II. BACKGROUND

This Part discusses the background of the current controversy over the refusal by pharmacists to dispense EC. Section A lists some of the most recent incidents in which pharmacists have refused to dispense emergency contraception and it looks at the response in the states and in the Congress. Section B provides an overview of how emergency contraception functions and why some religious believers regard it as an abortifacient.[19] Section C gives an overview of the hybrid rights doctrine in free exercise jurisprudence.

### *A. The Current Controversy and Government Responses*

There have been at least five reported instances of pharmacists refusing to fill prescriptions for EC in the past ten years.[20] For example, several pharmacists in an Eckerd pharmacy in Texas refused, on moral and religious grounds, to fill the EC prescription of a rape victim.[21] The victim's friend described the pharmacists' refusal to fill the prescription as a "second victimization."[22] Eckerd fired the pharmacists for violating company policy, which forbids pharmacists from refusing to fill prescriptions on moral or religious grounds.[23] Similar instances of pharmacists refusing to fill EC prescriptions have occurred in Alabama, New Hampshire, Illinois, and Wisconsin.[24]

Government responses to these refusals were quick. Following the February 2005 refusal of a Chicago pharmacy to fill two EC prescriptions, Illinois Governor Rod Blagojevich filed an emergency rule[25] which required pharmacies that sell contraceptives to fill all "valid, lawful prescription[s] for

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[19] An "abortifacient" is "an agent (as a drug) that induces abortion." MERRIAM-WEBSTER ONLINE, http://www.m-w.com/dictionary/abortifacient (last visited Oct. 19, 2006).

[20] NARAL, *supra* note 2, at 1-3.

[21] *Id.* at 3.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 1-3.

[25] *Id.* at 2; *see also* 29 Ill. Reg. 5586 (April 15, 2005).

. . . contraceptive[s]" or, if the prescribed contraceptive was not in stock, to order it or to transfer the prescription.[26] This rule has since been made permanent.[27] Pharmacists who allege the rule is a violation of their right to the free exercise of their religion have filed a lawsuit challenging the constitutionality of the rule.[28]

The California legislature also responded to the perceived problem, passing a law that made "obstruct[ion] of a patient in obtaining a prescription drug" unprofessional conduct and requiring a licensed pharmacist to dispense lawfully prescribed drugs.[29] The California statute does allow a pharmacist to decline to fill a prescription on "ethical, moral, or religious grounds," provided that the pharmacist has previously notified his or her employer in writing, that the employer can "reasonabl[y] accommodat[e]" the pharmacist "without creating undue hardship," and that the employer can ensure the patient "timely access to the prescribed drug."[30]

As of August 2006, additional "duty to fill" legislation requiring pharmacists to dispense all prescribed contraceptives, including EC, had been introduced in at least seven state legislatures in the 2005 and 2006 legislative sessions.[31]

Coming down on the other side of the issue, four state legislatures have passed laws that protect pharmacists who refuse to dispense prescribed contraceptives, including EC.[32] As of August 2006, bills had been introduced in an additional eighteen states that would specifically protect pharmacists who refuse to dispense EC.[33] Because the focus on this paper is on whether

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[26] 29 Ill. Reg. at 5596.

[27] ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2006).

[28] *Birth Control Rx Rule Challenged*, CBS NEWS, Dec. 20, 2005, http://www.cbsnews.com/stories/2005/12/20/national/main1146526.shtml?CMP=OTC-RSSFeed&source=RSS&attr=Politics_1146526 (last visited Oct. 12, 2006); Complaint for Declaratory and Injunctive Relief paras. 38-41, Menges v. Blagojevich, No. 3:05-cv-03307-JES-BGC (C.D. Ill. Dec. 21, 2005), 2005 WL 3675928.

[29] CAL. BUS. & PROF. CODE § 733(a)-(b) (West Supp. 2006).

[30] *Id.* § 733(b)(3).

[31] NATIONAL CONFERENCE OF STATE LEGISLATURES, PHARMACIST CONSCIENCE CLAUSES: LAWS AND LEGISLATION (2006), http://www.ncsl.org/programs/health/conscienceclauses.htm#r (last visited Oct. 12, 2006) [hereinafter NCSL]. The seven states are Michigan, Minnesota, Missouri, New Jersey, New York, Pennsylvania, and West Virginia.

[32] GUTTMACHER INSTITUTE, *supra* note 7. The four states are Arkansas, Georgia, Mississippi, and South Dakota. *Id.* The Arkansas statute potentially extends to pharmacies as well. *Id.* The Guttmacher Institute views the Colorado, Florida, Illinois, Maine, and Tennessee general refusal statutes as being broad enough to cover pharmacists or pharmacies. *Id.*

[33] NCSL, *supra* note 31. The eighteen states, arrived at by the author's calculation, are Alabama, Arizona, Illinois, Indiana, Michigan, Minnesota, Missouri, New Hampshire, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin. I excluded legislation further extending conscience protection rights

pharmacists have a Free Exercise hybrid right claim to a statutory requirement that they dispense EC, this paper does not look at conscience clause legislation in depth.

Members of Congress also introduced legislation in the 109th Congress to require pharmacies to dispense EC when presented with a lawful, valid prescription.[34] The "Access to Legal Pharmaceuticals Act" would require pharmacies that receive prescription drugs or devices in interstate commerce to ensure either the filling of a valid prescription, if the product is in stock, or to offer to order a product, if it is not in stock, in the event that an employee pharmacist refuses to fill the prescription or order the product.[35] Additionally, the proposed legislation forbids pharmacies from employing a pharmacist who seeks to prevent or deter an individual from filling a valid prescription, such as by refusing to return or transfer the prescription or by humiliating or harassing the individual.[36]

### *B. The Collision Between Medical Uncertainty and Religious Absolutes*

In the debate over EC, advancing medical technology, driven by cutting edge science and consumer demand, collides with religious doctrines that derive from eternal truths and are concerned with the soul as well as the body.

#### *1. How EC works*

There is some debate over precisely how EC prevents a pregnancy from developing. To understand the debate, and how health care providers and women seeking EC can get stuck in the middle, it is best to begin at the beginning.

Following intercourse during a period of fertility in the woman, the sperm must invade the female ovum ("egg") through a process known as capitation to create a pregnancy.[37] The union of egg and sperm produces a fertilized

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in the four states that have specific protection regarding the dispensation of EC.

[34] S. 809, 109th Cong. (2005). The companion measure in the House of Representatives is House Bill 1652.

[35] S. 809 § 3(a).

[36] S. 809 § 3(a). While it is beyond the scope of this paper, pharmacists who object to dispensing EC on religious grounds could seek an exemption from the Access to Legal Pharmaceuticals Act under the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2000). *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, ___ U.S. ___, 126 S. Ct. 1211 (2006).

[37] Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 ANNALS HEALTH L. 37, 40 (2006). Capitation is the production of "enzymes that weaken the membrane surrounding the ovum, allowing one sperm to enter." *Id.*

ovum, with a complete set of chromosomes that is called a zygote.[38] This process occurs in the fallopian tube and "is complete approximately seventeen to eighteen hours after intercourse."[39] The zygote spends the next three to four days in the fallopian tube and begins to divide into multiple cells.[40] At this point, it travels to the uterus and floats for approximately three days.[41] After three days, it implants into the lining of uterus and is called a blastocyst.[42] Implantation usually occurs approximately seven days after intercourse.[43]

Successful implantation requires the blastocyst to burrow into the lining of the uterus.[44] It must then "differentiate into cells that will form the placenta and supporting structures, as well as the embryo."[45] Losses of preembryos naturally occur at a significant rate, ranging from 25% among the "optimally fertile population" to as high as 74% among the infertile population (seen as a result of in-vitro fertilization treatment).[46]

The medical community generally believes that a pregnancy begins at implantation.[47] Thus, anything that prevents either the fertilization of the egg or the implantation of the zygote is viewed as a "contraceptive,"[48] not as an "abortifacient."[49] From the medical perspective, EC cannot act as an abortifacient because, even at its latest theoretical point of intervention in the reproductive process, it prevents implantation and thus prevents a pregnancy from beginning.[50] It does not end a pregnancy that has begun.[51]

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[38] *Id.*

[39] Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 85-86 (2002-03).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Collins, *supra* note 37, at 40.

[45] *Id.*

[46] *Id.* at 41.

[47] *Id.* at 46.

[48] "Contraceptive" is defined as the "deliberate prevention of conception or impregnation." MERRIAM-WEBSTER ONLINE, http://www.m-w.com/dictionary/contraceptive (last visited Oct. 19, 2006).

[49] "Abortifacient" is defined as "an agent (as a drug) that induces abortion," MERRIAM-WEBSTER ONLINE, http://www.m-w.com/dictionary/abortifacient (last visited Oct. 19, 2006), with "abortion" defined as "the termination of a *pregnancy* after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus." MERRIAM-WEBSTER ONLINE, http://www.m-w.com/dictionary/abortion (last visited Oct. 19, 2006) (emphasis added).

[50] *See* Holly Teliska, Recent Development, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229, 235 (2005) (stating that EC cannot end an established pregnancy and therefore cannot cause an abortion).

[51] *Id.*

There is some dispute over the manner in which EC affects this process. There is consensus that one method in which EC can work is by preventing fertilization.[52] But there is vigorous debate over whether EC also functions by preventing implantation of a fertilized egg.[53] Yet the important fact from the perspective of some religions is that it has not been proven that it does *not* function by preventing the implantation of fertilized egg.[54]

### 2. *Why some religions view EC as an abortifacient*

While the medical community has determined, by concluding that pregnancy cannot begin until the blastocyst has implanted in the uterine lining, that EC cannot act as an abortifacient, several religious groups and individuals disagree.[55] They believe that life begins at the moment of conception (or fertilization of the egg).[56] If life begins at the moment of fertilization, in their view any action that interferes with the implantation of a fertilized embryo is functioning as an abortifacient.[57] While this belief that life begins at the moment of fertilization is spread across many faiths and denominations, it is most publicly associated with the Roman Catholic Church.[58]

The Roman Catholic Church has spoken directly on the issue of EC in a document issued by the Pontifical Academy of Life entitled *Statement on the So-Called "Morning-After Pill."*[59] While the *Statement* only speaks for the

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[52] *Compare* Herbe, *supra* note 39, at 79 ("EC works before fertilization by either suppressing ovulation, like regular birth-control pills, or preventing fertilization of an egg by inhibiting the movement of the sperm or the egg.") *with* Collins, *supra* note 37, at 43 ("Studies almost universally show that contraceptives primarily, and possibly exclusively, work by preventing fertilization.").

[53] *Compare* Herbe, *supra* note 39, at 79-80 ("If an egg becomes fertilized, then EC may disrupt transport of the fertilized egg to the uterus or, if the transport through the fallopian tube is complete, prevent the implantation of the fertilized egg in the woman's uterus.") *with* Collins, *supra* note 37, at 43 ("The possibility that hormonal contraception can work by preventing a fertilized ovum from embedding in the uterus remains *just a theoretical possibility*.") (emphasis added).

[54] Collins, *supra* note 37, at 43 ("[T]here is no direct proof that preembryos are never lost.").

[55] *Cf. id.* at 45-46 (discussing religious opposition to contraception as an abortifacient).

[56] *Cf.* PONTIFICAL ACADEMY FOR LIFE, STATEMENT ON THE SO-CALLED "MORNING-AFTER PILL" § 3 (2000), *available at* http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pa_acdlife_doc_20001031_pillola-giorno-dopo_en.html ("Pregnancy, in fact, begins with fertilization and not with the implantation of the blastocyst in the uterine wall . . . ."); Herbe, *supra* note 39, at 86 ("The Roman Catholic Church's official teaching and belief is that life begins, and conception occurs, at fertilization.").

[57] Collins, *supra* note 37, at 47.

[58] *Id.* at 45; Herbe, *supra* note 39, at 87.

[59] PONTIFICAL ACADEMY ON LIFE, *supra* note 56.

position of the Roman Catholic Church, it bears reviewing as representative of the view taken of EC by many of those religions and religious believers that believe that life begins at the moment of fertilization.[60]

The document states that, while different stages of embryonic and fetal development are called by different terms (e.g. zygote, blastocyst) and that these distinctions might have scientific value, "it can never be legitimate to decide arbitrarily that the human individual has greater or lesser value . . . according to its stage of development."[61] Pregnancy, in the Roman Catholic Church's view, begins at the moment of fertilization.[62] The life created by that act of fertilization has the same moral status regardless of its stage of development.[63] By preventing the implantation of a blastocyst, EC functions as "nothing other than a chemically induced abortion. It is neither intellectually consistent nor scientifically justifiable to say that we are not dealing with the same thing."[64] In language that reflects the view of pharmacists who agree with the Roman Catholic Church's position, the document concludes that "from the ethical standpoint the same absolute unlawfulness of abortifacient procedures also applies to *distributing*, prescribing and taking the *morning-after pill*."[65] Pharmacists who believe, for religious reasons, that life begins at the moment of fertilization are confronted with a dilemma when presented with the prescription for EC: to follow their professional obligations by filling the prescription,[66] thereby potentially making themselves complicit in an abortion, or to assert the primacy of their religiously-informed conscience and to refuse to fill the prescription.[67]

### *C. Hybrid Rights Doctrine*

The hybrid rights exception to the free exercise rule enunciated in *Employment Division, Department of Human Resources v. Smith*,[68] apparently

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[60] *See* Herbe, *supra* note 39, at 87.

[61] PONTIFICAL ACADEMY ON LIFE, *supra* note 56, § 2.

[62] *Id.* § 3.

[63] *Id.* § 2.

[64] *Id.* § 3; *see also* Herbe, *supra* note 39, at 87 ("[S]ome pharmacists believe life begins at fertilization, and thus find EC to be an early form of abortion.").

[65] PONTIFICAL ACADEMY ON LIFE, *supra* note 56, § 4 (first emphasis added).

[66] *See* Herbe, *supra* note 39, at 87-88 (concluding that the pharmacist's professional obligations "leave the pharmacist with an ethical duty to fill and dispense the prescription").

[67] *Id.* at 87.

[68] 494 U.S. 872, 879 (1990) (holding that the Free Exercise Clause is not violated by a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (quotation marks omitted)).

borne out of the necessity of keeping a majority,[69] has produced doctrinal confusion in the lower courts and among commentators.[70] This subsection provides an overview of the doctrine as it has come to be applied and of the most significant case applying the approach advocated in this paper.

*1. The creation of the doctrine and its reception among the lower courts*

In *Smith*, the Supreme Court announced a sea change in its Free Exercise jurisprudence. The Court had previously required that laws that burdened the free exercise of religion, and a state's refusal to grant an exemption from said laws, be "justified by a compelling interest that cannot be served by less restrictive means."[71] In place of the compelling interest test, the Court held that a neutral, generally applicable law that has the incidental effect of burdening an individual's religiously motivated conduct does not violate the Free Exercise Clause.[72]

The Court distinguished earlier cases in which it had applied a compelling interest test by stating that it had only applied the test in cases where the Free Exercise Clause was not implicated alone, "but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children."[73] The Court further suggested that such a combination of Free Exercise and other constitutional protections had played a role in some of its compelled expression cases[74] and could play a role in a future freedom of association case.[75] Referring to this exception to the general rule the majority announced in *Smith* as a "hybrid situation,"[76] the Court created what has come to be known as the "'hybrid rights' exception."[77] While the Court was not explicit about what test applied

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[69] *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 902 (1994) ("Justice Scalia had only five votes. He apparently believed he couldn't overrule anything, and so he didn't. He distinguished everything away instead.").

[70] *See infra* Part II.C.2.

[71] *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting). Justice Blackmun further noted that "[u]ntil today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence." *Id.* at 908.

[72] *Id.* at 878-79.

[73] *Id.* at 881 (citations omitted) (citing Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[74] *Id.* at 882 (citing Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

[75] *Id.* (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)).

[76] *Id.*

[77] *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004).

when a successful hybrid rights claim was found, it is generally thought that the compelling interest test is to be applied.[78] The test asks "'whether the government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'"[79]

The doctrine has met with criticism from Supreme Court justices[80] and from academic commentators.[81] Representative of the criticism is then-Professor McConnell's suggestion that the hybrid rights exception was not "intended to be taken seriously" and was created only as a means of distinguishing *Wisconsin v. Yoder*.[82] It has also been met with skepticism by lower courts.[83] The courts have based their decisions variously on a lack of merit in the claim accompanying the free exercise claim,[84] by concluding that the state had a compelling interest that justified the infringement,[85] or by concluding that the litigants' religious exercise was not substantially burdened.[86] Indeed, at least two circuits—the Second and Sixth—have refused to recognize the existence of the exception, treating it as dicta until the Supreme Court clearly directs that it be treated otherwise.[87]

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[78] *See* John L. Tuttle, Note, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under* Employment Division v. Smith, 3 AVE MARIA L. REV. 741, 745 (2005); Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith*: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 668 (2001); Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 712 (9th Cir.), *withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *and rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

[79] *Thomas*, 165 F.3d at 712 (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

[80] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring in part and concurring in the judgment) ("[T]he distinction *Smith* draws strikes me as ultimately untenable.").

[81] *See* Tuttle, *supra* note 78, at 746 nn. 35-41 (2005) (collecting criticism).

[82] Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121-22 (1990).

[83] *See* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573, 588-98 (2003) (collecting cases).

[84] *Id.* at 588-93.

[85] *Id.* at 593.

[86] *Id.* at 593-94.

[87] *See* Tuttle, *supra* note 78, at 747 (citing Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993); Leebaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir. 2003)).

*2. How should the exception be applied?*

Justice Souter, in an opinion concurring in part and concurring in the judgment in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[88] accurately pinpointed the doctrinal challenges posed by the Court's Athena-like creation of the hybrid rights exception in *Smith*. Arguing that the exception was "ultimately untenable," he argued that

> [i]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[89]

The dilemma with hybrid rights claims, as Justice Souter recognized, is confusion at to what the strength of the non-Free Exercise claim or claims has to be in order to create a successful hybrid rights claim. Simply allowing the implication of an additional constitutional right creates an exception that swallows the rule; requiring that the non-free exercise claim be independently viable would appear to render the free exercise claim essentially irrelevant and render the exception nothing more than a convenient way for the *Smith* majority to distinguish inconvenient precedent.

The federal courts of appeals have responded in essentially three ways. As noted above, the Second and Sixth Circuits have chosen to disregard the hybrid rights language in *Smith* and only will apply the level of scrutiny required by the individual component claims.[90] The courts of appeals for the First Circuit and the District of Columbia Circuit have chosen to require that the non-free exercise claim be independently viable before the challenged law will be subject to strict scrutiny.[91] The Ninth and Tenth Circuits, on the other hand, have concluded that the non-free exercise claim needs to be "colorable" in order for the challenged law to receive strict scrutiny.[92] These courts define a "colorable" claim to be a claim that has a "'fair probability or likelihood, but not a certitude, of success on the merits . . . .'"[93]

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[88] 508 U.S. 520, 559-77 (1993) (Souter, J., concurring in part and concurring in the judgment).

[89] *Id.* at 567.

[90] Tuttle, *supra* note 78, at 751-52.

[91] *Id.* at 754.

[92] *Id.* at 756.

[93] *Id.* at 756-57 (quoting Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999)).

Advocates of the independently viable claim approach argue that the colorable claim approach is too loose and inconsistent with the *Smith* decision.[94] The colorable claim approach lacks the benefits of a bright-line test and is hard to define.[95] Akers argues that the colorable claim approach essentially enables the litigant to succeed on the Free Exercise claim alone, and that this is inconsistent with the exception as delineated in *Smith*, which required that another right be joined with the Free Exercise claim to create a hybrid rights claim.[96] The chief benefit of the independently viable claim approach, he states, is that it provides courts with a clear test and it is consistent with *Smith*'s view that the hybrid rights exception *should be* an exception to the government's ability to enforce neutral, generally applicable laws.[97]

In response to criticisms such as that by Justice Souter–that the independently viable claim approach renders the Free Exercise claim irrelevant and the exception illogical[98]–Akers responds that this is only true if the additional claim determines the level of scrutiny.[99] Presumably if the addition of the independently viable claim to the Free Exercise claim invokes automatic strict scrutiny, then in his view the hybrid rights exception remains viable as a concept.

Advocates of the colorable claim approach argue that it is an appropriate middle ground between the difficulties of either an implication approach or an independently viable claim approach.[100] Tuttle, for example, argues that the cases cited by the *Smith* Court as demonstrating hybrid situations—in particular *Yoder*—cannot be explained under the independently viable claim approach.[101] Conversely, the implication approach is inconsistent with the *Smith* decision itself.[102] The colorable claim approach, its advocates argue, is more consistent with the *Smith* decision because it accounts for the decision itself and for the cases cited in support of the hybrid rights exception.[103]

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[94] *See* Ryan M. Akers, *Begging the High Court for Clarifications: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77, 99 (2004-2005).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment).

[99] *Id.*

[100] Tuttle, *supra* note 78, at 764-66.

[101] *Id.* at 765.

[102] *Id.* at 766 (citing Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 706-07 (9th Cir.), *withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *and rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

[103] *Id.*

This paper will apply the colorable claim approach in Part III for two reasons. First, it is the governing standard in the Ninth Circuit,[104] and thus the most appropriate one for Hawai'i readers to consider immediately. Second, the independently viable claim approach appears to render the accompanying free exercise claim irrelevant—if a litigant has a viable non-free exercise claim, why bring a free exercise claim as well? While Akers attempts to sustain the viability of the independently viable claim approach by arguing that a successful hybrid rights claim might bring a higher level of scrutiny than the independently viable claim alone, which might invoke only intermediate scrutiny, this argument is ultimately unconvincing for the reasons discussed by Justice Souter and Tuttle above. The colorable claim approach is the best current understanding of the hybrid rights exception, and will be applied in this paper.

*3.* Thomas v. Anchorage Equal Rights Commission*: an exercise in hybrid rights jurisprudence*

The Ninth Circuit panel decision in *Thomas v. Anchorage Equal Rights Commission*,[105] later reversed on other grounds following an en banc rehearing,[106] provides the most useful example of how the colorable claim approach to a hybrid rights case should work. In *Thomas*, two Alaskan landlords who objected on religious grounds to renting their property to unmarried couples sought a declaratory judgment and permanent injunction barring the application of state and city laws that forbade discrimination in housing based upon marital status.[107] Among other claims, the landlords argued that the State of Alaska and City of Anchorage housing laws infringed their Fifth Amendment right to exclude others from their property and their free speech rights, in addition to burdening their free exercise rights.[108] For the reasons noted above, Judge O'Scannlain, writing for a divided panel,[109] concluded that

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[104] *See* Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999).

[105] 165 F.3d 692 (9th Cir.), *withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *and rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

[106] The en banc court reversed on ripeness grounds, concluding that the plaintiffs had not demonstrated the necessary "concrete plan" to violate the laws nor the necessary "specific threat of enforcement" directed toward them and that the history of the laws' enforcement showed that future enforcement against plaintiffs was too contingent on other factors. Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139-41 (9th Cir. 2000) (en banc). The court described *Thomas* as "a case in search of a controversy." *Id.* at 1137. Judge O'Scannlain, author of the panel opinion, wondered in a concurring opinion "whether this is a court afraid of a case." *Id.* at 1147 (O'Scannlain, J., concurring).

[107] *Thomas*, 165 F.3d at 696-97.

[108] *Id.* at 702-03.

[109] Judge Hawkins dissented. 165 F.3d at 718-27 (Hawkins, J., dissenting).

"a plaintiff invoking *Smith*'s hybrid exception must make out a 'colorable claim' that a companion right has been infringed."[110] Noting that the lack of exactitude in the "colorable" standard would require a reviewing court to make a "difficult, qualitative case-by-case judgment[] regarding the strength of the companion claim,"[111] he further concluded that "[i]n order to trigger strict scrutiny, a hybrid-rights plaintiff must show a 'fair probability'—a 'likelihood'—of success on the merits of his companion claim."[112]

Judge O'Scannlain proceeded to analyze the strength of the landlords' asserted companion claims. Analyzing the Fifth Amendment right to exclude claim, he focused on the nature of the regulation prong of the regulatory takings test.[113] He analyzed the landlords' claim closely under the Supreme Court's takings jurisprudence.[114] While not finding the antidiscrimination laws to rise to the level of "permanent physical occupation,"[115] he concluded that the housing laws nonetheless authorized a physical invasion and that landlords had made out a colorable claim of a violation of their Fifth Amendment rights.[116]

Judge O'Scannlain then analyzed the landlords' free speech claim. He first concluded that the speech in question was not commercial speech, reasoning that the motives behind the speech they wished to make were religious, not economic.[117] Having characterized the landlords' speech as non-commercial, he concluded that the Alaska laws were not content-neutral regulations.[118] The laws permitted landlord speech regarding a prospective tenant's income, he pointed out, yet they forbade religiously motivated speech related to a prospective tenant's marital status.[119] Concluding that this was content discrimination and noting that such laws are presumptively unconstitutional, the Ninth Circuit held that the landlords had also made out a colorable claim that their free speech rights had been violated.[120]

Since he had concluded that the landlords had made successful hybrid rights claims based on the Takings Clause and the Free Speech Clause, Judge O'Scannlain proceeded to apply the compelling interest test to the laws in

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[110] *Id.* at 705 (citing Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998)).

[111] *Id.*

[112] *Id.* at 706.

[113] *Id.* at 709.

[114] *Id.* 707-09.

[115] *Id.* at 709 (emphasis removed).

[116] *Id.*

[117] *Id.* at 709-11.

[118] *Id.* at 711.

[119] *Id.*

[120] *Id.*

question.[121] He determined that the laws were a substantial burden on the landlords' free exercise because they effectively forced them to abandon the rental housing market and were thereby deprived of their "chosen occupation."[122] Having found a substantial burden, he looked to see if Alaska had a compelling interest in its anti-marital status discrimination laws.[123] Recognizing that interests of only "'the highest order'"[124] can provide a compelling interest, he reviewed the Supreme Court's cases on anti-discrimination as a compelling interest and concluded that preventing marital status discrimination was not a sufficiently compelling governmental interest.[125] He found little evidence of a "'firm national policy'"[126] at the federal level against discrimination and determined that a single state's enactments cannot provide a compelling government interest for federal constitutional purposes.[127] He further noted that the Alaska laws in question contained exceptions and that other Alaska laws sanctioned discrimination against unmarried couples.[128] Writing for the Ninth Circuit panel, Judge O'Scannlain concluded that, even at the state level, preventing marital-status discrimination was not a compelling governmental interest.[129] Because the Alaska laws lacked a compelling interest for the substantial burden they imposed on the landlords' free exercise, the court held that the laws could not be enforced against the landlords.[130]

## III. ANALYSIS

This Part analyzes whether pharmacists who are required by law to dispense EC, against their religious beliefs, can make a successful hybrid rights claim for an exemption from the law. Section A explains the nature of the free exercise infringement, and why these pharmacists would believe the law requires them to violate their religious beliefs. Section B assesses whether such pharmacists can make a colorable claim that their right not to speak is also violated by such a law, giving them a successful hybrid rights claim. Finally Section C, following the framework laid out in *Thomas*, applies the compelling interest test to determine if the application of a "duty to fill" statute to these pharmacists is unconstitutional.

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[121] *Id.* at 711-712.
[122] *Id.* at 713-14.
[123] *Id.* at 714.
[124] *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).
[125] *Id.* at 714-16.
[126] *Id.* at 714 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983)).
[127] *Id.* at 715-16.
[128] *Id.* at 716-17.
[129] *Id.*
[130] *Id.* at 718.

### A. "Duty to Fill" Statutes and the Free Exercise of Religion

Statutes and rules that require *pharmacies* to fill all legal prescriptions[131] do not clearly speak to individual *pharmacists*. How is it, then, that such laws infringe the free exercise of individual pharmacists who object to dispensing EC on religious grounds? They do so in several ways: through direct impact on small or independent pharmacies, by endangering the employment of pharmacists who object to dispensing EC, and by imposing requirements on the manner in which pharmacists can act according to their religious beliefs.

For small or independent pharmacies, which employ only one or a few pharmacists, legislation that speaks to *pharmacies* can end up imposing requirements directly on individual pharmacists. As the American Pharmaceutical Association noted, "for a small business like an independent pharmacy operated by a single pharmacist, the distinction between the two is minimal."[132] Indeed, "[e]ven in larger operations, a 'pharmacy' does not exist without a 'pharmacist', and rigid requirements regarding dispensing certain products compromise the individual pharmacist's activities."[133] There are no pharmacies without pharmacists, and statutes or rules that attempt to regulate the actions of pharmacies end up regulating the actions of individual pharmacists; requiring a pharmacy to dispense EC when presented with a valid, lawful prescription inevitably will require an individual pharmacist to dispense the medication.

Second, such laws may result in the loss of employment for pharmacists who refuse to dispense EC because of their religious beliefs. For example, several of the plaintiffs challenging the Illinois rule allege that they were either fired or placed on "unpaid, indefinite suspension" as a result of the rule.[134] As the Ninth Circuit panel explained in *Thomas*, the threatened loss of one's chosen occupation as a result of a government law that bars one's religiously-motivated conduct is a burden on the free exercise of religion[135] because it imposes a "'substantial pressure'" either to modify one's behavior or to violate one's religious beliefs.[136] The "duty to fill" laws seen in Illinois and California

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[131] *See* ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2006); CAL. BUS. & PROF. CODE § 733(a)-(b) (West Supp. 2006); S. 809, 109th Cong. (2005).

[132] *Freedom of Conscience Hearings*, *supra* note 6, at 7 n.3.

[133] *Id.*; *see also* Complaint for Declaratory and Injunctive Relief, *supra* note 28, para. 25 (following adoption of the Illinois rule, Walgreens, Inc. informed pharmacist employees that the rule applied to them "as individuals").

[134] Complaint for Declaratory and Injunctive Relief, *supra* note 28, paras. 28, 30.

[135] *Thomas*, 165 F.3d at 714 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

[136] *Id.* at 713-714 (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987)).

create just such a threatened loss of employment for pharmacists who object to dispensing EC on religious grounds.

Finally, these laws can impose requirements on the manner in which an objecting pharmacist can refuse to dispense EC. California's statute is the clearest example.[137] It requires that a pharmacist who refuses, for religious reasons, to dispense a prescribed drug must have previously notified his or her employer in writing of the drug(s) he or she is unwilling to dispense.[138] This requirement potentially impinges the free exercise of those who fail to provide the necessary written notice to their employer or those whose religious beliefs arise before they are able to inform their employer. For example, a pharmacist might attend a Bible study group with a friend, experience a religious conversion, and as a result of this conversion sincerely believe that dispensing EC would make her complicit in abortion. Before she is able to provide written notice to her employer of the consequences of her newfound belief, she is presented with a prescription for EC. Under a statute such as California's, she must fill the prescription. Such a limitation on free exercise rights based upon when one's religious beliefs begin, however, is contrary to the Free Exercise Clause.[139] Because prior written notification requirements thus create limits on when a pharmacist may refuse to fill an EC prescription, "duty to fill" laws such as California's unconstitutionally burden such a pharmacist's free exercise rights.

"Duty to fill" laws that have the effect of requiring a pharmacist to dispense EC regardless of any religious objections he or she may have infringe the pharmacist's free exercise rights because they require them to be complicit in an action they believe is an abortion. As discussed in Part II.B.2 *supra*, religious believers who believe that life begins at the moment of fertilization regard EC as an abortifacient because it potentially prevents the implantation of a fertilized embryo.[140] Religions that believe that life begins at the moment of fertilization also generally tend to believe that abortion is the wrongful ending of a human life.[141] For many, if not all, of these religious believers, a belief that EC causes an abortion means that dispensing EC would make them

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[137] CAL. BUS. & PROF. CODE § 733(a)-(b) (West Supp. 2006).

[138] *Id.* § 733(b)(3).

[139] *Cf.* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987) ("The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired.").

[140] *See* Herbe, *supra* note 39, at 86-87; Susan Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 752-53 (2005) (Catholic religious organizations view EC as causing an abortion).

[141] *See, e.g.*, Stabile, *supra* note 140, at 753 (the Roman Catholic Church views abortion as a killing and as an "abominable crime" (quotation marks omitted)).

complicit in the ending of a human life.[142] For these religious believers, there is little difference between being forced to act contrary to their beliefs and being forced to denounce or deny a tenant of their faith.[143]

### *B. Does a Requirement to Dispense EC Compel Pharmacist Expression?*

A compelled expression claim appears to be a theoretically strong companion claim to create a hybrid rights claim. The *Smith* Court noted that two of its compelled expression cases—*Wooley v. Maynard*[144] and *West Virginia State Board of Education v. Barnette*[145]—had free exercise aspects.[146] This Section assesses whether pharmacists who object to dispensing EC for religious reasons can make a colorable claim that a requirement to dispense EC compels them to express a message that is not their own—that EC is appropriate for use by their patients.

The government may not compel an individual to express a message he or she is unwilling to express.[147] As Justice Jackson eloquently explained in *Barnette*, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force* citizens to confess by word or *act* their faith therein."[148] As the Court, per Chief Justice Burger, further explained in *Wooley*, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[149] "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[150] Justice Souter, writing for a unanimous Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[151] stated that the right against compelled expression is one

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[142] *See* Stabile, *supra* note 140, at 753 (forcing Catholic religious organizations to provide health insurance coverage for EC forces them to violate their "moral principle against killing"). *Cf.* Bryan A. Dykes, Note, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565, 593 (2002) ("Health care providers are moral accomplices when they participate in procedures . . . .").

[143] *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("[B]elief and action cannot be neatly confined in logic-tight compartments."). *Cf.* Stabile, *supra* note 140, 759-764 (discussing the inseparability of belief and conduct in the Roman Catholic faith and how a requirement to provide insurance coverage for contraceptives infringes that faith).

[144] 430 U.S. 705 (1977).

[145] 319 U.S. 624 (1943).

[146] Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882 (1990).

[147] *See Barnette*, 319 U.S. at 642.

[148] *Id.* (emphases added).

[149] 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).

[150] *Id.* (citing *Barnette*, 319 U.S. at 633-34).

[151] 515 U.S. 557 (1995).

that forbids the government from "compel[ling] affirmance of a belief with which the speaker disagrees."[152] A speaker has a choice "not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[153]

There is nothing in the compelled expression cases that limits the doctrine to spoken or written messages. The Court in *Hurley* explained that "the Constitution looks beyond written or spoken words as mediums of expression."[154] *West Virginia State Board of Education v. Barnette*[155] presented a case of symbolic expression. Jehovah's Witnesses objected, on religious grounds, to saluting the United States flag, as required by the state board of education.[156] The salute required the students "to keep the right hand raised with palm turned up" while repeating the Pledge of Allegiance.[157] Describing symbolism as "a primitive but effective way of communicating ideas," the Court recognized that the required salute obliged "the individual to communicate by . . . sign his acceptance of the political ideas [the flag] bespeaks."[158] The Court concluded that this compelled expression of ideas, partially by conduct, violated the First Amendment.[159]

Writing for a unanimous Court in the recent case of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*[160] ("*FAIR*"), Chief Justice Roberts limited the Court's compelled expression doctrine.[161] In situations where a speaker is forced to accommodate another's message, there is no violation unless the speaker's own message is affected by accommodating the speech of another.[162] The action that the accommodated speech interferes with must be "inherently expressive."[163] In short, for the pharmacists to succeed in a compelled expression claim they must demonstrate that they are "speaking" when they dispense and withhold prescription drugs.[164]

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[152] *Id.* at 573

[153] *Id.* at 575.

[154] *Id.* at 569.

[155] 319 U.S. 624 (1943).

[156] *Id.* at 626-629.

[157] *Id.* at 628-29. The Pledge of Allegiance at the time required the following statement: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all." *Id.*

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

[159] *Id.* at 642.

[160] ___ U.S. ___, 126 S. Ct. 1297 (2006).

[161] Posting of Marty Lederman to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2006/03/early_thoughts.html (Mar. 6, 2006, 10:52 EST) (stating that the opinion "shows that the Court is cutting back on some of the excesses of its compelled-speech doctrine").

[162] *Rumsfeld*, ___ U.S. at ___, 126 S. Ct. at 1309.

[163] *Id.* at ___, 126 S. Ct. at 1310.

[164] *Id.* at ___, 126 S. Ct. at 1309.

A pharmacist's dispensation of drugs is inherently expressive in at least one capacity—it contains an implicit statement that the drug is medically safe for the patient. Pharmacists serve an independent medical role in ensuring that prescriptions are appropriate for their patients–if they believe that a prescription is medically unsafe for their patient, they are obliged to withhold it, even if the prescription is otherwise lawful.[165] Because of this obligation, the act of filling a prescription, even if no words are spoken, expresses a message that the pharmacist believes the medication is safe for the patient to use. Conversely, the act of refusing to fill a prescription possibly communicates that the prescribed drug is unsafe for the patient.[166]

Another message is also potentially present in the act of filling or refusing to fill a prescription, however–one of moral approval or disapproval of the drug or the use to which the patient intends to put it. The presence of this message is best seen in an example involving a product that raises more moral issues than most prescription drugs: condoms. A small-town pharmacist who keeps condoms behind the counter might refuse, on moral and religious grounds, to sell condoms to customers he knows are not married. In such a situation, his action of selling or not selling the condoms contains an implicit statement of moral approval or disapproval

In this respect, EC is a drug that more closely resembles condoms—its prescription and use raises moral issues that are not necessarily present with other drugs.[167] Dispensation of EC carries with it an implicit message of moral approval, or at least the absence of disapproval, of the drug and the use to which the patient will put it. Refusal to dispense, on the other hand, potentially carries a message of moral disapproval of the drug and the use to which the patient will put it.[168]

The act of dispensing or refusing to dispense a prescribed drug is expressive in at least two ways: of medical safety for the patient and, for drugs such as EC, of moral approval or disapproval on the part of the pharmacist. The fact that the act of dispensing or refusing to dispense EC potentially contains multiple messages and lacks a single, clear message does not make it constitutionally unprotected expression.[169]

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[165] *See Freedom of Conscience Hearing*, *supra* note 6, at 6.

[166] A refusal to fill a prescription could also be non-expressive, such as when the patient is unable to pay for the drug.

[167] *See* Part II.B *supra* for discussion of one such moral issue raised by EC use.

[168] *See* NARAL, *supra* note 2, at 3 (stating that the refusal by three pharmacists to fill an EC prescription for a rape victim was experienced as "a second victimization").

[169] *See* Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (stating that "a narrow, succinctly articulable message is not a condition of constitutional protection").

Because the act of dispensing or refusing to dispense EC is expressive, statutes that force otherwise-objecting pharmacists to dispense EC are compelling speech. A pharmacist who, by the action of refusing to dispense EC, intends to communicate a message of moral disapproval, is forced instead to dispense EC and thereby communicate an entirely different message—moral approval, or at least the absence of disapproval. Through "duty to fill" statutes, the government is compelling pharmacists who object to dispensing EC on religious grounds to "affirm[] . . . a belief with which [they] disagree."[170] As *Barnette*,[171] *Wooley*,[172] and *Hurley*[173] have made clear, this compelled speech is something the government is constitutionally forbidden to do.

The above claim, abstracted from particulars as it is, might not be so strong as to be successful on its own. However, it is consistent with existing precedent and therefore does appear to present "a fair probability—a likelihood of success on the merits"[174] as that standard was applied to the companion claims in *Thomas*.[175] Thus, it appears that pharmacists who object, for religious reasons, to dispensing EC can make a colorable claim that their rights against compelled expression are being infringed and thereby demonstrate a valid hybrid rights claim.

### *C. Can "Duty to Fill" Statutes Pass the Compelling Interest Test?*

A valid hybrid rights claim requires the application of strict scrutiny to the challenged law. As the *Thomas* court stated, "we must determine 'whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling government interest justifies the burden.'"[176]

#### *1. Is there a substantial burden?*

The dilemma that confronts a pharmacist who is subject to a "duty to fill" law and objects to dispensing EC on religious grounds is similar to that confronted by the landlords in *Thomas*: either to violate their religious beliefs

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[170] *Id.* at 573.

[171] 319 U.S. 624 (1943).

[172] 430 U.S. 705 (1977).

[173] 515 U.S. 557 (1995).

[174] Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 706 (9th Cir.), *withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *and rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc) (quotation marks omitted).

[175] *Id.* at 707-11 (applying the colorable claim standard to plaintiffs' Takings Clause and Free Speech Clause claims).

[176] *Id.* at 712 (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

or to suffer punishment for refusing to dispense EC, or perhaps to leave their chosen occupation altogether.[177] The fact that the burden comes from regulation of their profession does not make it any less substantial.[178] The only way for such pharmacists to avoid violating either the law or their religious beliefs is to leave their chosen profession. As the *Thomas* court recognized, this "Hobson's Choice" imposes a "pressure to conform,"[179] "'to modify his behavior and violate his beliefs.'"[180] This pressure to violate one's beliefs, to conform to the state's policy, was a substantial burden for the landlords in *Thomas*.[181] It is also a substantial burden for pharmacists subject to "duty to fill" laws who object on religious grounds to dispensing EC.

*2. Does the government have a compelling interest?*

The *Thomas* court, reviewing earlier free exercise precedents, noted that the Supreme Court had described the compelling governmental interest necessary to justify substantially burdening religious exercise to rise to the level of "'paramount interests'"[182] and "'interests of the highest order.'"[183] In determining whether Alaska's interest in preventing marital-status discrimination was sufficiently great, the *Thomas* court followed the example of *Bob Jones University v. United States*[184] and surveyed the actions of the three branches of the federal government to determine if there was a "'firm national policy'"[185] against marital-status discrimination.[186] Reviewing the paucity of action seeking to prevent marital-status discrimination, the court concluded that there was no "firm national policy" against marital-status discrimina-

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[177] *See id.*

[178] *See id.*

[179] *Id.* at 714.

[180] *Id.* at 713 (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987)).

[181] *Id.* at 714.

[182] *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

[183] *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

[184] 461 U.S. 574 (1983).

[185] *Thomas*, 165 F.3d at 714 (quoting *Bob Jones Univ.*, 461 U.S. at 593)).

[186] *Id.* at 715-16. The court justified its focus on federal action on the basis that allowing individual states' laws to serve as compelling interests for federal constitutional rights would effectively "balkanize" areas of constitutional law where strict scrutiny is applied and would enable states to "'opt out'" of federal constitutional rules. *Id.* at 716. The court did conclude, however, on the basis of exemptions to Alaska's housing discrimination laws and on marital-status discrimination contained in Alaska's laws (e.g. intestate succession, workers' compensation death benefits, evidentiary privileges, and insurance coverage) that preventing marital-status discrimination was not a compelling interest in Alaska. *Id.* at 716-17.

tion.[187] Thus, the policy did not constitute a compelling governmental interest.[188]

A review of actions by the three branches of the federal government reveals a similar absence of a "firm national policy" to require pharmacists to dispense EC when presented with a valid, lawful prescription. Both the judiciary[189] and Congress[190] have acted to ensure that individuals have access to reproductive health services. Congress, however, has also acted to ensure that individual health care providers and institutions have the right to refuse to provide certain reproductive health services.[191] Thus, at the federal level, the national policy seems to be to protect an individual's right to make use of certain reproductive health services while at the same time respecting the autonomy of health care providers who choose not to provide such services. What national policy there appears to be on the issue actually would seem to favor the rights of pharmacists who refuse to dispense EC. At the very least, it is clear that there is no "firm national policy" and therefore no compelling governmental interest in requiring pharmacists to dispense EC.

Without a compelling governmental interest to justify the substantial burden imposed on objecting pharmacists' free exercise rights, "duty to fill" laws fail the strict scrutiny test required by the hybrid rights doctrine. Such laws are unconstitutional as applied to pharmacists who refuse, on religious grounds, to dispense EC.

## IV. CONCLUSION

A pharmacist who is subject to a "duty to fill" law, who believes that life begins at the moment of fertilization, and that EC works as an abortifacient is confronted with a dilemma if presented with an EC prescription: she can

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[187] *Id.* at 715-16.

[188] *Id.* at 717.

[189] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the right to privacy protects the decision by married couples to purchase contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy protects a woman's right to have an abortion).

[190] *See, e.g.*, Freedom of Access to Clinic Entrances Act, Pub. L. No. 103-259, § 2, 108 Stat. 694, 694 (1994) (codified at 18 U.S.C. § 248 (2000)) (prohibiting the use of "violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services").

[191] *See, e.g.*, the Church Amendment, 42 U.S.C. § 300a-7 (2000) (protecting individual providers and institutions that receive specified federal grants from being forced to perform abortions or sterilizations); the Hyde-Weldon Conscience Protection Amendment, Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, div. F, tit. V, § 508(d)(1)-(2), 118 Stat. 2809, 3163 (2004) (protecting health maintenance organizations and health insurance plans from being required to provide abortions); *see generally* Collins, *supra* note 37, at 47-53 (discussing federal and state statutes that protect the right of health care providers to refuse to provide certain reproductive health services).

compromise her religious beliefs by dispensing the drug, she can risk punishment from her employer and the government by violating the law, or she can leave her chosen profession. Prior to the change in the Court's free exercise jurisprudence in *Smith*, the general view would have been that this was a choice the Free Exercise Clause was intended to prevent. *Smith*'s rule that no exemptions are required from a neutral, generally-applicable law would appear to leave the pharmacist described above subject to the "duty to fill" law.

However, the hybrid rights exception created in *Smith* provides a way for the pharmacist described above to challenge the "duty to fill" law, particularly in circuits that follow the "colorable claim" approach to the exception. The pharmacist can join her free exercise claim with a colorable claim that her right against compelled expression is infringed by a "duty to fill" law—she is being compelled to express, against her belief, that EC is appropriate for her patients' use.

"Duty to fill" legislation does not survive the strict scrutiny that accompanies a viable hybrid rights claim. It substantially burdens the religious exercise of pharmacists such as the one described above because it has the effect of forcing them out of their chosen occupation. Their alternatives are violating their beliefs or violating the law. Ensuring access to EC does not meet the standard set out for a compelling governmental interest that justifies substantially burdening the pharmacists' religious exercise. While the federal courts and Congress have acted to ensure that individuals are able to pursue reproductive health care, Congress has also acted to protect health care providers who refuse to provide certain reproductive health services, such as abortion and sterilization. Currently, there appear to be no federal laws, regulations, or court decisions that speak to the EC issue directly.

In the absence of a "firm national policy" to ensure access to EC by requiring pharmacists to dispense it, "duty to fill" laws lack a compelling governmental interest. They cannot be constitutionally applied to pharmacists who refuse, on religious grounds, to dispense EC.

## V. POSTSCRIPT

On August 24, 2006, the Food and Drug Administration approved the over-the-counter ("OTC") dispensation of Plan B, a form of emergency contraception, for women aged eighteen years or older.[192] These women will be able to access EC without the necessity of receiving it from a pharmacist,

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[192] Approval Letter from Steven Galson, Director, Center for Drug Evaluation and Research, to Joseph A. Carrado, Vice President, Duramed Research, Inc. 2 (Aug. 24, 2006), *available at* http://www.fda.gov/cder/drug/infopage/planB/default.htm [hereinafter Approval Letter].

presumably avoiding the conflict discussed in this paper. This obviously raises a question as to the continued relevance of the discussion in this paper.

The issues discussed in this paper remain relevant for two reasons. First, women aged seventeen years and younger who seek EC will still need to receive it from a pharmacist.[193] Thus, the potential conflict between a pharmacist whose religious beliefs prevent her from dispensing EC and a woman seeking to fill an EC prescription remains, albeit in a smaller number of situations. Second, the larger issues discussed in this paper remain valid outside of the EC context. The conflict between the religious beliefs of some medical professionals and the desires of consumers to access important medical technology and drugs continues outside of the EC issue.[194] Whether or not the Free Exercise Clause, through hybrid rights exception, protects such medical professionals is a relevant question, and this paper provides a framework for answering it.

Bradley L. Davis[195]

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[193] Approval Letter, *supra* note 192, at 2.

[194] *See, e.g.*, NARAL, *supra* note 2, at 1-4 (examples of pharmacists refusing to provide prescription birth control to women). The "duty to fill" Illinois regulation and California statute discussed in Part II.A *supra* apply to the dispensation of standard contraceptives as well as emergency contraceptives, raising similar issues as exist with refusal to dispense EC.

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# Korean Sex Slaves' Unfinished Journey for Justice: Reparations from the Japanese Government for the Institutionalized Enslavement and Mass Military Rapes of Korean Women During World War II

"I can no longer tolerate the lies of the Japanese government."
Kim Hak-Sun[1]

## I. JUSTICE DENIED; JUSTICE REBORN

On August 14, 1991, Kim Hak-Sun broke the silence that had tormented her for more than fifty years.[2] Disgusted with the Japanese government's "lies" about its wartime atrocities, she became the first victim to publicly tell the story of her life as a Korean[3] sex slave[4] of the Japanese Imperial Army during World War II.[5] She told her story of how, at the age of seventeen, she was abducted and taken to China, where she was forced to become a sex slave.[6] She was repeatedly raped, tortured, and forced to witness numerous other atrocities, including the vicious beheadings of Chinese prisoners of war.[7] Kim was one of the estimated 100,000 to 200,000 women who became victims of Japan's now infamous comfort women system.[8]

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[1] ERIC YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION 435 (2001).

[2] *See* GEORGE HICKS, THE COMFORT WOMEN SEX SLAVES OF THE JAPANESE IMPERIAL FORCES 148 (1995).

[3] This paper focuses specifically on Korean sex slaves; however, the Japanese government established "comfort stations" in many other territories occupied by Japan during World War II. Although more than eighty percent of sex slaves were Korean, victims of Japan's sex slave system included young women from China, the Philippines, Guam, Taiwan, Malaysia, Indonesia, and the Netherlands. Shellie K. Park, Comment, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 ASIAN-PAC. L. & POL'Y J. 26 (2002).

[4] The term "sex slaves" is used in this paper to refer to women who were forcibly and systematically raped by members of the Japanese military as part of the Japanese government's World War II comfort women system. Though raw and graphic, this term most accurately conveys the horrific reality that victims experienced. This paper also employs the commonly used euphemistic term, "comfort women," as well as the women's self-proclaimed name, "*ianfu*," which is the Korean translation for "military comfort women." YAMAMOTO ET AL., *supra* note 1, at 435.

[5] HICKS, *supra* note 2, at 148-49.

[6] *Id.*

[7] *Id.* at 149.

[8] *See* YAMAMOTO ET AL., *supra* note 1, at 435.

After she spoke out publicly, a powerful reparations movement ensued, including the extensive litigation of numerous lawsuits demanding reparations from the Japanese government.[9] In December 1991, Kim and two other survivors filed the first lawsuit by former sex slaves against the Japanese government seeking an official apology, compensation for their suffering, and revisions to Japanese historical records.[10] In a 1995 interview, Kim predicted that the Japanese government would strategically stall litigation until all surviving victims were dead.[11] Her words proved "tragically prophetic," as litigation was still pending against the Japanese government when she passed away on December 16, 1997.[12] Her funeral procession passed in front of the Japanese Embassy,[13] where her casket halted for a moment as a symbolic demonstration of her struggle against the Japanese government.[14] Kim's story embodies the pain, frustration, courage, and hope that have inundated the fight for reparations from the Japanese government.[15] Though Kim's personal struggle tragically ended, remaining survivors' fight for justice continues.

By examining the Japanese military's mass rapes of Korean sex slaves during World War II, this paper addresses reparations efforts and analyzes reasons for the protracted and entangled nature of the reparations process, as well as prospects for future revitalization. Part II discusses the current controversy over reparations in terms of its historical underpinnings. Part III explains the major interests at stake affecting present-day inter-group conflicts. Part IV describes the reparations process to date, particularly extensive litigation and the establishment of the Asian Women's Fund ("AWF"). Part V posits a sophisticated analytical framework called the "Four Rs,"[16] which will help to unravel the complexities of reparations efforts and comprehensively assess their relative virtues and drawbacks. Part VI then employs the framework to analyze reasons for the overall failure of litigation and the AWF. Finally, Part VII uses the framework to project future possibilities for reparations efforts with the establishment of a truth

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[9] *See id.* at 436.

[10] *Id.*

[11] Chunghee Sarah Soh, The Comfort Women Project, San Francisco State University (1997-2001), http://online.sfsu.edu/~soh/comfortwomen.html.

[12] *Id.*

[13] Every Wednesday since 1992, survivors and supporters have protested in front of the Japanese Embassy in South Korea to raise public awareness about the Japanese government's wartime atrocities. *See* Eun-jung Han & Mike Weisbart, *Media Attention Bittersweet for "Comfort Women,"* KOREA TIMES, Feb. 27, 2004, *available at* http://search.hankooki.com/times/times_view.php?term=comfort+women++&path=hankooki3/times/lpage/culture/200402/kt2004022619012411710.htm&media=kt.

[14] Soh, *supra* note 11.

[15] *See* HICKS, *supra* note 2, at 148-50.

[16] *See infra* Part V.

commission modeled after South Africa's Truth and Reconciliation Commission.

## II. THE CURRENT CONTROVERSY: A FIGHT OVER THE HISTORY OF INJUSTICE

After the war, both victims and perpetrators buried their horrific stories in nearly fifty years of silence.[17] The current controversy most ostensibly began in June 1990 when Shoji Motooka, a member of the House of Councillors of Japan, raised the issue of sex slaves before the Japanese Diet.[18] He demanded that the government investigate the matter further, but the government refused, insisting that "it was the work of private persons and that neither the Japanese military nor the then government were involved."[19] This blatant denial outraged many survivors, who finally decided to speak publicly about the lives they had endured as sex slaves.[20] Their testimonies collectively formed a group narrative that directly challenged the accuracy of the Japanese government's dominant historical narrative.

The fight over the history of injustice is essential to validate survivors' moral standing to demand reparations from the Japanese government. The underlying themes of race, culture, gender, and imperialism that influenced the creation of the comfort women system continue to heavily texture the present-day dynamic between survivors and the Japanese government. Justice struggles are, "first and foremost, active, present-day struggles over collective memory. How a community frames past events and connects them to current conditions often determines the power of justice claims or of opposition to them."[21] As such, the most important threshold aspect of reparations efforts is the fight over the history of injustice as lain out in the competing historical narratives of victims and the Japanese government.

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[17] *See* YAMAMOTO ET AL., *supra* note 1, at 436.

[18] Etsuro Totsuka, *Translations: Commentary on a Victory For "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery*, 8 PAC. RIM L. & POL'Y J. 47, 49 (1999).

[19] USTINIA DOLGOPOL & SNEHAL PARANJAPE, COMFORT WOMEN: AN UNFINISHED ORDEAL 141 (1994).

[20] *See* HICKS, *supra* note 2, at 148.

[21] Sharon Horn & Eric Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1771 (2000).

### *A. The Victims' Historical Narrative*

The historical narrative woven from victims' experiences tells the horrific reality of women whose lives were a "living hell."[22] Their painful ordeals unfolded in the broader context of Japan's imperialistic national agenda of the early 1900s.[23] In December 1937, Japanese military forces captured the city of Nanking in China and began a "barbaric campaign of terror" known as the Rape of Nanking, which included the rapes and murders of an estimated 20,000 to 80,000 Chinese women, including young girls, pregnant mothers, and elderly women.[24]

The comfort women system was the tragic legacy of the Rape of Nanking.[25] Following international outcry over the incident, the Japanese government sought ways to restore the nation's honor and end international condemnation.[26] The government's solution was the comfort women system through which the military could simultaneously appease soldiers' sexual appetites and contain soldiers' activities within a heavily regulated environment.[27] Japan had annexed Korea in 1910 and established a formidable military presence[28] in the region, so Korean women became easy targets for exploitation.[29] The military initially used Japanese prostitutes for comfort stations but soon resorted to unwilling participants to accommodate the large numbers of soldiers.[30] The government justified comfort stations as necessary to prevent the spread of a venereal disease epidemic among soldiers and to prevent

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[22] DOLGOPOL & PARANJAPE, *supra* note 19, at 8. Hwang Keum-ju recalls:

> I saw so many deaths, so much illness. Girls arrived; they got sick and pregnant. The Japanese injected us with so many drugs like "#606" that we would have miscarriages. Sometimes our bodies would swell up like balloons but the Japanese soldiers did not care. They would line up for sex day after day. They did not care whether the girls were bleeding or what. They would still force sex on them.

COMFORT WOMEN SPEAK: TESTIMONY BY SEX SLAVES OF THE JAPANESE MILITARY 7 (Sangmie Choi Schellstede ed., 2000) [hereinafter COMFORT WOMEN SPEAK].

[23] *See* Carmen R. Argibay, Ad Litem Judge, International Criminal Tribunal for the Former Yugoslavia, Speech at the Stefan A. Riesenfeld Symposium: Sexual Slavery and the "Comfort Women" of World War II, *in* 21 BERKELEY J. INT'L L. 375, 376 (2003).

[24] Richard J. Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT'L & COMP. L. 59, 64 (2003).

[25] *See id.* at 66.

[26] Argibay, *supra* note 23, at 376.

[27] *See id.*

[28] *See* DOLGOPOL & PARANJAPE, *supra* note 19, at 30.

[29] *See* YAMAMOTO ET AL., *supra* note 1, at 436.

[30] Galvin, *supra* note 24, at 66-67.

soldiers from raping inhabitants of occupied territories, which would jeopardize the region's stability.[31]

Race, gender, and economics played major roles in the establishment and operation of the sex slave system. More than eighty percent of the women were Korean.[32] The Japanese people and government "denigrated Koreans as an inferior race of people."[33] Japanese women escaped the fate of *ianfu* because the government believed that Japanese women "should bear Japanese children 'who would grow up to be loyal subjects of the emperor.'"[34] Pervasive racist attitudes afforded Japanese prostitutes "safer conditions and better treatment, servicing only higher-ranking officers, whereas Korean and other non-Japanese comfort women serviced the inherently more sexual and more dangerous frontline troops."[35]

The government extensively employed economic-based exploitation tactics to recruit women.[36] Recruitment methods varied and included deception, coercion, and even forcible abduction.[37] The military frequently used the women's poverty and lack of education to lure them with promises of high-paying jobs as factory workers, cooks, nurse assistants, and cleaners.[38] Upon reaching their actual destinations, however, the women realized that they were there for a much different purpose.[39]

Daily life as a sex slave was "unmitigated misery."[40] The military forced victims into barracks-style stations divided into tiny cubicles[41] measuring approximately three-by-five feet.[42] There, they were forced to live, sleep, and have sex with as many as thirty soldiers per day.[43] Comfort stations operated around the clock: "9 a.m. to 3 p.m. for ordinary soldiers; 3 p.m. to 6 p.m. for non-commissioned officers, and 8 p.m. through the next morning at 7 a.m. for

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[31] Joseph P. Nearey, Comment, *Seeking Reparations in the New Millenium: Will Japan Compensate the "Comfort Women" of World War II?*, 15 TEMP. INT'L & COMP. L.J. 121, 134 (2001).

[32] Park, *supra* note 3, at 26-27.

[33] YAMAMOTO ET AL., *supra* note 1, at 436.

[34] Park, *supra* note 3, at 27.

[35] *Id.*

[36] Galvin, *supra* note 24, at 67.

[37] *Id.*

[38] Park, *supra* note 3, at 30.

[39] After the military collected the women, they were "sent to consolidated staging areas before being shipped via military transport to nearly all the outposts of the vast Japanese military empire." Galvin, *supra* note 24, at 68 (footnote omitted).

[40] DOLGOPOL & PARANJAPE, *supra* note 19, at 15.

[41] *Id.* at 48. As one survivor recalls, "each room had one straw mat, one blanket and a pillow, which was essentially dirty cotton stuffed with rags." *Id.* at 105.

[42] *Id.* at 48.

[43] *Id.*

officers."[44] The thirty minutes allotted for each soldier were thirty-minute increments of unimaginable horror for the women, many of whom had been virgins[45] before being forced into a life of sexual enslavement.[46] Disease was rampant.[47] Military doctors regularly examined the women, but "as many of the comfort women recall, these regular checks were carried out to prevent the spread of venereal diseases [to soldiers]; little notice was taken of the frequent cigarette burns, bruises, bayonet stabs and even broken bones inflicted on the women by soldiers."[48]

The devastating post-war aftermath of the comfort women system is apparent. Fewer than thirty percent of the women survived the war.[49] Their agony continued in having to suffer with the residual physical, psychological, and emotional scars from their former lives as sex slaves. Some returned home and were ostracized by their families.[50] Some committed suicide.[51] Others, out of shame, never returned home.[52]

Though victims' post-war experiences somewhat varied, one recurring theme has emerged: isolation. Many survivors faced a "bleak future" without marriage or children.[53] Their severe physical and emotional trauma manifested in myriad ways—sterility, sexually transmitted diseases, insomnia, nervous

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[44] *Id.* at 105.

[45] *See, e.g.*, COMFORT WOMEN SPEAK, *supra* note 22, at 6-7. Nearly fifty years later, Hwang Keum-ju vividly remembers the day she was first raped:

> [The officer] told me to follow his instructions. Then he told me to take off my clothes. . . . It was like a bolt from the sky. My long braided hair clearly showed that I was a virgin. How was it possible that I could take off my clothes in front of a man? . . . I told him no. He told me then I would be killed. . . . Then he grabbed my skirt and tore it at the seams. He ordered me again, but I was so shocked I just sank to the floor. Then he grabbed his knife and cut my underskirt and underpants. I was totally exposed. I was so shocked, I just fainted. When I woke up, I found myself lying in a pool of blood. I could not get up for a week afterwards. I was so sick I could not even drink water.

*Id.*

[46] *See* Nathalie I. Johnson, Comment, *Justice for "Comfort Women": Will the Alien Tort Claims Act Bring Them the Remedies They Seek?*, 20 PENN ST. INT'L L. REV. 253, 260 (2001) (explaining that soldiers would pay at a reception area for a ticket and condom, then wait in long lines outside *ianfu* quarters).

[47] *Id.* at 261. Soldiers disregarded rules mandating the use of condoms, and thus many women became pregnant or infected with sexually transmitted diseases. *Id.*

[48] COMFORT WOMEN SPEAK, *supra* note 22, at 117.

[49] David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, 3 OCCASIONAL PAPERS/REPRINT SERIES CONTEMPORARY ASIAN STUDIES 8 (1995).

[50] Park, *supra* note 3, at 28-29.

[51] *Id.*

[52] *Id.*

[53] Galvin, *supra* note 24, at 68.

breakdowns, shame, and alienation.[54] Kim Sang-hi describes the pain that haunts many survivors: "Now, no family, no children, I am only growing old. Whenever I see an old lady of about my age walking hand in hand with her grandchild, my heart wrenches."[55] The pain and suffering of sex slaves continued long after the war.[56] History, as they experienced it, is much different from that written in Japanese historical records and textbooks.

### *B. The Japanese Government's Official Historical Narrative*

By contrast, the historical narrative adopted by the Japanese government is a shifting, incomplete record that circumscribes the full extent of the government's wartime atrocities. For more than fifty years after the war, the government steadfastly denied the existence of comfort stations.[57] However, in January 1992, a watershed in the reparations movement happened when history professor Yoshimi Yoshiaki of Chuo University unearthed official government documents[58] implicating the Japanese government and published excerpts in a popular daily newspaper called the *Asahi Shimbun*.[59] The documents, along with substantiating testimonies of former Japanese soldiers,[60] debunked the historical inaccuracies promulgated by the Japanese government and forced the government to modify its position on the existence of comfort stations.[61]

Unable to refute the official documents, the government grudgingly admitted to minimal involvement.[62] On August 4, 1993, the Japanese government issued a report entitled "On the Issue of Wartime 'Comfort

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[54] Park, *supra* note 3, at 29.

[55] COMFORT WOMEN SPEAK, *supra* note 22, at 35.

[56] *See* Park, *supra* note 3, at 28.

[57] *Id.*

[58] HICKS, *supra* note 2, at 164-65. These documents included: a routine military report containing a "table covering 854 comfort women under Army control in its area, broken down by unit and locality, with the percentages affected by disease"; an army report detailing the "ticket system being used to avoid congestion or unseemliness" in comfort stations; and regulations regarding the "supervision of comfort stations and the inspection of returning troops for the purpose of preventing venereal disease." *Id.*

[59] Soh, *supra* note 11.

[60] Former soldiers of the Japanese military began to publicly tell their stories that implicated the Japanese government. *See, e.g.*, DOLGOPOL & PARANJAPE, *supra* note 19, at 121-31 (documenting statements of former soldiers Kouki Nagatomi, Ichiro Ichikawa, and Yoshio Suzuki).

[61] *See* YAMAMOTO ET AL., *supra* note 1, at 436.

[62] *See id.* In July 1992, these documents forced the Japanese government to acknowledge that it played a role in the operation of comfort stations. *Id.* Yet, the government refused to acknowledge the extent of that role, denying that the military *forcibly* recruited the women. *Id.* (emphasis added).

Women.'"[63] The government conceded that "comfort stations were established in various locations in response to the request of the military authorities at the time."[64] The report also stated that "[i]t is virtually impossible to determine the number of women," but "it is apparent that there existed a great number of comfort women."[65] Further, "many comfort stations were run by private operators,"[66] and "[i]n many cases private recruiters, asked by the comfort station operators who represented the request of the military authorities, conducted the recruitment of comfort women."[67]

Although the government reluctantly admitted these facts about the comfort women system, government-approved Japanese history textbooks have also been widely controversial for their misrepresentation of national history.[68] The Japanese Education Ministry is responsible for censoring history textbooks, which "continue to distort or omit facts relating to atrocities committed by Japan."[69] The government pays for and disseminates the textbooks to elementary through junior high school students in Japan's compulsory education system.[70] In late March 2005, Senior Vice Education Minister Hakubun Shimomura stated that it is inappropriate to teach about comfort women in junior high school.[71] Textbook screenings in recent years[72] reflect a government trend of purposely excluding comfort women from history textbooks.[73] In response to criticism over the textbooks, Japan's Education Ministry blamed "its lack of authority to interfere in textbook matters in the absence of 'clear mistakes.'"[74] The continuing controversy over the textbooks

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[63] THE ASIAN WOMEN'S FUND, THE "COMFORT WOMEN" ISSUE AND THE ASIAN WOMEN'S FUND 50 (2004) (This report was the product of a two-year-long study conducted through hearings of former military personnel and a search for archived documents).

[64] THE ASIAN WOMEN'S FUND, *supra* note 63, at 51.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 52.

[68] Sue R. Lee, Comment, *Comforting the Comfort Women: Who Can Make Japan Pay?*, 24 U. PA. J. INT'L ECON. L. 509, 545 (2003).

[69] *Id.*

[70] *Japan OKs Nationalist Text 2nd Time, No 'Comfort Women' Euphemism*, JAPAN ECON. NEWSWIRE, April 5, 2005.

[71] *Id.*

[72] In screenings from 1997 through 2001, all textbooks at least referenced "comfort women." *Id.* In 2001, only three out of eight textbooks mentioned either "comfort women" or "comfort facilities." *Id.* By April 2005, "only one publisher [even] used the term 'comfort facilities.'" *Id.*

[73] Christine Wawrynek, *U.N. Report: World War II Comfort Women: Japan's Sex Slaves or Hired Prostitutes?*, 19 N.Y.L. SCH. J. HUM. RTS. 913, 920 (2003).

[74] Howard W. French, *Japan's Refusal to Revise Textbooks Angers Its Neighbors*, N.Y. TIMES, July 9, 2001, at A3. ("'Under the current textbook screening system, it is up to the authors to decide what historical facts to include in their books,' Japan's Education Ministry

indicates that the Japanese government has yet to accept full responsibility for its actions.

## III. PRESENT-DAY CONFLICTING INTERESTS FORESTALLING THE REPARATIONS PROCESS

The key interests at stake in the conflict provide some insight into the ongoing struggle for reparations.[75] For survivors, justice and healing are paramount, while for the Japanese government, foreign relations and national image are critical priorities. These interests have strongly influenced how the two groups have interacted with each other. While both have very powerful interests at stake, the Japanese government's perceived irreconcilability of these interests has continued to frustrate reparations efforts.

### *A. Survivors' Interests*

Although each survivor's story is unique in many respects, two recurring themes have emerged: justice and healing. Despite the numerous apologies issued by government officials, many *ianfu* continue to live with the debilitating effects of injustice. In testimonies and interviews, survivors have repeatedly indicated that they want the Japanese government to accept full responsibility for their suffering and issue a formal apology.[76] Hwang Keum Joo echoes the sentiments of many other *ianfu*, saying that her last hope is a "dignified death, a wish that can only be fulfilled when she receives an official apology and compensation from the Japanese government."[77]

Survivors desperately want to heal. The pain is still very real for victims such as Yi Bok-nyo, whose "rage has not subsided."[78] She has said, "This rage is still so strong that I will not ever be able to rest in peace before the Japanese government apologizes to me personally for their crime committed against me. When I recall the painful past, I still feel uncontrollable bursts of anger,

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said in a statement. 'We cannot force inclusions of certain points.'").

[75] Both the North and South Korean governments could potentially play very significant roles in reparations efforts; however, a discussion of that issue lies beyond the scope of this project.

[76] *See generally* COMFORT WOMEN SPEAK, *supra* note 22 (telling the stories of multiple comfort women). Like many others, Kim Bok-Sun "continues to be upset at Japan's denial of their responsibility for creating and operating the comfort stations" and is "most insistent on a formal apology from the Japanese government." DOLGOPOL & PARANJAPE, *supra* note 19, at 87.

[77] Suvendrini Kakuchi, *"Comfort Women" Await Apology from Japan*, WOMEN'S ENEWS, May 30, 2004, http://www.feminist.com/news/vaw17.html.

[78] COMFORT WOMEN SPEAK, *supra* note 22, at 92.

resentment, and hatred toward them."[79] Kim Sang-hi describes the frustration of wanting to heal but being unable to do so:

> I became a Catholic, but I still cannot find solace in religion. I should forget and forgive, but I cannot. I try and try, but I cannot let go of it. When I wake up every morning, my head subconsciously turns east toward Japan, and I curse her. I cannot help it.[80]

The residual physical and emotional scars from their experiences as sex slaves continue to serve as debilitating reminders of their former lives as sex slaves.

### *B. The Japanese Government's Interests*

Like *ianfu*, the Japanese government has powerful interests at stake. One of Japan's most compelling self-interests is its political agenda.[81] As an example, in recent years, the Japanese government has tried to expand its international powers with attempts to gain a permanent seat on the United Nations Security Council and becoming involved in United Nations peacekeeping operations.[82] Its efforts to increase Japan's presence in the global community have generally been frustrated and overshadowed by major foreign policy problems stemming from issues of war accountability.[83]

The Japanese government also has an interest in improving relations with Japan's international neighbors.[84] Japan's history of aggression and failure to apologize for its brutality continue to strain foreign relations, especially with its neighbors in Asia.[85] Former South Korean Foreign Minister Ban Ki-moon noted that "the right recognition of history is the basis for ties between the two neighbors."[86] He added that "'[t]he Japanese government should be mindful of the recognition that the two countries should address history issues in a way that promotes forward-looking development.'"[87] Until Japan reconciles with its international neighbors, it is unlikely that the government will be able to successfully further national goals.

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[79] *Id.* at 92-93.

[80] *Id.* at 35.

[81] Galvin, *supra* note 24, at 89-90.

[82] *Id.* at 90.

[83] *Id.* For example, Japan recently sent military personnel to assist with United Nations peacekeeping efforts in East Timor, where "Japan's presence was subject to strong protest resulting from its harsh treatment of the East Timorese, particularly with regard to East Timorese 'comfort women.'" *Id.* at 89.

[84] *See id.*

[85] *Id.*

[86] *Scars of Japan's Colonialism Unhealed Six Decades After Liberation*, YONHAP NEWS AGENCY (S. Korea), Dec. 30, 2004.

[87] *Id.*

In addition, the Japanese government is sensitive to issues revolving around its national image.[88] The Japanese government is extremely conscious of its national image, as indicated by its consistent response to international pressure.[89] For example, the government established the comfort stations in response to international outcry of the Rape of Nanking.[90] Appalled by the international media's negative portrayal of the Japanese army, Emperor Hirohito and the government took immediate action to restore the "honor of Japan."[91] Japan's national image hardly improved after the war, as displayed in the frequent protests that greet Japan's prime minister in trips abroad.[92] A viable strategy for reparations efforts in the future must reconcile the interests of both victims and the Japanese government.

## IV. UNSUCCESSFUL REPARATIONS EFFORTS: THE LAWSUITS AND THE ASIAN WOMEN'S FUND

The two most prominent reparations efforts thus far have been a series of lawsuits and the establishment of the Asian Women's Fund ("AWF").[93] Through lawsuits filed in both Japan and the United States, survivors attempted to compel the Japanese government to accept legal responsibility and pay compensatory damages for their suffering.[94] While the cases slowly pushed forward in the courts, the Japanese government responded to public pressure by establishing the AWF, purportedly to atone for its moral responsibility and pay monetary restitution to victims.[95] Ultimately, both the lawsuits and the AWF failed to generate effective and lasting reparations for victims.

### *A. Lawsuits*

Angered by the Japanese government's denial of its role in the comfort women system, survivors turned to legal channels for redress. In December 1991, Kim Hak-Sun and two other survivors filed the first lawsuit by former

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[88] Argibay, *supra* note 23, at 376.

[89] *See id.*

[90] *Id.*

[91] *Id.* Their unfortunate solution was the establishment of the comfort women system. *See* discussion *supra* Part II.

[92] Galvin, *supra* note 24, at 90. "[P]rotests often mar Japanese appearances abroad, such as Prime Minister Koizumi's visit to Manila in 2002, his visit to Seoul in 2001, and the anniversary celebration of the U.S.-Japan peace treaty." *Id.*

[93] YAMAMOTO ET AL., *supra* note 1, at 435-38.

[94] *Id.*

[95] *Id.*

sex slaves against the Japanese government.[96] The Tokyo District Court dismissed their case.[97] Other suits followed,[98] but the Japanese government has thus far been successful with the dismissal[99] of every case except one.

The lower court ruling in *Ha v. Japan*[100] has been the lone courtroom victory for *ianfu*. On December 25, 1992, ten Korean women, including three *ianfu*, filed the lawsuit with the Yamaguchi Prefectural Court, seeking an official apology and compensation from the Japanese government.[101] Plaintiffs claimed that Japan had a moral duty to atone for its wartime crimes and a legal obligation to compensate them under international and domestic laws.[102] More than five years later, on April 27, 1998, the court found the Japanese government guilty of negligence and ordered it to pay 300,000 yen, or $2,270, to each of the three *ianfu* plaintiffs.[103] The court based its ruling on Japan's State Liability Act,[104] and held that the Japanese government had violated a

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[96] *Id.* at 436.

[97] Christopher P. Meade, Note, *From Shanghai to Globocourt: An Analysis of the "Comfort Women's" Defeat in Hwang v. Japan*, 35 VAND. J. TRANSNAT'L L. 211, 233 (2002).

[98] *See, e.g.*, Boling, *supra* note 49, at 16-17 (Numerous lawsuits immediately followed, including lawsuits filed by the Korean Council for Women Drafted for Sexual Slavery, and a suit by a Dutch former comfort woman.); Barry A. Fisher, *Japan's Postwar Compensation Litigation*, 22 WHITTIER L. REV. 35, 44 (2000) ("To date, there are at least four lawsuits, two regarding Koreans, one regarding Chinese, and one regarding Filipinas.").

[99] *See* Fisher, *supra* note 98, at 44.

> The Japanese government avoided liability for claims of individual comfort women by relying on the following arguments: 1) strong technical legal arguments based on the uncertain state of international law prior to the end of WWII, claiming that international customary law in those days did not recognize an individual victim's right to claim compensation against the state; 2) procedural grounds, such as the statute of limitations, arguing that the comfort women's claims are time barred because over fifty years have passed since the alleged action; and 3) post-war settlement treaties, such as the San Francisco Peace Treaty, settled all war claims, thereby waiving a citizen's right to bring individual war claims against Japan. The Japanese government challenged the comfort women's claims as an invalid retroactive application of international law because "international law was not codified until after WWII, several years after the establishment of the comfort women stations in 1931." The Japanese government has consistently resisted redress by employing these legal theories.

Park, *supra* note 3, at 43.

[100] Meade, *supra* note 97, at 234.

[101] Park, *supra* note 3, at 40.

[102] Meade, *supra* note 97, at 235.

[103] *Id.* at 236; *see, e.g.*, Chin Kim & Stanley Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA PAC. BASIN L.J. 263 (1998) (analyzing the court's ruling).

[104] Meade, *supra* note 97, at 235-36. "The State Liability Act requires Japan to compensate individuals injured by a public servant's violation of his professional duties. A 1985 [Japanese] Supreme Court judgment had held that 'except when Diet members directly and clearly violate the Constitution,' the legislature is immune from suit from individuals for their legislative acts."

constitutional obligation to enact legislation to compensate victims of its comfort women system.[105] This was a partial victory, as the court ignored plaintiffs' demands that the government issue an official apology.[106] Both parties appealed, but Japan's High Court later overturned the ruling.[107]

Frustrated by the failure of litigation in Japan, survivors brought their claims to the United States. On September 18, 2000, fifteen *ianfu* filed a class action lawsuit in the United States District Court for the District of Columbia.[108] The Alien Tort Claims Act ("ATCA")[109] allowed these plaintiffs to sue the Japanese government in a United States federal district court.[110] However, under the ATCA, when a "cause of action is brought against a sovereign nation, the only basis for obtaining personal jurisdiction over the defendant is through an exception to the Foreign Sovereign Immunities Act (FSIA)."[111]

The FSIA[112] grants foreign states immunity from being sued in United States district courts unless the state waives its immunity or the claims fall within certain enumerated exceptions.[113] The Japanese government successfully argued that it is entitled to sovereign immunity under the FSIA.[114] The government additionally argued that post-war treaties had resolved the issue of reparations, which were nonjusticiable political questions.[115] On October 4, 2001, the district court dismissed the lawsuit due to lack of jurisdiction over Japan.[116] The opinion read in part: "[t]here is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen . . . discussions

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*Id.* The court found that there had been a direct and clear violation of the Constitution based on the Japanese government's direct admission vis-à-vis the August 1993 statement recognizing its role in the comfort women system. *Id.* at 236.

[105] *Id.*

[106] Nearey, *supra* note 31, at 141.

[107] Byoungwook Park, Comment, *Comfort Women During WW II: Are U.S. Courts a Final Resort for Justice?*, 17 AM. U. INT'L L. REV. 403, 408 (2002).

[108] Hwang Geum Joo v. Japan ("Hwang I"), 172 F. Supp. 2d 52 (D.D.C. 2001), *aff'd*, 332 F.3d 679 (D.C. Cir. 2003), *vacated*, 542 U.S. 901 (2004), *remanded to* 413 F.3d 45 (D.C. Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S. Ct. 1418 (2006).

[109] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). The ATCA gives United States federal district courts original jurisdiction to adjudicate civil cases and award tort damages for violations of the law of nations or United States treaties. Afreen R. Ahmed, Note, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia's "Comfort Women,"* 14 TEX. J. WOMEN & L. 121, 141-42 (2004).

[110] Jamie S. Jeffords, Note, *Will Japan Face Its Past? The Struggle for Justice for Former Comfort Women*, 2 REGENT J. INT'L L. 145, 158 (2003/2004).

[111] *Id.*

[112] Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1994 & Supp. 1999).

[113] Ahmed, *supra* note 109, at 142.

[114] *Id.*

[115] *Id.*

[116] Park, *supra* note 107, at 406.

nearly half a century later . . . . [E]ven if Japan did not enjoy sovereign immunity, plaintiffs' claims are nonjusticiable and must be dismissed."[117]

On appeal to the District of Columbia Circuit Court of Appeals, the women asserted two legal arguments.[118] The first was based on the commercial activity exception to sovereign immunity under the FSIA.[119] Under this exception, the FSIA may "remove[] a state's sovereign immunity for claims based on a 'commercial activity' of the foreign state that either is carried on within U.S. territory or has a direct effect in the U.S."[120] The women unsuccessfully attempted to document the effects of the comfort system on the United States, but the appellate court held that "the commercial activity exception does not apply retroactively to events prior to May 19, 1952 . . ."[121] Notwithstanding the exception's inapplicability, the 1951 Treaty of Peace between Japan and the Allied Powers "created a settled expectation on the part of Japan" that it could not be sued in United States courts for Japan's actions during World War II, and Congress "has done nothing that leads [the court] to believe it intended to upset that expectation."[122]

Secondly, the women argued that Japan had violated *jus cogens* norms and thus impliedly waived its sovereign immunity.[123] The appellate court rejected the argument, noting that this FSIA exception requires a sovereign to agree to be sued in the United States, and "a sovereign cannot realistically be said to manifest its intent to subject itself to suit inside the United States when it violates a *jus cogens* norm outside the United States."[124] The District of Columbia Court of Appeals affirmed the lower court's grounds for dismissing the case.[125]

The women then appealed to the Supreme Court of the United States, which granted their petition for writ of certiorari, vacated the judgment of the District of Columbia Court of Appeals, and remanded the case.[126] On remand, the Court of Appeals affirmed its prior decision, noting that "much as we may feel for the plight of the appellants, the courts of the United States simply are not

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[117] *Hwang I*, *supra* note 108, at 67.

[118] *See* Hwang Geum Joo v. Japan ("Hwang II"), 332 F.3d 679, 680-81 (D.C. Cir. 2003), *vacated*, 542 U.S. 901 (2004), *remanded to* 413 F.3d 45 (D.C. Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S. Ct. 1418 (2006).

[119] 28 U.S.C. § 1605(a)(2) (2002).

[120] Ahmed, *supra* note 109, at 143.

[121] *Hwang II*, *supra* note 118, at 681.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 686.

[125] *Id.* at 687.

[126] Hwang Geum Joo v. Japan ("Hwang III"), 542 U.S. 901 (2004) (memorandum), *remanded to* 413 F.3d 45 (D.C. Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S. Ct. 1418 (2006).

authorized to hear their case."[127] The women appealed again, but on February 21, 2006, the United States Supreme Court denied their petition for writ of certiorari.[128] This officially closed American courthouse doors to *ianfu*.[129]

### *B. The Asian Women's Fund*

The Asian Women's Fund ("AWF") also proved ineffective as a means of reparations. Established by the Japanese government in 1995, the government-controlled[130] AWF represented the government's first concrete attempt to address the issue of moral responsibility by offering monetary compensation to victims.[131] The purpose of the AWF was to show "atonement of the Japanese people, through expressions of apology and remorse to the former so-called wartime comfort women," to "restore their honor, which was affronted," and to "indicate in Japan and abroad [Japan's] strong respect for women."[132] To accomplish this purpose, the AWF was to pay survivors "atonement money," gather information for historical records, institute welfare programs for survivors, and develop activities addressing violence against women.[133]

Funding for the program came from two sources—the Japanese government and private donations from the Japanese people.[134] Funds from the Japanese government went to medical and welfare support programs; donations from the Japanese people went to the "atonement money" fund used to compensate

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[127] Hwang Geum Joo v. Japan ("Hwang IV"), 413 F.3d 45, 53 (D.C. Cir. 2005) (citing *Hwang II*, 332 F.3d 679, 687 (D.C. Cir. 2003)), *cert. denied*, ___ U.S. ___, 126 S. Ct. 1418 (2006).

[128] Hwang Geum Joo v. Japan ("Hwang V"), ___ U.S. ___, 126 S. Ct. 1418 (2006) (memorandum).

[129] Although litigation was unsuccessful, there is ongoing legislation in the United States Congress. On April 4, 2006, Congressman Lane Evans of Illinois introduced legislation in the House of Representatives that urged Japan to "formally acknowledge and accept responsibility for its sexual enslavement of young women," "educate current and future generations about this horrible crime against humanity," "publicly, strongly, and repeatedly refute any claims that the subjugation and enslavement of comfort women never occurred," and "follow the recommendations of the United Nations and Amnesty International." H.R. 759, 109th Cong. § 2 (2006).

[130] The government appointed Bunbei Hara, former Speaker of the Upper House of the Diet, as the first President of the Asian Women's Fund (1995-1999). Jeffords, *supra* note 110, at 155. Former Prime Minister Tomiichi Murayama succeeded Hara as the second president of the program (1999-present). *Id.*

[131] YAMAMOTO ET AL., *supra* note 1, at 437.

[132] THE ASIAN WOMEN'S FUND, *supra* note 63, at 55.

[133] Jeffords, *supra* note 110, at 155.

[134] The Asian Women's Fund, http://www.awf.or.jp/english/project_atonement.html (last visited Oct. 19, 2006).

*ianfu*.[135] The Japanese government also embarked on an aggressive campaign to solicit donations from private citizens.[136]

On January 11, 1997, the Japanese government launched the AWF in the Republic of Korea.[137] Although the project was scheduled to last for five years, public opposition to the program was so strong that the AWF Board of Directors suspended operations from July 30, 1999, through February 20, 2002.[138] Many criticized it as an "attempt to buy comfort women's silence and end negative publicity for the state, not an act of sincere atonement or an admission of culpability."[139] Others have criticized it as a "means of perpetuating state impunity."[140] When the atonement project ended on May 1, 2002,[141] only seven Korean women had accepted funds from the AWF.[142]

## V. THE "FOUR RS": AN ANALYTICAL FRAMEWORK FOR ASSESSING THE REPARATIONS PROCESS AND GUIDING FUTURE EFFORTS

The heavy task of correcting injustice by restoring broken relationships requires an approach that extends beyond the law.[143] Until now, no workable analytical framework had been developed that offered a holistic approach to reparations by coalescing key components drawn from relevant disciplines.[144] As evidenced in groups around the world attempting to heal wounds of historical injustice, meaningful reparations draw upon concepts of healing that stem from various disciplines.[145] Developed by Professor Eric Yamamoto,[146] the "Four Rs" is a four-dimensional analytical framework that may be used to effectively assess ongoing reparations.[147] This framework draws upon concepts of healing that emerge from the wide-ranging disciplines of law,[148]

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[135] *Id.*

[136] The letter sent to Japanese citizens urged them to "take part in and contribute to this national fund, in order that as many Japanese citizens as possible translate into action the desire to make amends." THE ASIAN WOMEN'S FUND, *supra* note 63, at 59.

[137] *Id.* at 72.

[138] *Id.* at 72-73.

[139] Lee, *supra* note 68, at 545.

[140] Fleming Terrell, Note, *Unofficial Accountability: A Proposal for the Permanent Women's Tribunal on Sexual Violence in Armed Conflict*, 15 TEX. J. WOMEN & L. 107, 124 (2005).

[141] THE ASIAN WOMEN'S FUND, *supra* note 63, at 73.

[142] Jeffords, *supra* note 110, at 156.

[143] ERIC YAMAMOTO, INTERRACIAL JUSTICE 154 (1999).

[144] *See id.* at 173.

[145] *Id.* at 153-71.

[146] Professor Eric Yamamoto is a professor of law at the University of Hawai'i William S. Richardson School of Law.

[147] YAMAMOTO, *supra* note 143, at 174.

[148] *Id.* at 155-56. "Notions of rights and duties, remedies, and open process still carry enormous purchase. . . . Procedurally, justice is commonly defined in terms of fair process . . . .

theology,[149] social psychology,[150] political theory,[151] and indigenous healing practices.[152] Collectively, these disciplines "offer a rough, incomplete, yet nevertheless compelling portrait of the dynamics of intergroup reconciliation."[153] The "Four Rs" is a framework that suggests four points of inquiry—recognition, responsibility, reconstruction, and reparation—to assess the reparations process for inter-group conflicts.[154] To be sure, it is not a "formula for justice"; however, it is a useful analytical tool for assessing and guiding ongoing reparations efforts.[155]

As a prefatory matter, a precondition for usage of the framework is for both groups in conflict to share the common goal of reparation.[156] The "Four Rs" framework is practicable only where both groups seek to repair their broken relationship and have peaceable, productive future relationships.[157] The Japanese government's active participation in the reparations process is necessary, making interest-convergence essential. In discussing black-white racial tensions in America, scholar Harlon L. Dalton notes, "racial progress for Blacks (and, I would add, for other people of color) is achieved only when

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Substantively, . . ., legal justice norms focus on fairness and equality." *Id.* at 155.

[149] *Id.* at 159-62. "Theology offers a developed conception of intergroup healing. A Judeo-Christian theology of reconciliation grounds healing in stories of freedom from bondage, care for the abandoned, and compassion for the outcast . . . ." *Id.* at 159.

[150] *Id.* at 162-64. Psychology "offers catharsis—to confront externally induced emotional trauma as a foundation for releasing it." *Id.* "Western psychologists therefore seek to create a new reality for their patients by guiding them through stages of healing: denial, anger, self-blame, guilt, acceptance, and forgiveness." *Id.* at 162.

[151] *Id.* at 164-66. Political theory "focuses on democratic processes and offers the concept of reparation—to repair societal harm by one entity, usually a government, inflicted directly on another, usually a marginalized social group." *Id.* at 164.

[152] *Id.* at 166-67. For example, the indigenous Hawaiian healing practice of *ho'oponopono* is unique in that it is a "therapeutic process that examines the past and uncovers thoughts and feelings leading to conflict, in order to loosen and then cut the negative entanglements of those involved in their communities." *Id.* at 166.

[153] *Id.* at 173.

> In transcending categories, religious scholars speak of the "spiritual" rush of reconciliation—the reunification of people through God. Psychologists work toward patient "catharsis"—the entering of places of pain and its deep emotional release—and social psychologists observe dramatic "transformations" in consciousness and behavior. Political theorists speak of "reconstituting community"—reshaping the polity by breaking old barriers and reincorporating people at the margins. Indigenous Hawaiian healing practitioners search for *pono*—making right, or righteous, the broken relationship.

*Id.*

[154] *Id.* at 174-75.

[155] *Id.* at 174.

[156] *See id.* at 172-73.

[157] *See id.* at 174.

Whites view it as serving their own interests as well."[158] The key to reconciliation, and the utility of the framework, will be for *ianfu* supporters to sharpen at the threshold Japan's self-interests in reparations.

### *A. Recognition*

The recognition aspect of the reparations process may be analogized to "the first step in healing a lingering physical wound: a person's suffering must be recognized and the wound carefully assessed."[159] Without an assessment of the often deeply cut wounds, groups cannot take appropriate steps to properly treat the underlying wound causing the conflict. If left untreated for too long, the wound festers from infection.

Recognition has two essential components: empathy and the unraveling of stock stories. Empathy requires both groups to "see into the woundedness of the other."[160] Groups must recognize two kinds of wounds: the immediate harm—"the anger, hurt, and material loss resulting from disabling group constraints"; and the pervasive wound—"the pain buried in collective memories of group exclusion from or subjugation within a . . . social structure."[161] Mutual storytelling and listening are effective ways to bring these harms to surface.[162] Without identifying the particular harms caused by oppression, groups cannot begin to address the sometimes subtle but debilitating problems that underlie inter-group conflict.[163]

The other component of recognition is the critical examination of particulars and context, as well as the unraveling of stock stories.[164] This requires an assessment of the particulars of the controversy: who the principals and the aligned interests are, what the specific dispute is about, how and where it arose, what the legal claims are, how principals are dealing with the dispute, why tensions are escalating, how the dispute might be resolved, etc.[165] These

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[158] HARLON L. DALTON, RACIAL HEALING 1133 (1995).

[159] YAMAMOTO, *supra* note 143, at 175.

[160] *Id.* at 176. Empathy within interracial justice inquiry involves not only recognizing victims' wounds but also those of oppressors, as "particularly in borderland locales, where power flows simultaneously in multiple directions, those groups can be oppressed in some relationships . . . and oppressive in others." *Id.* at 177. While it is important to note that the Japanese government was situated differently as the oppressed in other relationships, particularly in its relationships with other governments, that is beyond the scope of this paper.

[161] *Id.* at 176.

[162] *Id.* at 177.

[163] *Id.*

[164] *Id.* at 176.

[165] *Id.* at 179.

particulars form the socioeconomic context in which the controversy began and continues in the present day.[166]

From the assessment of particulars, the examination of context shifts to the unraveling of stock stories. Stock stories are narratives told by groups about themselves and others.[167] Stock stories are important because they create the lens through which group members see other groups.[168] The process of unraveling stock stories through critical interrogation is informative about groups in the controversy.[169]

> Critical interrogation of stock stories . . . requires the unraveling of each story's "facts" (events, tenor of interactions, information omitted), its methodology (sources of information, rhetorical techniques, storyteller vantage points, viewpoints represented and excluded), its tendency to universalize (attributing a particular trait to all group members), and its range of social impacts (in creating identities as a justification for actions toward others and for delineating perpetrators and victims).[170]

Sometimes the process reveals shaky or illusory factual foundations.[171] The process can illuminate "purposeful distortions of history by political leaders in order to legitimate continuing oppression."[172] Recognizing the harms and the context in which they were caused are important considerations when analyzing reparations efforts.

### *B. Responsibility*

An analysis of responsibility involves an inquiry into the power structures that have shaped the victim-perpetrator relationship.[173] Forms of oppressive structures are often rhetorical, institutional, and economic.[174] Groups must assess group agency and accept responsibility where appropriate.[175] Aggressor groups, especially national governments, are often concerned about power loss and utilize denial as a psychological tool to avoid responsibility.[176]

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[166] *Id.*

[167] *Id.* at 180. They are often a "conglomeration of group members' selective historical recollections, partial information about events and socioeconomic conditions, and speculations about the future." *Id.*

[168] *Id.*

[169] *Id.* at 181.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 183.

[173] *Id.* at 175.

[174] *Id.* at 186-87.

[175] *Id.* at 185.

[176] *Id.* at 188.

Acceptance of responsibility by the oppressor group may have dramatic consequences, but it is a critical step to begin the process toward reconciliation.

### *C. Reconstruction*

In the analogy of group harm as a wound, reconstruction "entails cleansing the wound and treating the infection."[177] It involves "active steps (performance) toward healing the social and psychological wounds resulting from disabling group constraints."[178] Simply put, "it means reaching out in concrete ways to heal."[179] To repair the broken relationship, groups must move beyond rhetoric—they must act.[180]

Reconstruction incorporates two distinct but important concepts: "mutuality of performance" and retelling of "stories about the self, the other, and the relationship."[181] Mutuality of performance refers to the symbiotic relationship of apology by the perpetrator and forgiveness by the victim.[182] The main function of an apology may be thought of as restoring membership to a community by validating the harm suffered by the group.[183] The apology is the manifestation of acknowledgment and acceptance of responsibility for the harm.[184] Those who have suffered serious harm generally respond in one of three ways: "revenge, martyrdom or passive embrace of victimhood, or forgiveness."[185] If victims are able to forgive, groups may begin the process toward mutual liberation in unlocking the painful bondage of the past.[186]

Forgiveness, however, is "'not an arbitrary, free act of pardon given out of the unilateral generosity of the forgiver—forgiveness is an interpersonal transaction between two parties.'"[187] In connection with other aspects of the reparations process, "[w]hen supported by appropriate recognition and acceptance of responsibility, the reconstructive acts of apology and forgiveness free both the perpetrator and the victim 'from the haunting legacies of the past.'"[188] The results have promising potential: the encounter "'paves the way

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[177] Eric Yamamoto, *Racial Healing*, 1 J. GENDER RACE & JUST. 47, 54 (1997).

[178] YAMAMOTO, *supra* note 143, at 175.

[179] *Id.* at 191.

[180] *See id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* at 196.

[186] *Id.* (quoting GEIKO MULLER-FAHRENHOLZ, THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION 5, 25 (1997)).

[187] *Id.* (quoting DAVID W. AUGSBURGER, CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS 283 (1992)).

[188] *Id.*

for a better cooperation between formerly conflicting partners. A painful past opens new possibilities for the future."[189]

There are, however, inherent dangers embedded in the mutuality of performance. "Apologies are susceptible to insincerity, misapprehension, poor timing, and inadequacy."[190] Rhetoric alone is insufficient to repair relationships.[191] Without "changes in the apologizer's underlying belief system" and active participation in the reparations process, an apology is meaningless—just "hollow words and empty gestures."[192] Some may view the apology as an end rather than a vehicle for change.[193] The discourse does not end with the apology; rather, the apology paves the way for a new beginning.[194] It begins the process of healing wounds and repairing relationships broken by painful histories of injustice.[195]

Another apology concern is "that apologies will not change the relationship structure enough to bring about enduring forgiveness."[196] Forgiveness does not automatically flow from an apology.[197] The harm suffered by victims may sometimes be so irreparable that some are unable to forgive.[198] Forgiveness does not happen easily, as the "challenge of confronting the past and reliving the hurt is sometimes so difficult and unbearable that some victims are unable to forgive."[199]

The second aspect of reconstruction, the retelling of group stories, focuses on transforming the relationship by remaking historical narratives.[200] Where one group's historical narrative of injustice has been excluded from the other group's dominant historical narrative, both groups must mutually engage to construct a new, joint historical narrative.[201] "Healing psychological wounds requires in part the completion or remaking of inappropriate, damaging narratives."[202] Through this process of recreating and retelling stories, groups may begin to reconcile and heal their broken relationships.[203]

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189 *Id.*
190 *Id.* at 194.
191 *Id.* at 194-95.
192 *Id.* at 194.
193 *Id.* at 195.
194 *Id.* at 196.
195 *Id.* at 197.
196 *Id.* at 195.
197 *See supra* note 187 and accompanying text.
198 YAMAMOTO, *supra* note 143, at 197.
199 *Id.*
200 *Id.* at 199.
201 *Id.*
202 *Id.*
203 *Id.*

### D. Reparation

As legal scholar Roy L. Brooks puts it, "[s]imply saying 'I'm sorry' is never enough when righting an atrocity."[204] Reparation requires material change to repair broken relationships. "It encompasses both acts of repairing damage to the material conditions of . . . group life . . . and of restoring injured human psyches."[205] Through material changes, reparation draws together the recognition of harm, acceptance of responsibility, and reconstruction of the relationship.[206] It is a change in attitudes that have damaged the relationship and the dismantling of disabling social structures.[207] To be sure, "[r]eparations that repair are costly. They require change. Change means the loss of some social advantages by those more powerful."[208] Nevertheless, those are necessary changes for meaningful group reconciliation.

## VI. Why Reparations Efforts Have Been Ineffective: A "Four Rs" Analysis of Lawsuits and the Asian Women's Fund

Employing the "Four Rs" to analyze the reparations process illuminates the relative strengths and limitations of the lawsuits and the Asian Women's Fund. In light of the historical and present-day conflict between *ianfu* and the Japanese government, the "Four Rs" framework is particularly helpful in assessing why reparations efforts have thus far failed and what more must be done to repair the groups' broken relationship.

### A. Lawsuits

Reparations efforts through the legal system have been limited by narrow legal claims that are constrained by the tort model of reparations. Although litigation in Japan and the United States failed on the face of their narrow legal rulings, these public suits were important beginning steps that yielded gain for victims, albeit in less immediately obvious ways.[209]

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[204] Roy L. Brooks, Atonement & Forgiveness: A New Model for Black Reparations 155 (2004).

[205] Yamamoto, *supra* note 143, at 203.

[206] *See id.* at 203-09.

[207] *Id.* at 205.

[208] *Id.*

[209] *See infra* Parts VI.A.1-4.

*1. Recognition*

The courtroom litigation and narrow legal outcomes undermined victims' stories. As an example, during ongoing litigation in the first class action suit, five non-plaintiff survivors accompanied the plaintiffs to a hearing and offered to testify.[210] The court rejected their offer.[211] "This exclusion of live testimony was later explained away as respect for privacy—a dubious pretext in view of the women's willingness to be cross-examined and the importance of their testimony to the case."[212]

The suppression of victims' stories is a recurring theme that has angered and frustrated many women. A former sex slave, known only as "Ms. K" said, "If I were to speak to the Japanese government, there is only one question I would ask: Is it right to ignore me like this as if they did nothing to me? Are they justified after trampling an innocent and fragile teenage girl and making her suffer for the rest of her life?" [213] The full extent of some victims' suffering could not surface because legal proceedings are limited in scope.[214] As a result, many victims have been unable to heal.

Despite the apparent failure of litigation, it provided an important means of storytelling for those who were allowed to speak. The courtroom transformed into the cultural-political forum that brought victims together to speak out in a collective voice much stronger and louder than any individual voice alone. Their stories of horror, pain, grief, and frustration shocked the world. The initial lawsuit filed by Kim Hak-Sun and other survivors attracted considerable media attention and exposed the brutality of Japan's comfort women system.[215] Victims' stories emerged very poignantly.[216] The lawsuits gathered the support of many instrumental groups, which have organized weekly protests in front of the Japanese Embassy,[217] created a Seoul hotline for victims to share

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[210] HICKS, *supra* note 2, at 163.

[211] *Id.*

[212] *Id.*

[213] COMFORT WOMEN SPEAK, *supra* note 22, at 105.

[214] YAMAMOTO, *supra* note 143, at 154.

[215] *See* Soh, *supra* note 11.

[216] For example, during one of the hearings in the initial lawsuit, in the middle of reading her formal statement, Yi Ki Bun suddenly "blurted out emotionally":

> Can you imagine how I survived in Taiwan? I lived by copying beggars, smearing my face and body all over with mud and ripping my clothes. This was the way I got money by getting sympathy . . . When I returned home I couldn't bear to hear mothers calling their children. I couldn't stand it, realising [sic] I didn't have children and couldn't have any. Can you understand my misery?

HICKS, *supra* note 2, at 162-63.

[217] Han & Weisbart, *supra* note 13. The Korean Council for the Women Drafted for Military Sexual Slavery by Japan has organized weekly protests in front of the Japanese Embassy in South Korea since 1992. *Id.*

their stories,[218] and called upon the United Nations to conduct an investigation into the comfort women system.[219] Litigation was tremendously significant in generating political momentum and opening doors for victims to tell their stories larger public forums.[220]

In spite of the media's generally positive role in raising awareness of the *ianfu*'s stories, the attention has been very difficult for some women, such as Yun Soon-Man.[221] Media coverage prompted many lawyers, media personnel, and others to visit and seek interviews with victims who had stepped forward.[222] According to Yun, "the constant interviewing is becoming a source of distress to the women, particularly as they cannot see it serving any useful purpose to them."[223] The attention has been difficult for Yi Young-sook as well: "Occasionally people come to hear my story of a former 'comfort woman.' I am reluctant to talk about it because it is my shameful, terrible past. Recollecting such a past is so emotionally draining."[224]

### 2. *Responsibility*

By exculpating the Japanese government of legal liability to victims, courts failed to compel Japan to accept responsibility for the establishment of the sex slave system and the resulting suffering by victims. Although mounting evidence implicated the Japanese government, it continued to use the lawsuits' narrow legal rulings to justify the refusal to accept legal responsibility. Even after the incriminating documents surfaced in 1992, the government hesitated to accept responsibility, making only minimal concessions. For example, during cross-examination of government officials in the first lawsuit, government representatives admitted minimal responsibility in the supervision of comfort stations, but refused to fully confirm plaintiffs' historical accounts.[225]

Despite the apparent failure of the lawsuits, the substantial subsequent media attention pressured the Japanese government into accepting responsi-

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[218] HICKS, *supra* note 2, at 152.

[219] Jeffords, *supra* note 110, at 156.

[220] For example, following the initial Tokyo lawsuit, activist groups rallied and helped survivors bring their stories to the larger public stage. HICKS, *supra* note 2, at 168. Many groups invited survivors to speak at a number of public meetings and public hearings in both Japan and South Korea. *Id.* at 169. Kim Hak-Sun was recognized for her work on *ianfu* issues; she was named "Woman of the Year by the Alliance of the South Korean Women's Organisations [sic] during the International Women's day celebrations." *Id.*

[221] DOLGOPOL & PARANJAPE, *supra* note 19, at 81.

[222] *Id.*

[223] *Id.*

[224] COMFORT WOMEN SPEAK, *supra* note 22, at 100-01.

[225] HICKS, *supra* note 2, at 162.

bility for its comfort women system and the resulting harm inflicted on victims. The initial lawsuit filed by Kim Hak-Sun and other women was instrumental in bringing to surface documents that prompted a change in the Japanese government's position on the history of the comfort women system.[226] The widespread publicity of the lawsuits and mounting international criticism compelled the Japanese government to at least minimally accept responsibility for its role in the comfort women system.[227] Though the Japanese government continues to resist accepting full responsibility for its role in the comfort women system, its piecemeal apologies suggest that the media has played a powerful role in reparations efforts for *ianfu*.

*3. Reconstruction*

Litigation arguably exacerbated the already very fragmented relationship between victims and the Japanese government. Instead of promoting cooperation, the adversarial nature of the legal system forced the groups into further opposition with one another. "Taking a joint rather than adversarial approach to the analysis of the conflict allows both groups to articulate feelings and perspectives omitted from stock stories or official government versions of events."[228] The lawsuits lacked mutual engagement. Rather than reconstruct the relationship, litigation only reinforced the imbalance of power between victims and the Japanese government.

The apologies were ill received because the government's actions directly contradicted its words. The government issued multiple statements allegedly offering its sincere apologies and determination to learn from history, yet the words remained unaccompanied by concrete action. In a statement issued on August 4, 1993, Chief Cabinet Secretary Yohei Kono stated that the "Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those . . . who suffered immeasurable pain and incurable physical and psychological wounds as comfort women."[229] Furthermore, he promised that Japan would "face squarely the historical facts . . . instead of evading them, and take them to heart as lessons of history."[230] A year later, on August 31, 1994, Prime Minister Tomiichi Murayama "offered

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[226] *Id.* at 164.

[227] *See, e.g., id.* at 163-72. On July 6, 1992, the government first reported the results of its investigation into the comfort women issue, and on August 4, 1993, the government issued a follow-up report acknowledging that the government had played a role in establishing an unknown number of comfort stations throughout Asia. THE ASIAN WOMEN'S FUND, *supra* note 63, at 50-51.

[228] YAMAMOTO, *supra* note 143, at 202.

[229] THE ASIAN WOMEN'S FUND, *supra* note 63, at 49.

[230] *Id.*

his profound remorse" for Japan's acts of aggression.[231] Survivors still waited for concrete action. A few months later, the Diet drafted a "cautiously worded resolution"[232] that expressed its "deep remorse"[233] and promised to "learn in all humility the lessons of history."[234] The "halfhearted tenor" of these apologies did little to repair the government's relations with comfort women.[235]

Former Japanese Prime Minister Koizumi created further controversy with his visits to the Yasukuni Shrine.[236] Many have criticized the visits because the shrine honors, among those who died during World War II, some of Japan's convicted war criminals.[237] The government's apologies continued to contradict its actions and thus many victims have been unable to forgive.

*4. Reparation*

The lawsuits' failure to bring about reparation suggests that the tort model of the legal system is inhospitable to groups seeking redress for group-based injustice. As discussed in Part IV.A., only one lawsuit succeeded in giving plaintiffs a nominal judgment of approximately $2,270.[238] Plaintiffs continued to suffer, and the Japanese government continued to refuse them compensation. Lawsuits are generally ineffective channels of reparation, partly due to the legal system's "abstract linkage of damage to compensation."[239] The law also requires a close connection between the harm suffered by victims and the relief sought.[240] This tort model is focused on individual harm, rather than group harm.[241] As such, courts are ill equipped to handle reparations for group-based injustice.[242] The dearth of reparation from the lawsuits strongly indicates that litigation is "not an ideal form of social action."[243]

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[231] *Id.* at 52.

[232] Park, *supra* note 3, at 44.

[233] THE ASIAN WOMEN'S FUND, *supra* note 63, at 56.

[234] *Id.*

[235] YAMAMOTO, *supra* note 143, at 195.

[236] Joo-hee Lee, *Past Threatens Future of Korea-Japan Relations: A Number of Thorny Issues Remain Unsolved as Two Countries Fail to Overcome Antagonism*, THE KOREA HERALD, August 22, 2006 ("Koizumi has continued to defy [calls by Korea and China to stop visits] and visited the shrine a total of six times during his five-year incumbency.").

[237] *See id.*

[238] *See infra* Part IV.A.

[239] YAMAMOTO, *supra* note 143, at 140.

[240] Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, B.C. THIRD WORLD L.J. 81, 114 (2004).

[241] *Id.*

[242] *See id.*

[243] MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 58 (1998).

### *B. The Asian Women's Fund*

The AWF failed as a means of reparations but for different reasons. Missing in the establishment of the AWF was that reparation "aims for more than a monetary salve for those hurting."[244] From the outset, "the AWF engendered fierce criticism."[245] It failed to satisfy reparation demands because the government refused to accept official responsibility and show genuine remorse through its actions.[246] The AWF offered *ianfu* monetary compensation, but the majority refused the offer because money alone could not heal their wounds of injustice.

#### *1. Recognition*

The AWF only minimally recognized the harm done to the comfort women during the war and in years subsequent. In 1996, AWF President Bunbei Hara sent a letter to comfort women that acknowledged their suffering: "The [AWF], established in cooperation with the Government and the people of Japan, herein conveys to you the sense of atonement held by the Japanese people for the unbearable suffering you were forced to endure as a wartime 'comfort woman.'"[247] The letter went on to say, "I know that you not only experienced intolerable suffering during the war, but through more than 50 years since, have lived with physical damage and cruel memories."[248] While the government recognized that the women were suffering, the AWF failed to do more. The AWF neither advanced understanding of the harm's historical context, nor invited *ianfu* to publicly share their stories. It merely offered a token amount of money to symbolically represent the government's recognition of their suffering.

#### *2. Responsibility*

Perhaps the most fatal flaw of the AWF was that the Japanese government failed to take full responsibility for the harm suffered by victims. By utilizing solicited donations from citizens rather than government-sponsored funds, the program diffused responsibility for healing the wound.[249] "The AWF is

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[244] YAMAMOTO, *supra* note 143, at 204.

[245] YAMAMOTO ET AL., *supra* note 1, at 437.

[246] Park, *supra* note 3, at 45.

[247] THE ASIAN WOMEN'S FUND, *supra* note 63, at 64.

[248] *Id.*

[249] Mari Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 BERKELEY WOMEN'S L.J. 174, 183 (2001). The AWF offered survivors "'consolation money' . . . derived from donations made by private Japanese citizens and

premised on the idea that Japan is not the government alone but a nation of citizens that must collectively deal with Japan's past."[250] This "political scheme allowed the government to appear morally responsible and sympathetic to the comfort women's cause while avoiding any official legal responsibility for the past abuses committed by its officials."[251]

The government insisted that the AWF satisfied any moral obligation and vehemently defended the AWF in the face of opposition and criticism.[252] Upon the conclusion of the program, the AWF issued a statement conveying the government's perceived fulfillment of any moral obligation it may have had to victims.[253] The statement also responded to intense criticism of the AWF:

> Many victim support groups criticized the Japanese Government and the [AWF] . . . . Unfortunately, there was . . . completely negative criticism—that acknowledging moral responsibility was just a ruse to avoid acknowledging legal responsibility. There were also demands that the Asian Women's Fund be abolished. We are willing, in all humility, to receive criticism, but we cannot accept the argument that the Asian Women's Fund is a ruse.[254]

The statement continued to defend the program, responding to criticism that the AWF was essentially a private fund:

> But the Fund is not simply a private organization. It also presents the Prime Minister's letter of apology to victims, and implements medical and welfare support projects financed by the Japanese Government. In addition, the salaries of the Fund's secretariat staff are paid from the Government budget.[255]

The Japanese government's defense of the AWF as a legitimately public and private fund angered and insulted *ianfu*.[256] The majority of survivors refused to accept money from the AWF, criticizing it as the Japanese government's attempt to "shirk, not accept, responsibility."[257]

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corporations"; "[g]overnment funds would cover only the administrative costs of launching and running the private fund for the victims' housing, medical care, and welfare costs." *Id.*

250 YAMAMOTO ET AL., *supra* note 1, at 437.

251 Arakawa, *supra* note 249, at 183.

252 THE ASIAN WOMEN'S FUND, *supra* note 63, at 42-43.

253 *Id.*

254 *Id.*

255 THE ASIAN WOMEN'S FUND, *supra* note 63, at 43.

256 YAMAMOTO ET AL., *supra* note 1, at 437.

257 *Id.*

*3. Reconstruction*

The AWF failed in part because, like the lawsuits, it failed to foster the mutual engagement necessary to repair the relationship between victims and the Japanese government. Its success depended on survivors' acceptance of the funds, which most refused because the government's repeated apologies contradicted the AWF's use of private funds as atonement money.[258] Upon the establishment of the AWF in 1995, Prime Minister Tomiichi Murayama said,

> Turning from yesterday to today, we still see many women suffering violence and inhuman treatment in many parts of the world. The [AWF] as I understand it, will take steps to address these problems facing women today. The Government of Japan intends to play an active role . . . .[259]

He went on to offer his "profound apology to all those who, as wartime comfort women, suffered emotional and physical wounds that can never be closed."[260] A year later, nearing the 50th anniversary of the end of World War II, Murayama again expressed "deep remorse."[261] In a 1996 letter sent to *ianfu* on behalf of the AWF, he again apologized, "I thus extend anew my most sincere apologies and remorse to all the women who underwent immeasurable and painful experiences and suffered incurable physical and psychological wounds as comfort women."[262] He further resolved, "[w]e must not evade the weight of the past, nor should we evade our responsibilities for the future."[263]

In spite of the government's repeated apologies and commitment to reconciliation, for many, like Kim Soon-duk,[264] those are empty words: "I am very unhappy with the Japanese government today. It was good they [sic] finally admitted their past crime. But their apologies are only half-hearted. They try to let civilian organizations pay some compensation. But it was the government's deeds. The Japanese government must compensate us."[265] Because the AWF compensated *ianfu* with civilian funds, many perceived the government's repeated apologies as merely rhetoric, unsubstantiated with

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[258] *See* discussion *supra* notes 229 to 235 and accompanying text.

[259] THE ASIAN WOMEN'S FUND, *supra* note 63, at 60.

[260] *Id.*

[261] *Id.* at 62.

[262] *Id.* at 63.

[263] *Id.*

[264] When she was sixteen, Japanese officials promised Kim Soon-duk a job as a military nurse. She went with them to Nagasaki and later Shanghai, where she was forced to become a sex slave. In her testimony about life as a sex slave, she noted, "I frequently thought of killing myself." COMFORT WOMEN SPEAK, *supra* note 22, at 37-41.

[265] *Id.* at 40.

concrete action.[266] As such, *ianfu* refused to accept AWF funds and could not begin the process of forgiving and healing.[267]

*4. Reparation*

The program failed to effectuate any material form of reparation because the vast majority of survivors refused to accept AWF funds.[268] They were insulted by the AWF, as "symbolic compensation without accompanying efforts to repair damaged conditions of racial group life is likely to be labeled as insincere."[269] The government persisted in refusing to take responsibility for its past crimes or to actively rehabilitate victims who had suffered, thus creating a public perception of "insincerity and foot-dragging."[270] While the Japanese government appeared to accept responsibility for victims' suffering by offering *ianfu* material compensation, the AWF merely created "illusions of progress" that disguised its failure to provide any meaningful reparations to victims.[271]

## VII. A PATH TOWARD "REPAIR" THROUGH LONG-AWAITED JUSTICE: JAPAN'S ACTIVE PARTICIPATION IN TRUTH AND RECONCILIATION— LEARNING FROM THE SOUTH AFRICAN MODEL

At this point in the reparations process, *ianfu* seek justice through healing, which the lawsuits and the AWF have been unable to accomplish. Survivors want the Japanese government to accept responsibility for their suffering and show contrition through taking active steps to repair the harm.[272] Given the limitations of both litigation and the AWF, effective reparations efforts in the future must coalesce the recognition of harm, acceptance of responsibility, reconstruction of the relationship, and reparation to rehabilitate survivors' material living conditions.

One viable method of doing so is through a truth commission, "an official investigation into the facts of atrocities, tortures, and human rights abuses."[273] Four general key elements of a truth commission make it the most viable and appropriate method for effectuating reparations.[274] First, a truth commission

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[266] *See, e.g., id.*

[267] *See infra* note 142 and accompanying text.

[268] *See id.*

[269] YAMAMOTO, *supra* note 143, at 204.

[270] *Id.*

[271] *Id.*

[272] *See supra* Part III.A.

[273] MINOW, *supra* note 243, at 52.

[274] Mark Vasallo, Comment, *Truth and Reconciliation Commissions: General Considerations and a Critical Comparison of the Commissions of Chile and El Salvador*, 33 U. MIAMI INTER-AM. L. REV. 153, 155 (2002).

deliberately focuses on the past.[275] This is especially important for *ianfu* because of the scant history currently known, due in part to governmental cover-ups and the passing away of first-hand witnesses with time.[276] Second, a truth commission attempts to paint an overall picture of abuses,[277] which validates the collective experiences of victims by creating a new, inclusive historical narrative. Third, the truth commission exists for a set period of time,[278] ideal because time is limited for aging survivors. Lastly, a truth commission is typically vested with authority,[279] which validates the group suffering that will emerge through the commission's fact-finding hearings.

The South African Truth and Reconciliation Commission ("TRC") has been a prominent and relatively successful model of a truth commission implemented to investigate mass group-based atrocities.[280] The most effective next step in the reparations process will likely be the establishment of a truth commission modeled after the TRC to investigate the horrors of Japan's sex slave system and begin the process of healing through long awaited justice for survivors.

### *A. The South African Truth and Reconciliation Commission*

The TRC was established during South Africa's transition from apartheid to democracy.[281] At the time, the nation was still reeling from atrocities committed under apartheid, as displayed in the highly volatile racial divide between black and white South Africans.[282] In the early 1990s, major political parties negotiated a settlement resulting in the 1993 Interim Constitution that served "as a bridge from the past of a deeply divided society to a future committed to human rights, democracy, and peaceful co-existence."[283] On July 19, 1995, South Africa's first democratically-elected Parliament established the TRC.[284] The TRC reflected the African concept of *ubuntu*[285]—a

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[275] *Id.*

[276] *See* discussion *supra* Part II.B.

[277] Vasallo, *supra* note 274, at 155.

[278] *Id.*

[279] *Id.* at 155-56.

[280] *See generally* MINOW, *supra* note 243, at 52-90 (discussing the TRC in comparison with other truth commissions).

[281] *See* YAMAMOTO, *supra* note 143, at 254-55.

[282] *Id.*

[283] MINOW, *supra* note 243, at 53.

[284] *Id.*

[285] *See* YAMAMOTO, *supra* note 143, at 256. "'Ubuntu says I am human only because you are human. If I undermine your humanity, I dehumanize myself.' It characterizes justice as community restoration—the rebuilding of the community to include those harmed or formerly excluded." *Id.* (citations omitted).

restorative justice concept that "no one can be healthy when the community is sick."[286] While extremely controversial, especially for groups formerly in power, the TRC was the product of a necessary compromise between racial groups to prevent South Africa from engaging in a bloody civil war.[287]

The new government carefully structured the TRC in response to the needs of the nation.[288] Newly elected President Nelson Mandela appointed Nobel Peace laureate archbishop Desmond Tutu to head the commission comprised of seventeen psychologists, lawyers, and scholars.[289] The TRC is divided into three committees: the Committee on Human Rights Violations ("CHR"), the Amnesty Committee ("AC"), and the Committee on Reparation and Rehabilitation ("CRR").[290] Each has "distinct but related functions."[291] The CHR is responsible for conducting human rights violation hearings on specific incidents and recording victims' statements.[292] The CHR also has an investigative unit that verifies testimonies.[293] The AC was responsible for deciding whether to grant amnesty to perpetrators who confess to political crimes.[294] The CRR currently recommends reparations for victims and makes policy recommendations to the President.[295]

Given the interracial tensions caused by apartheid, the TRC's "paramount task is to initiate a healing process that encourages genuine reconciliation among the races."[296] In deciding how to deal with past atrocities committed under apartheid,

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[286] *Id.*

[287] *See id.* at 254-55.

[288] *See id.*

[289] *Id.* at 255.

[290] Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753, 763 (1998).

[291] YAMAMOTO, *supra* note 143, at 255.

[292] Lansing & King, *supra* note 290, at 763.

[293] *Id.* at 763-64.

[294] YAMAMOTO, *supra* note 143, at 255. When evaluating an individual's eligibility for amnesty, the AC considers the following six factors: "motive of the offender"; "context and circumstances of the act, including whether the act was political"; "the legal and factual nature of the offense"; "the objective of the act, in particular whether it was politically motivated and whether directed against the State or an individual"; "whether the offense was committed on behalf of a political organization"; and "the proportional relationship between the act and any political objective." Lansing & King, *supra* note 290, at 764-65.

[295] YAMAMOTO, *supra* note 143, at 255. The CRR makes these recommendations by gathering information on victims, evidence of the nature and extent of victims' harm, making policy recommendations to the President on reparation for victims, and creating a support strategy for witnesses. Lansing & King, *supra* note 290, at 765.

[296] YAMAMOTO, *supra* note 143, at 255.

> South Africans concluded that "to achieve unity and morally acceptable reconciliation, . . . the truth about gross violations of human rights must be: established by an official investigation unit using fair procedures; fully and unreservedly acknowledged by the perpetrators; made known to the public, together with the identity of the planners, perpetrators, and victims."[297]

The TRC's primary goal is "to promote reconciliation through interracial healing . . . by filling a psychological gap left by legal and political reforms formally abolishing apartheid."[298] This gap "is characterized by a need for recognition (survivor storytelling and perpetrator confessions of wrongful acts), for acceptance of responsibility, and for reconstructive acts (perpetrator apologies, victim forgiveness), and reparation."[299] While not without criticism, the TRC has generally been successful in beginning the process of reconciliation among groups and healing a nation.[300]

### *B. A Proposed Truth Commission for Sex Slaves*[301]

Several key components of the South African model may transfer well into reparations efforts for *ianfu*. A "Four Rs"[302] analysis of the TRC as a model for a possible truth commission suggests that the truth commission has the

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[297] MINOW, *supra* note 243, at 55 (citation omitted).

[298] YAMAMOTO, *supra* note 143, at 256-57.

[299] *Id.* at 257.

[300] *See id.*

[301] It is important to note that there are significant differences in the circumstances that created the TRC and those that will shape the creation of a truth commission for *ianfu*. First, the TRC was created to address atrocities committed within a country, whereas *ianfu* were inhabitants of a territory occupied by an independent country. *Compare* MINOW, *supra* note 243, at 52 (describing South Africa's internal turmoil), *with* DOLGOPOL & PARANJAPE, *supra* note 19, at 30 (describing the relationship between Japan and Korea). Second, the TRC was created in a time of transition within South Africa and was fairly contemporary with the horrors of the atrocities; in the case of sex slaves, the truth commission would be investigating international human rights abuses more than fifty years after the fact. *Compare* MINOW, *supra* note 243, at 52 (describing the contemporaneous transition from apartheid to democracy), *with* Park, *supra* note 3, at 23-24 (explaining that the comfort women system existed through the end of World War II). Third, the new South African government created the TRC; it is unlikely that either Japan or the Korean governments will actually establish a truth commission on their own, given the international political and economic ramifications that may ensue. *Compare* MINOW, *supra* note 243, at 53 (stating that the new democratically-elected Parliament created the TRC), *with supra* Part III.B (discussing the major interests of key parties in the current conflict). Because of this, the United Nations, as a neutral entity empowered with substantial international authority, should establish the truth commission with the full participation of the Japanese government.

[302] *See* discussion *supra* Part V.

potential to effectively engender healing and reconciliation where lawsuits and the AWF have failed.

The active participation of both groups is essential to repairing damaged relationships. The TRC is a successful example of interest-convergence applied to resolving inter-group conflict, as the TRC is the product of a "negotiated settlement.[303] The National Party, which held power before the abolishment of apartheid, had to relinquish power in order to avoid a bloody civil war in which those in power would lose their socioeconomic status; in exchange, amnesty[304] "was the price the people of South Africa paid to attain national peace and begin healing."[305]

Interest-convergence will be necessary to compel the Japanese government's active participation in the reparations process.[306] The government's participation in the truth commission will distinguish it from previous important yet ineffective investigative bodies created by the United Nations Commission on Human Rights ("UNCHR"),[307] the UNCHR Subcommission on the Prevention of Discrimination and Protection of Minorities,"[308] and the International Commission of Jurists.[309] Mock trials, such as the Tokyo People's Tribunal[310] and the Women's International War Crimes Tribunal,[311]

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[303] YAMAMOTO, *supra* note 143, at 259.

[304] The amnesty program offered by the TRC will likely be unnecessary in the case of the *ianfu*, as most of the individual perpetrators have passed away.

[305] YAMAMOTO, *supra* note 143, at 254, 259.

[306] *See supra* Part V.

[307] The UNCHR appointed Special Rapporteur Radhika Coomaraswamy to "investigate the 'comfort women' issue." Galvin, *supra* note 24, at 88. Her 1996 report was "extremely critical of the lack of an adequate Japanese response to the 'comfort women.'" *Id.*

[308] The UNCHR Subcommission appointed Special Rapporteur Gay McDougall, who issued a report that "criticized Japan for not taking more steps to a full and unqualified acceptance by the Japanese government of its legal liability for the enslavement of over 200,000 'comfort women' during World War II and the consequences arising from such liability." *Id.* at 88-89.

[309] DOLGOPOL & PARANJAPE, *supra* note 19, at 7. The Commission appointed Ustinia Dolgopol and Snehal Paranjape to investigate documents and interview survivors to investigate Japan's wartime comfort system. *Id.*

[310] The Tokyo People's Tribunal was a panel of international judges who heard testimony from former comfort women, legal experts, and scholars on the comfort women system. Wawrynek, *supra* note 73, at 918-19. Although lacking the authority to impose any punishment, it announced that, "'the Tribunal finds Emperor Hirohito guilty of responsibility for rape and sexual slavery.'" *Id.* (citing from Murakami Mutsuko, *From Our Correspondent: Verdict for the "Comfort Women"*, ASIAWEEK.COM, December 18, 2000, http://www.asiaweek.com/asiaweek/foc/2000/12/18).

[311] The Women's International War Crimes Tribunal was a mock tribunal originally proposed by the activist group, Violence Against Women in War-Network, Japan. Nearey, *supra* note 31, at 143. Although its decision was not legally binding, the Tribunal "found that Emperor Hirohito was 'guilty of nonresponsibility for rape and sexual slavery as a crime against humanity." The Tribunal furthermore "determined that 'the government of Japan [had] incurred state responsibility.'" *Id.*

were also ineffective because Japan refused to participate, and tribunal findings and decisions had no binding legal effect on Japan.

*1. Recognition*

One successful aspect of the TRC has been its capacity to serve as a forum for storytelling. Victims benefited from the cathartic effect of telling their stories during TRC hearings and a sense of closure in hearing the stories of others.[312] A hallmark feature of the TRC is the absence of cross-examination during witness testimony.[313] "The chance to tell one's story and be heard without interruption or skepticism is crucial to so many people, and nowhere more vital than for survivors of trauma."[314] Like South Africans, *ianfu* witnessed and experienced unimaginable trauma. The process of telling their stories in a public forum may give some the catharsis that is necessary to begin the process of healing and reconciliation.

The TRC was also lauded for its "focus on victims, including forgotten victims in forgotten places."[315] One TRC official described the deeply powerful victim-focused "ritual" of the TRC proceedings:

> The ritual, which was what the public hearings were, . . . began with a story. This was the secret of the Commission—no stern-faced officials sitting in a private chamber, but a stage, a handful of black and white men and women listening to stories of horror, deep sorrow, amazing fortitude, and heroism. The audience was there too, and a much wider audience watched and listened through television and radio. It was a ritual, deeply needed to cleanse a nation. It was drama. The actors were in the main ordinary people with a powerful story. But this was no brilliantly written play; it was the unvarnished truth in all its starkness.[316]

The TRC was successful because it acknowledged the pain that lay beneath the surface and the need for victims to express that pain as perpetrators listened. For *ianfu*, this type of storytelling has similar potential. The truth commission will give them a forum in which to tell their stories of horror, suffering, and survival.

It is important to note, however, that the storytelling function of the truth commission may be difficult for *ianfu* because of perceptions of shame that are particular to gender and culture. For many *ianfu*, shame had been a recurring

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[312] Lansing & King, *supra* note 290, at 769.

[313] *See* MINOW, *supra* note 243, at 58.

[314] *Id.*

[315] *Id.* at 60.

[316] Galvin, *supra* note 24, at 98 (citation omitted).

problem that they struggled with when deciding to speak out.[317] While many survivors spoke out, many women who joined in the lawsuits preferred to remain anonymous.[318] Plaintiffs' counsel Fukushima Mizuho noted that the women's desire to preserve anonymity was "an indication of the importance of chastity in Korean society, as well as of the mental suffering these women had endured and were continuing to endure."[319] While storytelling is an important method of reconstructing the relationship, truth commission officials must be cognizant of the difficulties that survivors may have in reliving the horrors of their experiences.

### 2. *Responsibility*

The TRC instituted an amnesty program in order to discover truth about events that took place by having perpetrators come forward to accept responsibility for their crimes.[320] Although an amnesty program will be ineffective in a truth commission for *ianfu*, the Japanese government's active participation will be one form of accepting responsibility. The truth commission will give the government ample opportunity to claim responsibility. Applied to reparations for *ianfu*, *ubuntu*[321] is the idea that, as a member of a larger international community, it must accept responsibility for harm caused by its comfort women system.[322] As long as *ianfu* are suffering, the government must make efforts to help them heal. Upon the establishment of the truth commission, the government must actively participate in the hearings and accept responsibility for harm inflicted by its comfort women system.

### 3. *Reconstruction*

Another lesson gleaned from the TRC is the power of reconstructing historical narratives to repair inter-group relationships. The TRC's goal of compiling a thorough record of collective violence was accomplished by collecting testimonies, conducting independent investigations, and granting amnesty to truthful perpetrators.[323] For South Africa, the process of creating

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[317] HICKS, *supra* note 2, at 162. For example, Ri Po Pu "repeatedly stated that, as a woman, what had happened to her was very disgraceful and emphasized that for a Korean woman, it was difficult to speak out." DOLGOPOL & PARANJAPE, *supra* note 19, at 110. Woo Yun Jae hesitated to tell her story publicly because of the "shame" she believed it would bring to her and her family. *Id.* at 92.

[318] HICKS, *supra* note 2, at 162.

[319] *Id.*

[320] YAMAMOTO ET AL., *supra* note 1, at 434.

[321] *See supra* note 285.

[322] *See* YAMAMOTO, *supra* note 143, at 256.

[323] MINOW, *supra* note 243, at 59.

a "common historical memory constructed by victims, perpetrators, and collaborators is central to national reconstruction."[324] Truth commissions are committed to producing a complete narrative of both groups' trauma.[325] The hearings in which victims and perpetrators testified were "important as communal experiences as well as sources of information. '[I]t is the *process* of compiling the commissions' report, as much as the final product, which is important . . . . [I]t is the involvement of broad sectors of society in providing information and in being listened to that is crucial.'"[326] As the TRC showed, "[t]elling stories is a beginning step toward forgiveness and, therefore, nation building."[327]

Storytelling may also help to transform relationships. After giving her testimony before the TRC, one victim of apartheid noted,

> When I have told stories of my life before, afterward I am crying, crying, crying, and felt it was not finished. This time, I know what they've done to me will be among these people and all over the country. I still have some sort of crying, but also joy inside.[328]

The TRC fostered storytelling, which in turn, "facilitated personal and collective mourning" and "enabled them to work through their loss and the losses of black South Africa."[329] The TRC hearings provided a forum in which victims told their stories and perpetrators—along with the rest of the world—listened.[330] The acts of storytelling and listening helped to repair relationships. This type of mutual engagement will be important in truth commission hearings, where *ianfu* would be able to tell their stories, while the Japanese government would listen.

The concern remains, however, that apologies alone are meaningless. Many South Africans were concerned that words alone would not lead to meaningful reconciliation.[331] "Those who suffered need to perceive an apology as complete and sincere, with the former aggressors recognizing the historical roots of present hurts and accepting responsibility for the harm inflicted."[332] The concern over empty apologies has been one of the challenges facing the TRC.[333] For example, many considered former South African President F.W. de Klerk's apology only a "minimalist, insincere effort to satisfy the

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[324] YAMAMOTO, *supra* note 143, at 260.
[325] MINOW, *supra* note 243, at 58 (citation omitted).
[326] *Id.* at 127-28.
[327] YAMAMOTO, *supra* note 143, at 258.
[328] *Id.* at 260.
[329] *Id.* at 258.
[330] *See id.*
[331] *Id.* at 257.
[332] *Id.*
[333] *Id.* at 261-62.

commission's call" and that he "appeared to accede to the requirements of form (apology) without conceding anything meaningful in substance."[334] The problems with apologies appearing in the TRC are similar to the apologies repeatedly issued by the Japanese government[335]—that "the apology must also be accompanied by meaningful social structural and attitudinal changes."[336] With interest-convergence and the Japanese government's active participation, a truth commission hopefully will shift the perception of the apologies away from being mere "cheap reconciliation, in which the words are warm but the relationship is cold." [337]

*4. Reparation*

Material reparations are necessary to give substance and meaning to apologies. In South Africa, material changes were necessary to foster the healing and reconciliation that both black and white South Africans needed.[338] Apartheid had left black South Africans in very poor socioeconomic conditions, so black leaders demanded tangible reparations, namely in improved living conditions and the development of black economic institutions.[339] The African National Congress emphasized that "reparation is essential to healing. 'Unless there are meaningful reparations [by the perpetrators], the process of ensuring justice and reconciliation will be flawed.'"[340]

Likewise, Japan's comfort women system left many poverty-stricken survivors in its wake. At the end of World War II, many *ianfu* had little in the form of material possessions and lived in very poor conditions.[341] Yun Soon-man, for example, currently lives in a rented space that "consists of an outdoor kitchen, a shared toilet area and a room approximately six foot by six foot with one window and a door. Her dream is to be able to own her own house and to have some additional space in which to live."[342] Without rehabilitating survivors' poor material conditions, whether through medical or welfare support programs, reparations will be illusory.[343]

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[334] *Id.*

[335] *See supra* Part VI.B.3.

[336] YAMAMOTO, *supra* note 143, at 257.

[337] *Id.*

[338] *Id.* at 267-68.

[339] *Id.*

[340] *Id.* at 268 (citation omitted).

[341] *See generally* DOLGOPOL & PARANJAPE, *supra* note 19, at 78-119 (retelling the stories of multiple comfort women).

[342] *Id.* at 81.

[343] *See* YAMAMOTO, *supra* note 143, at 204.

Furthermore, history has been a major source of conflict between victims and the Japanese government.[344] The stories emerging from the truth commission hearings will create a new collective history that can be incorporated into Japanese history textbooks.[345] With the emerging stories, the Japanese government will be able to rewrite its history books to incorporate victims' experiences and their collective group narrative of suffering, injustice, and the path to justice.[346] The stories and information drawn out through the truth commission hearings will allow *ianfu* and the Japanese government to embark on other projects to perpetuate the group's collective memory, such as building memorials and creating museums documenting the *ianfu's* experiences and long journey for justice.

### *C. Conclusion*

There are no easy answers to resolving the sixty-year conflict between *ianfu* and the Japanese government.[347] Extensive litigation and the establishment of the AWF were both significant components of the larger struggle for reparations.[348] Their failure to bring about lasting reparations makes the establishment of a truth commission imperative.[349] Time is an urgent issue.[350] The TRC example shows that reconciliation is a long and difficult process that sometimes takes many years—years that many *ianfu* do not have.[351] Their wounds run deep, and time is limited for the survivors who remain waiting for reparations from the Japanese government.[352] Of the thousands of victims, approximately 141 *ianfu* are still alive.[353] Unless the Japanese government begins to actively and sincerely participate in the reparations process, for *ianfu*, justice delayed, will mean justice denied.

Kristl K. Ishikane[354]

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[344] *See supra* Part II.

[345] *See* YAMAMOTO, *supra* note 143, at 198-99.

[346] *See id.*

[347] *See supra* Part II.

[348] *See supra* Part VI.

[349] *See supra* Part VII.

[350] Park, *supra* note 3, at 42.

[351] *Id.*

[352] *See supra* Part III.A.

[353] *Japanese Army's Comfort Woman* [sic], THE HOUSE OF SHARING, 2001, http://www.nanum.org/eng.

[354] J.D. Candidate 2007, William S. Richardson School of Law, University of Hawai'i at Manoa. Thank you to Professor Eric Yamamoto for the constant encouragement and guidance throughout the writing of this paper. Your steadfast commitment to social justice is an inspiration.

# Balancing Authority and Responsibility: The Forbes Cave Collection, NAGPRA, and Hawai'i

## I. INTRODUCTION

By New Year's Eve of 2005 the frustration and tension about the implementation of the Native American Graves Protection and Repatriation Act[1] ("NAGPRA") in Hawai'i had come to a head. As the smoke, light, and sound of fireworks filled the Honolulu sky, Edward Halealoha Ayau sat in a prison cell at the Federal Detention Center.[2] U.S. District Court Judge David A. Ezra had ordered Ayau, executive director of Hui Malama I Na Kupuna o Hawai'i Nei[3] ("Hui Malama"), jailed for contempt of court on December 27, 2005, for failing to obey an earlier order to provide the court with an exhaustive inventory and the exact location of all items loaned to Hui Malama by the Bishop Museum ("the Museum") almost six years earlier.[4] The dozens of items were part of a group of "priceless" artifacts originally stolen from the Kawaihae Caves complex on the Big Island of Hawai'i in 1905 and subsequently sold or donated to the Museum.[5] Hui Malama had re-interred the items in two of the caves from which they were originally taken, thus, in their view, completing the repatriation process and following their *kuleana* (responsibility) to care for the spiritual well being of their ancestors.[6] After Hui Malama had placed the items back in the caves, however, several other NAGPRA claimants came forward to assert their rights to the objects.[7] During the summer of 2005, two of these claimants filed suit in federal court alleging that the Museum and Hui Malama violated NAGPRA and demanding that Hui Malama return the items to the Museum so that the repatriation process could

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[1] 25 U.S.C. §§ 3001–3013 (2000).

[2] Gordon Y.K. Pang, *Judge Sets Ayau Free to Participate in Talks*, HONOLULU ADVERTISER, Jan. 18, 2006, at A1 (explaining that Ayau was jailed on Dec. 27, 2005 and released on Jan. 17, 2006).

[3] This translates as "Group Caring for the Ancestors of Hawai'i." Hui Malama I Na Kupuna O Hawai'i Nei, http://www.huimalamainakupuna.org/#background (last visited on Oct. 25, 2006).

[4] Order Finding Edward Halealoha Ayau, Pualani Kanaka'ole Kanahele, William Aila and Antoinette Freitas in Contempt of Court at 2-5, Na Lei Ali'i Kawananakoa v. Bishop Museum, No. 05-00540 DAE-KSC (D. Haw. Dec. 28, 2005) [hereinafter Contempt Order].

[5] *See infra* text accompanying notes 111-27.

[6] *See infra* text accompanying notes 131-33.

[7] Native American Graves Protection and Repatriation Review Committee Findings and Recommendations, 68 Fed. Reg. 50,179 (Aug. 20, 2003).

be resumed.[8] Judge Ezra found that the plaintiffs had raised serious questions about whether Hui Malama and the Museum had violated NAGPRA and held that the loan of the items had to be recalled so that the repatriation process could validly continue.[9] Judge Ezra ordered Ayau taken into custody for contempt after Hui Malama failed to comply with the recall of the loan.[10]

The reaction of the Hawaiian community to Judge Ezra's order and Ayau's subsequent imprisonment was as emotional as it was mixed. Hui Malama characterized the order as culturally and religiously "repugnant," saying that it was "an order to steal from the dead."[11] Supporters of the group held twice-daily vigils for Ayau while he was imprisoned.[12] Professor Jonathan Osorio, director of the Kamakakukalani Center for Hawaiian Studies at the University of Hawai'i at Manoa, expressed his belief that Ayau, "was incarcerated only because he has defied the federal court's entry into the dispute among *kanaka maoli* and the Bishop Museum."[13]

Others, however, expressed their support for Judge Ezra and their belief that Ayau and Hui Malama were primarily responsible for the fate that befell them. La`akea Suganuma, president of the Royal Academy of Traditional Arts (a plaintiff in the lawsuit against Hui Malama and the Museum), said that he thought Ezra "could have been harsher" and that his actions were "fair".[14] An editorial in the *Honolulu Advertiser* argued that Hui Malama's prior actions in the case were a result of the group "assum[ing] an authority it did not possess."[15] The editorial also said that the case had created "an enormous gulf of distrust" in the Hawaiian community.[16] A letter writer to the *Honolulu Advertiser* expressed his view succinctly saying, "There is always a price to be paid for martyrdom."[17]

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[8] *See* Order Granting Plaintiffs' Motion for a Preliminary Injunction at 9, Na Lei Ali'i Kawananakoa v. Bishop Museum, No. 05-00540 DAE-KSC (D. Haw. Dec. 21, 2005) [hereinafter Order Granting Preliminary Injunction].

[9] Contempt Order, *supra* note 4, at 2.

[10] *Id.* at 5-6.

[11] Reply to Defendant Bernice Pauahi Bishop Museum's Opposition to Defendant Hui Malama I Na Kupuna O Hawai'i Nei's Motion for Relief from the Order Filed Sept. 7, 2005 and For Hearing Filed Dec. 16, 2005 at 16, Na Lei Ali'i Kawananakoa v. Bishop Museum, No. 05-00540 DAE-KSC (D. Haw. Jan. 26, 2006) [hereinafter Reply Brief].

[12] Pang, *supra* note 2.

[13] Jonathan Osorio, Commentary, *Judge Ezra vs. Hawaiian Beliefs*, HONOLULU ADVERTISER, Jan. 5, 2006, at 11A.

[14] Sterling Kini Wong, *Burial Group Resists Court Order*, KA WAI OLA A OHA, Jan. 2006, at 6, *available at* http://www.oha.org/pdf/kwo0601.pdf.

[15] Editorial, *Artifacts Opponents Must Seek Solution*, HONOLULU ADVERTISER, Dec. 28, 2005, at 12A [hereinafter *Seek Solution*].

[16] *Id.*

[17] Michael Jay Green, Letter to the Editor, *Judge Ezra Reviews All Available Materials*, HONOLULU ADVERTISER, Jan. 23, 2006, at A7.

Something has gone seriously wrong with the NAGPRA repatriation process over the past six years in this case. NAGPRA was adopted with the express intent to address flagrant violations of "the civil rights of America's first citizens."[18] How is it, then, that here the NAGPRA process has left the descendents of Hawai'i 's first citizens feeling that they, once again, have been violated? One party to the dispute feels that "an important part of Hawai'i's cultural past [has been hijacked] in a manner that should shock the conscience of the court."[19] Another feels that the District Court demands of them action that "amounts to stealing from the dead [and] threatens severe spiritual consequences for anyone involved."[20] One commentator says that the case "demonstrate[s] the inability of the American judicial system to deal with issues of religious belief."[21] Another says that, "U.S. federal courts have no business making decisions in regard to Hawaiian religious traditions."[22] Does this discord stem from a failure of NAGPRA as it applies to Native Hawaiian issues? Does it stem from a failure of the federal judicial system? Does it stem from an irreconcilable history of conquest and oppression? Or does is stem from a failure of the Native Hawaiian community itself?

This paper will argue that, in this case, there is plenty of fault to go around. There are several problems with NAGPRA and its implementation in Hawai'i that should be addressed and corrected because, as written, it fails to effectively address the distinct cultural and legal differences between Native Hawaiians and Indians on the mainland. Federal courts in Hawai'i should make procedural changes that would incorporate some aspects of Hawaiian culture, thereby lending greater legitimacy to their adjudication of NAGPRA disputes. Native Hawaiian groups themselves, however, must also share some of the blame. Ultimately, the onus is on the Native Hawaiian community to work together to come to a consensus and develop a process that will streamline the repatriation process and make sure that important cultural goals are achieved, because, as has been demonstrated in the past, the federal government and the federal courts often lack the cultural and historical acumen to deal with Native Hawaiian issues in a satisfactory manner.

Section II of this paper outlines the history and practice of NAGPRA. Section III provides an extensive history of traditional Hawaiian burial

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[18] 136 CONG. REC. S17, 173 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

[19] Ken Kobayashi, *Kawananakoa Seeks Transfer of Artifacts*, HONOLULU ADVERTISER, Aug. 20, 2005, at A1.

[20] Declaration of Edward Halealoha Ayau at 4, Na Lei Ali'i Kawananakoa v. Bishop Museum, No. 05-00540 DAE-KSC (D. Haw. Dec. 21, 2005) [hereinafter Declaration of Edward Halealoha Ayau].

[21] Osorio, *supra* note 13.

[22] Eric Po'ohina, Letter to the Editor, *Genealogy Determines Who Gets the Artifacts*, HONOLULU ADVERTISER, Jan. 13, 2006, at A19.

practices, the Forbes Cave collection, and the current dispute. Section IV, using the Kawaihae Caves case as an example, discusses the shortcomings of NAGRPA as applied in Hawai'i and proposes possible avenues for resolving those shortcomings.

## II. NAGPRA: IN THEORY AND IN PRACTICE

When NAGPRA went into effect on November 16, 1990, it represented a long process of compromise and reconciliation that gained the support of many legislators, anthropologists, archaeologists, civil rights groups, and representatives of Indian and Native Hawaiian communities.[23] The statute was the culmination of decades of efforts by Indian and Native Hawaiian groups to prevent and correct the desecration of the graves of their ancestors, to regain control of the remains of thousands of their ancestors so that those remains could be dealt with in a manner consistent with their customs, and to retrieve religious and cultural artifacts that had been stolen or illegally acquired from their peoples.[24]

The legislation expresses Congress' desire to acknowledge that the civil rights of native peoples had been violated through archaeological practices in which their remains were treated differently and less respectfully than the remains of other ethnic groups.[25] While NAGPRA deals with other major areas of federal law,[26] it is designed primarily to address the human and civil rights of American Indians and Native Hawaiians.[27]

NAGPRA arose against a historical backdrop of the victimization of Indians and Native Hawaiians through grave robbing, plundering, and cultural larceny at the hands of Western interlopers.[28] The violation of Native graves and the

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[23] *See, e.g.*, C. Timothy McKeown & Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection and Repatriation Act Twelve Years After*, 21 UCLA J. ENVTL. L. & POL'Y 153, 153-57 (2002/2003) (listing numerous religious, professional, and other organizations that supported NAGPRA).

[24] Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992).

[25] McKeown & Hutt, *supra* note 23, at 154-55; *see also* H.R. Rep. No. 101-877, at 13 (1990) ("There was testimony that non-Indian remains which are unearthed are treated much differently than those of Indians. The non-Indian remains tend to be quickly studied and then reburied while so many Indian remains are sent to museums and curated.").

[26] McKeown & Hutt, *supra* note 23, at 154-55 (explaining that the law deals with components of civil rights law, Indian law, property law, and administrative law).

[27] *See* Trope & Echo-Hawk, *supra* note 24, at 59 ("NAGPRA is, first and foremost, human rights legislation.").

[28] *See, e.g.*, *id.* at 38.

> Massive numbers of Indian dead have been dug up from their graves and carried away. National estimates are that between 100,000 and two million deceased Native people have been dug up from their graves for storage or display by government agencies,

pilfering of Native remains was often tacitly supported or overtly encouraged by museums[29] and the federal government.[30] Respect for the dead and the sanctity of their final resting place has long enjoyed a place of cultural and legal protection in the United States.[31] Unfortunately, it seems that the graves,

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museums, universities and tourist attractions. The practice is so widespread that virtually every Indian tribe or Native group in the country has been affected by non-Indian grave looting.

*Id.*

[29] *See, e.g., id.* at 41-42.

During [the late 1800s], collecting crews from America's newly founded museums engaged in competitive expeditions to obtain Indian skeletons. As Franz Boas, the famous American anthropologist, observed in the 1880s, "it is most unpleasant work to steal bones from graves, but what is the use, someone has to do it." Scientific means were not always used by museum collecting expeditions during this period, which can better be described, in some instances, as "fervid rip-and-run operations." Some museums employed outright deception in order to obtain skeletons. New York's American Museum of Natural History, for example, literally staged a fake funeral for a deceased Eskimo to prevent his son from discovering that the museum had stolen the remains.

*Id.*

[30] *See, e.g., id.* at 40-42.

[T]he search for Indian body parts became official federal policy with the Surgeon General's Order of 1868. The policy directed army personnel to procure Indian crania and other body parts for the Army Medical Museum. In ensuing decades, over 4000 heads were taken from battlefields, burial grounds, POW camps, hospitals, fresh graves, and burial scaffolds across the country. Government headhunters decapitated Natives who had never been buried, such as slain Pawnee warriors from a western Kansas battleground, Cheyenne and Arapaho victims of Colorado's Sand Creek Massacre, and defeated Modoc leaders who were hanged and then shipped to the Army Medical Museum. . . . At the turn of the century, Congress continued its deplorable federal policy with the passage of the Antiquities Act of 1906. That Act, which was intended to protect "archaeological resources" located on federal lands from looters, defined dead Indians interred on federal lands as "archaeological resources" and, contrary to long standing common-law principles, converted these dead persons into "federal property." The Antiquities Act allowed these dead persons to be dug up pursuant to a federal permit "for the permanent preservation of the remains in public museums." Since then, thousands of Indian dead have been classified as "archaeological resources" and exhumed as "federal property."

*Id.*

[31] *See, e.g., id.* at 38-39.

The normal treatment of a corpse, once it is decently buried, is to let it lie. This idea is so deeply woven into our legal and cultural fabric that it is commonplace to hear it spoken of as a "right" of the dead and a charge on the quick. [No] system of jurisprudence permits exhumation for less than what are considered weighty, and sometimes, compelling reasons. These basic values are strictly protected in all fifty states, and the District of Columbia, by statutes that comprehensively regulate cemeteries and protect graves from vandalism and desecration. Criminal laws prohibit grave robbing and mutilation of the dead and ensure that human remains are not mistreated. Statutes in most

remains, and funerary objects of Native peoples were afforded no such respect or protection.

NAGPRA attempts to rectify this historical legacy by creating a mechanism and a process by which lineal descendents, culturally affiliated Indian tribes, and Native Hawaiian organizations can consult with federal agencies and federally funded museums.[32] These consultations serve as the mechanism by which Indians and Native Hawaiians may seek repatriation of Indian or Native Hawaiian remains and cultural items that are held in the museums' or agencies' collections.[33]

Only lineal descendents, Indian tribes, and Native Hawaiian organizations are recognized NAGPRA claimants.[34] "Indian tribe" is defined within the statute as:

> [A]ny tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.[35]

"Native Hawaiian organization" is defined as, "any organization which (A) serves and represents the interests of Native Hawaiians; (B) has as a primary and stated purpose the provision of services to Native Hawaiians; and (C) has expertise in Native Hawaiian Affairs[.]"[36] Hui Malama and the Office of Hawaiian Affairs are the only two groups specifically identified as Native Hawaiian organizations within the statute.[37] "Lineal descendent" is not defined within the statute, but is defined by regulation as:

> [A]n individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descendance to a known Native American individual whose remains,

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states guarantee that all persons—including paupers, indigents, prisoners, strangers, and other unclaimed dead—are entitled to a decent burial. Disinterment of the dead is strongly disfavored under American common law except under the most compelling circumstances, and then only under close judicial supervision or under carefully prescribed permit requirements, which may include judicial consent. Common law goes to great lengths to protect the sanctity of the dead.

*Id.*

[32] McKeown & Hutt, *supra* note 23, at 167.

[33] *Id.*

[34] *See* Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000).

[35] *Id.* § 3001(7).

[36] *Id.* § 3001(11).

[37] *Id.* § 3001(11)(C).

> funerary objects, or sacred objects are being claimed under these regulations.[38]

Under NAGPRA, cultural items are divided into four separate, though closely related, categories: (1) "associated funerary objects"; (2) "unassociated funerary objects"; (3) "sacred objects"; and (4) "cultural patrimony".[39] "Associated funerary objects" are defined as all objects that are reasonably believed to have been placed with human remains at the time of death or later where the remains and the objects are both in the possession of the museum or federal agency; this category also includes any item made exclusively for burial purposes or to contain human remains.[40] "Unassociated funerary objects" are all objects that are reasonably believed to have been placed with human remains at the time of death or later where the objects, but not the associated human remains, are in the possession of the federal agency of museum.[41] "Sacred objects" are defined as specific ceremonial objects needed by Indian and Native Hawaiian religious leaders for the practice of their religions.[42] "Cultural patrimony" is defined as any object that has ongoing historical, traditional, or cultural importance to a Native group or culture such that no individual member of an Indian tribe or Native Hawaiian organization can alienate, appropriate or convey the object; the object must have been considered inalienable at the time that it was separated from the tribe or organization.[43]

Lineal descendents, Indian tribes, and Native Hawaiian organizations have standing under NAGPRA to claim human remains, associated and unassociated funerary objects, and sacred objects that are in the collections of federal agencies or museums or that were excavated or discovered on federal or tribal lands.[44] Indian tribes and Native Hawaiian organizations, but not lineal descendents, have standing to claim objects of cultural patrimony.[45] This is because objects of cultural patrimony are, by statutory definition, communal property, which cannot be owned or claimed by any one member of the Indian or Native Hawaiian community.[46]

NAGPRA required each federal agency and museum to complete a comprehensive inventory of all human remains and associated funerary objects

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[38] 43 C.F.R. § 10.2(b)(1) (2005).
[39] 25 U.S.C. § 3001(3).
[40] *Id.* § 3001(3)(A).
[41] *Id.* § 3001(3)(B).
[42] *Id.* § 3001(3)(C).
[43] *Id.* § 3001(3)(D).
[44] McKeown & Hutt, *supra* note 23, at 184.
[45] *Id.*
[46] *See* 25 U.S.C. § 3001(3)(D).

in its collection within five years of the law's enactment.[47] This inventory was to be undertaken in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders.[48] It was to include a listing of all such items as well as, to the extent possible, to identify the items' geographical and cultural affiliations.[49] Within six months of their completion, these item-by-item inventories were to be provided to culturally affiliated Indian tribes or Native Hawaiian organizations.[50] As of 2002, seven years after the deadline for completion, inventories had been received from 883 federal agencies and museums and 103 national parks.[51]

NAGPRA required that museums and federal agencies undertake a similar process with regard to the unassociated funerary objects, sacred objects, and objects of cultural patrimony in their collections.[52] Rather than an itemized inventory of each item in its collection, however, the museum or agency was required to prepare a written summary of these types of objects.[53] The summary was to describe the scope of the collection, the types of objects that the collection contains, and refer, when "readily ascertainable," to the location, means, and period of acquisition and cultural affiliation.[54] These summaries were to be completed by November 16, 1995, and were to provide Indian tribes and Native Hawaiian organizations with basic information about and notification of the nature of the federal agencies' and museums' collections.[55] Unlike the item-by-item inventories of associated funerary objects, museums and agencies were not required to consult with Indian tribes or Native Hawaiian organizations when preparing these summaries.[56] The summaries were, rather, intended to bring Indian tribes and Native Hawaiian organizations into consultation with agencies and museums following their completion.[57]

Under NAGPRA, federal agencies and museums are required to expeditiously return human remains or cultural items when requested by a lineal descendant, Indian tribe, or Native Hawaiian organization provided that the following criteria are met: (1) the claimant has standing; (2) the object being claimed is within the category of objects covered by the statute; and (3)

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[47] *Id.* § 3003.
[48] *Id.* § 3003(b)(1)(A).
[49] *Id.* § 3003(a).
[50] *Id.* § 3003(d).
[51] McKeown & Hutt, *supra* note 23, at 177.
[52] *See* 25 U.S.C. § 3004(a).
[53] *Id.*; 25 U.S.C. § 3004(b)(1)(A).
[54] 25 U.S.C. § 3004(a).
[55] McKeown & Hutt, *supra* note 23, at 177.
[56] 25 U.S.C. § 3004.
[57] *Id.* § 3004(b)(1)(B).

the claimant can establish lineal descent or cultural affiliation with the object in question.[58]

Even if these criteria are met, however, the federal agency or museum may still retain custody of an item if any of the following statutory exemptions apply: (1) the item is claimed by multiple claimants and the museum or agency is unable to determine by a preponderance of the evidence which of the claimants is the most appropriate recipient; (2) the museum or federal agency obtained the item with the voluntary consent of an individual or group that had the authority to transfer ownership to the agency or museum; or (3) the item is part of the collection of a museum or federal agency and is indispensable to a scientific study which is "of major benefit to the United states."[59]

The federal agency or museum is allowed to retain permanent possession of the item only if it is able to prove that it has the right of possession under the second of these exemptions.[60] Under the first exemption, the federal agency or museum may maintain possession only until such point as the disputing claimants mutually agree upon the appropriate recipient or the appropriate recipient is determined by regulatory or judicial means.[61] Under the third exemption, the items must be returned to the appropriate claimant no later than ninety days after the completion of the study.[62]

Initial questions about the validity of a claim to repatriate objects and the resolution of disputes amongst multiple claimants are left to be resolved amongst the claimants and the federal agency or museum that is in current possession of the objects themselves.[63] Unsatisfied claimants, museums, and federal agencies however, can appeal the repatriation decisions of federal agencies and museums before the NAGPRA Review Committee.[64] The Review Committee considers appeals by any involved party regarding disputes arising under NAGPRA.[65]

Upon request, the Committee may decide to review and make findings related to particular human remains or cultural items, including: (1) whether the remains or items are subject to the jurisdiction of NAGPRA; (2)

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[58] McKeown & Hutt, *supra* note 23, at 184. This article also provides an excellent step-by-step analysis of what must be proven to establish each of these criteria. *Id.* at 184-92.

[59] *Id.* at 192-97.

[60] *See id.* at 193-97.

[61] *Id.* at 193.

[62] *Id.* at 197.

[63] *Id.* at 198. For an excellent analysis of this initial stage of the repatriation process, *see id.* at 198–203.

[64] *See* Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3006(c) (2000).

[65] U.S. DEPT. OF THE INTERIOR, DISPUTE PROCEDURES OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REVIEW COMMITTEE, at 1 (2003), *available at* http://www.cr.nps.gov/NAGPRA/REVIEW/Dispute%20procedures.0305.pdf.

determining the cultural affiliation of the remains or items; (3) determining the ownership of the remains or items; and (4) the appropriate disposition of the remains or items.[66] Upon written request by any party to the dispute, the Review Committee makes an initial determination of whether to consider the dispute.[67]

If the Committee decides to consider the dispute, it schedules a meeting at which it considers the facts of the dispute, listens to representatives of the parties involved, questions the parties' representatives, makes advisory findings as to contested facts, and makes recommendations to the parties or the Secretary as to the proper resolution of the dispute.[68] The Review Committee then publishes its findings and recommendations in the *Federal Register*.[69] The findings and recommendations of the Review Committee are non-binding, but are admissible in any legal action brought under NAGPRA.[70] If the disputing parties still fail to reach resolution following the Review Committees findings and recommendation, any party may resubmit the dispute to the Committee, provided that the party is able to show that it has substantial new information to offer for consideration.[71]

If the parties remain unable to agree after consultation amongst themselves and consideration by the Review Committee, they may look to the federal courts to resolve the dispute.[72] Any person with standing may bring an action in U.S. District Court alleging a violation of NAGPRA, and the district courts have the authority to issue any orders necessary to enforce NAGPRA's provisions.[73] The district courts, therefore, have final, binding authority under NAGPRA.[74]

## III. THE KAWAIHAE CAVES DISPUTE: A NAGPRA IN HAWAI'I CASE STUDY

### *A. Ancient Hawaiian Death and Burial Customs*

Sometimes it is best to begin at the beginning. But perhaps in this case it is appropriate to begin even earlier than that—to begin in a time before the current controversy arose, to begin even before the items in dispute today were removed from the Kawaihae Caves complex by interlopers and sold to the

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[66] *Id.*
[67] *Id.* at 3.
[68] *Id.*
[69] *Id.*
[70] Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3006(d) (2000).
[71] U.S. DEP'T. OF THE INTERIOR, *supra* note 65, at 3-4.
[72] 25 U.S.C. § 3013.
[73] *Id.*
[74] *Id.*

Museum. Our story begins perhaps 300 or 400 years earlier, when the items were, arguably, first spirited away in the caves by ancient Hawaiians.[75]

Like most other cultures, Hawaiians of the time had a highly developed belief system concerning death, the afterlife, and the connection between the deceased and the living. Hawaiians believed that na iwi (the bones)[76] and the *'uhane* (spirit)[77] were connected and that the *'uhane* remained near *na iwi* following *make* (death).[78] Hawaiians believed that the *'uhane* took one of three possible paths after *make*.[79] The *'uhane* could join the *'aumakua* (gods) in *Po* (eternity), it might stay in the burial area and depart for the *Milu* (the underworld), or a ritual known as *'unihipili* might keep the *'uhane* alive in *na iwi* to serve its *kahu* (keeper).[80]

Hawaiians also interred funerary objects with the bodies of the deceased.[81] They believed that these objects were taken with the *'uhane* to *Po*, serving to both sustain and comfort the *'uhane* as it made the journey.[82]

*Na iwi* and the *'uhane* formed the makeup of the complete person—*na iwi* comprising the necessary physical components and the *'uhane* comprising the necessary psychic components.[83] *Na iwi* were what survived after make and became the manifestation of immortality.[84] The *mana* ("supernatural or divine power")[85] of the deceased was imparted to the ground through *na iwi* as they became a part of *Haumea* (Earth).[86] As a result, the entire burial area became sacred with *mana*.[87]

Hawaiians chose their burial sites for symbolic and safekeeping purposes.[88] While loved ones respected *na iwi*, it was also true that *na iwi* could, if found,

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[75] *See, e.g.*, Lisa Sweetingham, *What Would the Ancestors Want? A Suit Over Hawaiian Artifacts Could Decide*, COURT TV, (Sept. 28, 2005), http://www.courttv.com/news/2005/0923/hawaiian_artifacts_ctv.html ("'It was there for three or 400 years before Mr. Forbes stole it . . . .' Said Rev. Charles Kauluwehi Maxwell").

[76] MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 104 (University of Hawai'i Press 1986) (1957).

[77] *Id.* at 363.

[78] Edward Halealoha Ayau, *Native Hawaiian Burial Rights*, *in* THE NATIVE HAWAIIAN RIGHTS HANDBOOK 246 (Melody Kapilialoha MacKenzie ed., 1991); *see also* PUKUI & ELBERT, *supra* note 76 at 228.

[79] Ayau, *supra* note 78, at 246-47.

[80] *Id.*

[81] *Id.* at 249.

[82] *Id.*

[83] *Id.* at 247.

[84] *Id.*

[85] PUKUI & ELBERT, *supra* note 76, at 235.

[86] Ayau, *supra* note 78, at 248.

[87] *Id.*

[88] *Id.* at 248.

be used by enemies against them.[89] Desecration of *na iwi* or burial sites both interfered with the ability of the *'uhane* to join the *'aumakua* in eternity and resulted in injury and spiritual trauma to the living descendents of the deceased.[90] As a result, burial practices developed designed to protect and secrete *na iwi*.[91] These practices included hiding *na iwi* in caves and lava tubes whose locations were known to only a few and keeping burials *hunakele* (secret)[92] so that *na iwi* would not be disturbed.[93]

There exists an essential link between na iwi, funerary objects, gravesites, and the immortality of Native Hawaiians.[94] Any injury or disruption of *na iwi*, the grave, or its objects results in a spiritual and emotional injury to the *`uhane* of the decedent and to his living ancestors.[95]

### *B. The Fall of the Kapu System*

The religious foundation of both public and private life for ancient Hawaiians was the kapu[96] system.[97] The *kapu* system was a highly integrated set of cultural and religious norms and mores that placed supreme authority in the *ali'i* and which regulated and affected nearly all aspects of life and death for ancient Hawaiians.[98] Under the *kapu* system, the ruling *ali'i* and their chiefs enjoyed almost "absolute authority over inferiors and commoners."[99] Violations of the *kapu* system were punished swiftly and severely.[100]

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[89] *Id.* at 247.

[90] *Id.*

[91] *Id.* at 248.

[92] PUKUI & ELBERT, *supra* note 76, at 91.

[93] Ayau, *supra* note 78, at 248.

[94] *See generally id.* at 246-49.

[95] *See, e.g.*, Stewart Yerton, *Whole Foods in PR Pickle: The Idealist Retailer Must Decide What to do About Bones at its Site*, HONOLULU STAR-BULL., July 20, 2006, *available at* http://starbulletin.com/2006/07/20/business/story01.html. Ty Tengan, an assistant professor at the University of Hawai'i, said, "To desecrate iwi is an affront not just to the dead, but also to the deceased person's descendants." *Id.*

[96] "*Kapu*" translates literally as "taboo." PUKUI & ELBERT, *supra* note 76, at 132.

[97] *E.g.*, Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 100 (1998).

[98] *E.g.*, *id.* at 106.

[99] *E.g.*, *id.* at 107-08.

[100] *See, e.g.*, DAVID MALO, HAWAIIAN ANTIQUITIES 56-57 (Nathaniel Emerson trans., Bernice P. Bishop Museum 1951) (1898). Malo explains that:

> The great chiefs were entirely exclusive, being hedged about with many tabus [sic], and a large number of people were slain for breaking, or infringing upon, these tabus [sic]. The tabus [sic] that hedged about an ali'i were exceedingly strict and severe. . . . If the shadow of a man fell upon the house of a tabu [sic] chief, that man must be put to death, and so with any one whose shadow fell upon the back of the chief, or upon his robe or malo, or upon anything that belonged to the chief. If any one passed through the private

Commoners were often put to death for breaking or infringing *kapu* centering on chiefly prerogatives or the separation of chiefs and their inferiors.[101] The eventual end of the *kapu* system, and its aftermath, provides another possible explanation for why certain non-funerary cultural objects were hidden away by Native Hawaiians in burial caves, lava tubes, and sand dunes.

As Westerners began to arrive and prosper in late 18th century Hawai'i, their health and success began to create tension and doubt about the *kapu* system. Hawaiians of the time believed that the observance of the *kapu* system was essential to their health and prosperity.[102] Westerners, however, were wealthy and powerful despite their ignorance or conscious disregard for the *kapu*; the wealth and power of the *haole* (Westerners) offered Hawaiians "the seductive example of the powerful man who did not need the *kapu* to sustain him."[103] This example was particularly seductive for the Hawaiian chiefs, who gradually began to abandon or ignore the *kapu* themselves.[104] Many Hawaiians compared their rules of behavior, which centered on the *kapu* system, with those of visiting Westerners.[105] The comparison was difficult for many Hawaiians to ignore. King Kamehameha I, however, remained "a firm adherent and supporter of the *kapu* system."[106] His death in May of 1819 seems to have created the opening for perhaps the most significant change in post-contact Hawaiian culture, as it was around this time that his heir, Liholiho, officially abolished the *kapu* system once and for all.[107]

Many ordinary Hawaiians, however, while relieved of the life and death burden of religious observation created by the *kapu* system, continued to hold fast to some aspects of their old beliefs.[108] Despite the fact that Christian missionaries began arriving in Hawai'i not long after the fall of the *kapu* system, many Hawaiians continued to practice their religion to some degree.[109] The bones of dead chiefs continued to be venerated; gods of fishing and planting were still given first fruits; the volcano goddess, Pele, still had her devotees; travelers' shrines were still "piled with offerings"; the "spirit world of . . . Hawaiians was still filled with powerful supernatural beings"; and, most importantly in the context of the Kawaihae Caves dispute, an untold number

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doorway of a tabu [sic] chief, or climbed over the stockade about his residence, he was put to death.

*Id.*

[101] *Id.*

[102] *See, e.g.*, GAVAN DAWS, SHOAL OF TIME 53-60 (1974).

[103] *Id.* at 59.

[104] *Id.*

[105] *See, e.g.*, Sullivan, *supra* note 97, at 110-11.

[106] *See, e.g., id.* at 111.

[107] *See, e.g., id.*

[108] DAWS, *supra* note 102, at 59.

[109] *E.g., id.*

of religious artifacts were stashed away to be preserved, protected, and secretly worshipped.[110]

### C. The Forbes Expedition

In October of 1905, David Forbes, William Wagner, and an unnamed third man[111] went searching through burial caves on the Big Island of Hawai'i, ostensibly for blue beads used by the Hawaiians in trade with the Chinese.[112] It is clear from Forbes' writing that the men understood the spiritual significance of those caves and their forbidden nature.[113] Forbes said of the caves that, "[a] Hawaiian will not refer to such a place, will on no account enter a cave, and will seldom, even if highly paid, show the way[.]"[114] The men may have been looking for blue beads used for trade, but what they eventually found in the interlocked Kawaihae Caves complex was a series of burial caves described by Forbes himself as "the last resting place of hundreds of Hawaiians."[115]

The men moved carefully through the caves apparently cataloguing their find and planning their plunder.[116] The objects that they found in, and eventually removed from, the caves included: a "nicely shaped and polished" hardwood, hand-shaped canoe and surfboard serving as the coffin for a "great chief or hero unknown to history";[117] a wooden calabash, described as "the most beautiful . . . I have ever seen, inlaid with human teeth and carved with female figures"; two carved female images; two carved images of 'aumakua; a polished bowl inlaid with human teeth; a helmet made of wood fiber and covered with human hair; a heather cloak; and a water gourd. Along with these items, the intruders discovered many sets of human remains.[118] The men

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[110] *Id.*

[111] *See* David Forbes, *Hidden Treasure: Old Cave on the Island of Hawaii Yields Valuable Museum Pieces* (1909), *available at* http://www.missalohahawaii.com/ForbesDocuments.pdf. The man is never referred to by name. Upon the discovery of two carved figures of *'aumakua*, however, Forbes remarks that, "the Hawaiian assumed a crouching position and covered his face." *Id.* at 3.

[112] *See id.* at 1.

[113] *See id.* at 1-3.

[114] *Id.* at 1.

[115] *Id.* at 2.

[116] *See id.* at 3.

[117] *Ali'i* (royalty) were often buried in canoes made of Hawaiian koa and kukui woods. Ayau, *supra* note 78, at 248.

[118] Forbes, *supra* note 111, at 3.

apparently took what they wanted from the caves without excuse and with great excitement.[119]

On November 7, 1905, Forbes wrote to William T. Brigham at the Museum to tell him about the find and to ask for Brigham's assistance in determining the value of the items that had been removed from the cave.[120] In his letter, Forbes seems to hint, without stating directly, that he would be willing to sell the collection to the Museum.[121]

Brigham replied to Forbes' letter four days later.[122] Brigham informed Forbes that it would be impossible for the Museum to accurately evaluate the items absent a careful inspection of them.[123] He suggested that it would be best for Forbes and his partners to ship the items to the Museum where they could be inspected and appraised.[124] Brigham's letter makes it clear that he and the Museum that he represented understood, even at that point, the illicit and probably illegal nature of the items' removal from the caves. Brigham gave Forbes this advice:

> [K]eep the matter quiet for there are several laws here concerning burial caves, and I shall not make the matter public, of course, until you say so. If you should wish to keep the collection or part of it, the coming from this place [Bishop Museum] should throw any suspicious persons off the scent.[125]

Following this correspondence, the entire collection was sent to the Museum for inspection and valuation. On November 21, Brigham wrote to Forbes, assessing the total value of the collection at $472.[126] Shortly thereafter, the collection was returned to Forbes and his associates, who drew lots to divide the collection amongst themselves.[127] Eventually, all three of the men sold or donated their share of the collection to the Museum, where it remained for the rest of the twentieth century.

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[119] *Id.* at 3 ("After the first, uncanny feeling in a cave wears off, excitement and expectancy carry the explorer along.").

[120] *See* Letter from David A. Forbes to William T. Brigham, Dir., Bishop Museum (Nov. 7, 1905), *available at* http://www.missalohahawaii.com/ForbesDocuments.pdf.

[121] *See id.* ("I may also say that in an indirect way I have a certain interest in the Museum being agent in this District for the Trustees business interest").

[122] *See* Letter from William T. Brigham, Dir., Bishop Museum, to David A. Forbes (Nov. 11, 1905), *available at* http://www.missalohahawaii.com/ForbesDocuments.pdf.

[123] *See id.*

[124] *Id.*

[125] *Id.*

[126] Letter from William T. Brigham, Director, Bishop Museum, to David A. Forbes (Nov. 21, 1905) *available at* http://www.missalohahawaii.com/ForbesDocuments.pdf.

[127] Forbes, *supra* note 111, at 3.

### *D. The Kawaihae Caves Dispute and NAGPRA*

On February 26, 2000, the Museum loaned eighty-three items from the Kawaihae Caves collection to Hui Malama.[128] The Museum had determined that these objects were funerary objects as defined by NAGPRA.[129] At the time of the loan, Hui Malama was one of four NAGPRA claimants to the items recognized by the Museum.[130] Shortly after receiving the items, Hui Malama reinterred them in two separate caves in the Kawaihae Caves complex.[131] Although the loan agreement called for the return of the items within a year, Hui Malama insists that the loan was "to facilitate repatriation of the items" and that "the Bishop Museum did not intend for Hui Malama to return the items."[132] Representatives of the Museum, however, claim that prior to the loan Hui Malama told the Museum that the other claimants had agreed that Hui Malama would hold the items until repatriation was final, and that it was only after the loan was completed that other claimants told the Museum that they had not agreed to the loan.[133]

On March 21, 2000, twenty-one staff members of the Museum sent a highly critical letter to William Duckworth, the Museum's director at the time.[134] The letter asserted that the items had been removed in violation of federal guidelines and museum policy, and that the letter writers had "an ethical obligation as museum professionals and concerned community members to point out that these actions are damaging to the Museum's reputation at many levels".[135] One Museum staff member who signed the letter told a reporter that the Museum had shipped the items out on a Saturday "when nobody else was going to be around, so that [the loan] could be kept secret,"[136] and a Museum

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[128] *See, e.g.*, Native American Graves Protection and Repatriation Review Committee Findings and Recommendations, 68 Fed. Reg. 50,179, 50,179 (daily ed. Aug. 20, 2003).

[129] *See, e.g.*, Notice of Intent to Repatriate, 65 Fed. Reg. 17,898, 17,899 (Apr. 5, 2000).

[130] *Id.* The other three claimants were The Hawaii Island Burial Council, The Department of Hawaiian Homelands, and The Office of Hawaiian Affairs. *Id.*

[131] *See, e.g.*, Declaration of Edward Halealoha Ayau, *supra* note 20, at 6-7 (stating that the items were reinterred within the "po'ele'ele, the darkest of darkness" of the two caves within the complex known as the Forbes Cave and the Mummy Cave).

[132] Edward Halealoha Ayau, remarks at the meeting of the Native American Graves Protection and Repatriation Review Comm., U.S. Nat'l Park Serv., 25 (March 13-15, 2005) (minutes available at http://www.cr.nps.gov/nagpra/review/meetings/RMS029.pdf).

[133] William Brown, Dir. of Bishop Museum, remarks at the meeting of the Native American Graves Protection and Repatriation Review Comm., U.S. Nat'l Park Serv., 24 (March 13-15, 2005) (minutes available at http://www.cr.nps.gov/nagpra/review/meetings/RMS029.pdf).

[134] Robbie Dingeman, *Museum Items Missing*, HONOLULU ADVERTISER, Mar. 25, 2000, at A1.

[135] *Id.*

[136] *Id.* The employee who made these comments, DeSoto Brown, was later suspended without pay for violating museum policies by appearing on radio programs and criticizing the

board member expressed concern about the items being removed without the input of the board.[137] OHA Chairman Clayton Hee said the issue was dividing Hawaiian groups and *'ohana* (families).[138] A representative of the Hawaiian Homes Commission, another of the affiliated claimants, however, stated that from his perspective there was no controversy and that the items were safe and "in good hands."[139]

On April 5, 2000, the Museum published notices of inventory completion and intent to repatriate human remains and funerary objects, including the eighty-three items on loan to Hui Malama, in the *Federal Register*.[140] Other Native Hawaiian organizations that believed themselves to be culturally affiliated with the items were asked to come forward prior to May 5, 2000, and given notice that repatriation to the four currently-recognized claimants would proceed after that date if no additional claimants came forward.[141]

Several Native Hawaiian leaders went public with their dissatisfaction with the loan and the Kawaihae Caves repatriation process in an April 11, 2000, article in the *Honolulu Advertiser*.[142] These leaders expressed concern over the safety and security of the items, citing threats from grave robbers, moisture, and insects.[143] The article described a split in beliefs among Native Hawaiians about the final disposition of the items, with some Native Hawaiians in favor of reburial and others calling for them to preserved "in a museum environment for the benefit of current and future Hawaiian generations."[144] The article warned of growing questions and frustrations within the Hawaiian community over the loan, but pointed out that some other claimants believed that the items would be safe because they trusted in the integrity of Hui Malama.[145]

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Museum's actions regarding the loan. Robbie Dingeman, *Nine Claims Listed for Bishop Artifacts*, HONOLULU ADVERTISER, May 6, 2000, at B1 [hereinafter Dingeman, *Nine Claims*].

[137] Dingeman, *supra* note 134.

[138] *Id.*

[139] *Id.*

[140] *Notice of Intent to Repatriate*, 65 Fed. Reg. 17,898, 17,899 (Apr. 5, 2000); *Notice of Inventory Completion*, 65 Fed. Reg. 17,899, 17,900 (Apr. 5, 2000).

[141] Notice of Intent to Repatriate, 65 Fed. Reg. at 17,899; Notice of Inventory Completion, 65 Fed. Reg. at 17,900.

[142] Robbie Dingeman, *Hawaiian Leaders Urging Artifacts' Return to Museum*, HONOLULU ADVERTISER, Apr. 11, 2000, at A1.

[143] *Id.* The worry about repatriated items being robbed from graves is quite real, as demonstrated by the 2004 theft of 158 items repatriated from the Bishop Museum, re-interred by Hui Malama, and subsequently stolen from Kanupa Cave on the Big Island of Hawai'i. *See* Ken Kobayashi & Gordon Y.K. Pang, *Guilty Plea in Artifact Trafficking*, HONOLULU ADVERTISER, Mar. 25, 2006, at B1. La'akea Suganuma said of the possibility of theft, "Hawaiian artifacts are big on the market, and anything that's not secured is apt to be stolen. These things have been going on for years . . . ." *Id.*

[144] Dingeman, *supra* note 142.

[145] *Id.*

A week later, the director of the Museum apologized for the way that it handled the loan to Hui Malama.[146] William Duckworth stated that, "[t]here is no doubt that Bishop Museum was mistaken in our decision to make the loan without written confirmation, and to make it to Hui Malama. That decision caused great consternation, both within the museum and without, and for that, I—we—apologize."[147]

Following Duckworth's apology, *Archaeology* magazine published an online article questioning the relationship between Hui Malama and the Museum.[148] The article pointed out that Edward Halealoha Ayau previously worked for the Museum for six months and that both his sister and domestic partner, Noelle Kahanu, were currently employed by the Museum.[149] Both Ayau and Kahanu had been employed by Sen. Daniel Inouye in the past, and *Archaeology* wrote that, "the suspicion is that the museum keeps close to them so as to also keep close to Inouye's money pipeline."[150] Representatives of the Museum dismissed the criticism saying that it could be explained as "small-town stuff" and encouraged anyone who could prove any impropriety involving Hui Malama and the Museum to come forward and do so.[151]

In the following months, the Museum determined that nine additional Native Hawaiian organizations were culturally affiliated with the items it had previously loaned to Hui Malama, thereby bringing the total number of claimants to thirteen.[152] One of the claimants said that his organization, comprised of three men of Hawaiian ancestry, entered the fray to open up the repatriation process to public scrutiny and to work towards preserving the artifacts by keeping them in the Museum.[153] Another claimant categorized the reburial of the items as "a great loss to the Hawaiian people."[154]

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[146] Robbie Dingeman, *Museum Regrets Way Relics Released*, HONOLULU ADVERTISER, Apr. 19, 2000, at A1.

[147] *Id.*

[148] Scott Whitney, *Showdown In Honolulu*, ARCHAEOLOGY, Apr. 27, 2000, http://www.archaeology.org/online/features/hawaii/.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Native American Graves Protection and Repatriation Review Committee Findings and Recommendations*, 68 Fed. Reg. 50,179, 50,179 (Aug. 20, 2003). The thirteen culturally affiliated Native Hawaiian organizations were: The Hawai'i Island Burial Council, Hui Malama, The Department of Hawaiian Homelands, The Office of Hawaiian Affairs, the Kekumano 'Ohana, the Keohokalole 'Ohana, the Hawaiian Genealogy Society, Na Papa Kanaka O Pu'ukohola Heiau, The Native Hawaiian Advisory Council, The Pu'uhonua O Waimanalo, The Royal Hawaiian Academy of Traditional Arts, The Nation of Hawai'i, and The Van Horn Diamond 'Ohana. *Notice of Inventory Completion*, 66 Fed. Reg. 14,200, 14,200 (Mar. 9, 2001).

[153] Dingeman, *Nine Claims* (citing Jim Growney of E Nana Pono).

[154] *Id.* (citing Cy Kamuela Harris of the Kekumano 'Ohana).

On September 18, 2000, the Museum's board of directors met and voted to recall the loan of the items to Hui Malama.[155] On September 29, 2000, the Museum wrote to the group, citing other claimants' rights to view the items during the consultation and repatriation process, and demanding that the items be returned.[156] Hui Malama responded on October 10, 2000, saying that it would not return the items.[157] Again, the Museum demanded their return.[158] Hui Malama did not comply with the recall nor did it return the items.[159]

While this back and forth was going on between the Museum and Hui Malama, the Museum met four times with the claimants in an attempt to determine the most appropriate course of action for the repatriation of the items under NAGPRA.[160] Eventually, the claimants began meeting by themselves, without representatives from the Museum, in order to try to resolve internal differences regarding whether or not the items should be removed from the caves.[161]

Despite the groups' inability to agree, the NAGPRA process marched on, and on March 9, 2001, the Museum published notices of inventory completion and intent to repatriate for the eighty-three disputed items in the *Federal Register*.[162] One of the claimants asserted that the claimants were told by the Museum's representatives that the publication of the notice "would not affect the Museum's obligation to recover the items."[163]

A month after publication of the notices, the Museum notified the thirteen claimants that it had repatriated the objects to them.[164] The claimants were asked to agree amongst themselves about the appropriate disposition of the objects and to notify the Museum if they decided that repatriation would require the recovery of the items from their "present location."[165] The claimants were unable to reach a consensus, and on August 4, 2001, they sent the Museum a document that indicated that they had "agreed to disagree" about the disposition of the items.[166]

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[155] *Native American Graves Protection and Repatriation Review Committee Findings and Recommendations*, 68 Fed. Reg. at 50,179.

[156] Order Granting Preliminary Injunction, *supra* note 8, at 6.

[157] *Id.* at 6.

[158] *Id.* at 6–7.

[159] 68 Fed. Reg. at 50,179.

[160] *Order Granting Preliminary Injunction*, *supra* note 8, at 7.

[161] *Id.*

[162] *See* Notice of Inventory Completion, 66 Fed. Reg. 14,200 (Mar. 9, 2001); Notice of Intent to Repatriate Cultural Items, 66 Fed. Reg. 14,201 (Mar. 9, 2001).

[163] Order Granting Preliminary Injunction, *supra* note 8, at 7.

[164] National Park Service Native American Graves Protection and Repatriation Review Committee Findings and Recommendations, 68 Fed. Reg. at 50,180.

[165] *Id.*

[166] Order Granting Preliminary Injunction, *supra* note 8, at 8.

On August 7, 2001, the Museum informed the claimants that the museum had completed repatriation of the Kawaihae Caves items to them and that the claimants would be responsible for the final disposition of the items.[167] The letter also informed the claimants that the Museum would no longer seek to recover the items because its role in the repatriation process as required by NAGPRA had been completed.[168]

Nonetheless, the Royal Hawaiian Academy of Traditional Arts (Academy), one of the claimants, continued to discuss the status of the repatriation with the Museum for the next eight months.[169] This dialogue ceased on March 18, 2002, when the Museum sent the Academy an email stating that the Museum considered the matter closed.[170] Later that same day, the Academy requested in writing that the NAGPRA Review Committee consider the dispute between the Academy and the Museum.[171]

The Review Committee agreed to consider the dispute and to hear testimony at its May 9-10, 2003, meeting in St. Paul, Minnesota.[172] Representatives from the Academy and the Museum gave testimony at the meeting, but no other claimants were present.[173] The Museum's director seemed to reverse his prior statements, testifying that, "because of errors in the process, the repatriation of the eighty-three items loaned to Hui Malama had not been completed and that the Museum's April 12, 2001, letter to claimants" purporting to complete repatriation of the items was invalid.[174] The Museum's director also testified that "the most fundamental error" the Museum made was the loan of the items to Hui Malama.[175] The Academy asked the Review Committee to find or recommend that: (1) repatriation of the eighty-three items did not occur; (2) intentional errors were made during the loan process; (3) the Museum's process for selecting claimants needed to be reviewed; (4) the definitions of

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[167] National Park Service Native American Graves Protection and Repatriation Review Committee Findings and Recommendations, 68 Fed. Reg. at 50,180.

[168] *Id.*; *see also* Order Granting Preliminary Injunction, *supra* note 8, at 8.

[169] National Park Service Native American Graves Protection and Repatriation Review Committee Findings and Recommendations, 68 Fed. Reg. at 50,180.

[170] *Id.*

[171] *Id.*

[172] *See* Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., Minutes (May 9-10, 2003), http://www.cr.nps.gov/nagpra/review/meetings/RMS025.PDF.

[173] *Id.* at 5-8.

[174] William Brown, remarks at the meeting of the Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., 6 (May 9-10, 2003), (minutes available at http://www.cr.nps.gov/nagpra/review/meetings/RMS025.PDF.

[175] *Id.*

funerary objects and objects of cultural patrimony did not fit Hawaiian culture; and (5) the Museum should apologize for its actions.[176]

After considering the statements and reviewing the documentation of the Museum and the Academy, the Review Committee made findings and recommendations by a vote of six to one.[177] The Committee found that: (1) the repatriation process used by the Museum for the Kawaihae Caves items was flawed and incomplete; (2) the place and manner for return of the items was not determined consistent with NAGPRA regulations; and (3) "the Bishop Museum was responsible for the completion of the repatriation process for the [items.]"[178] The Committee recommended that: (1) "the Bishop Museum renew the consultation process for the repatriation of the [items]"; (2) "the Museum recall the loan" of the items to Hui Malama; (3) the claimants in the dispute all be treated in a respectful and equitable manner; and (4) "the eighty-three items be made available to all parties in the consultation."[179]

Committee member Rosita Worl, the lone dissenting vote, said that the thirteen claimants needed to resolve the dispute amongst themselves and expressed concern that the Committee's involvement in the dispute "could set an undesirable precedent."[180]

Even after the Review Committee's findings and recommendations, the dispute remained unsettled, and Hui Malama did not return the loaned items to the Museum. In response to the Review Committee's decision and the ongoing push by Museum officials and other claimants to retrieve the loaned objects from the cave, Native Hawaiian groups opposed to such an action organized and staged a twenty-four hour Memorial Day prayer vigil outside of the Museum.[181] Prominent Native Hawaiian leaders called for the ouster of the Museum's director.[182] Unrest and division in the Hawaiian community over the dispute continued to grow. In the meantime, the federal Office of the

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[176] La`akea Suganuma, remarks at the meeting of the Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., 6 (May 9-10, 2003), (minutes available at http://www.cr.nps.gov/nagpra/review/meetings/RMS025.PDF).

[177] Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., Minutes, 8 (May 9-10, 2003), *available at* http://www.cr.nps.gov/nagpra/review/meetings/RMS025.PDF.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 7.

[181] Vicki Viotti, *Anger Resurfaces Over Retrieving Artifacts*, HONOLULU ADVERTISER, May 28, 2004, at B2.

[182] *Id.* During the controversy, directorship of the Museum had shifted to William Brown. *See id.*

Inspector General ("OIG") initiated a criminal investigation of Hui Malama pursuant to the Review Committee's May 2003 findings.[183]

In September 2004, representatives of Hui Malama appeared before the NAGPRA Review Committee to ask that it rescind its 2003 findings and recommendations regarding the Kawaihae Caves dispute.[184] Hui Malama testified at the meeting that the group had "become the target of lies and slanderous statements" and had been "investigated by the [OIG] as a result of [the Museum director's] actions."[185] The executive director of the Native Hawaiian Advisory Council asked that the recommendations be rescinded.[186] She argued that the repatriation issue should have remained a private disagreement between the Museum and Hui Malama, but that it had "escalated into a pubic disagreement with far-reaching implications."[187] Hui Malama presented signed petitions calling for the Review Committee to rescind all four of its 2003 recommendations.[188]

Conversely, the Academy's La'akea Suganuma testified that Hui Malama "ridicule[d] anybody who disagrees with them" and that Hui Malama "does not represent the Hawaiian people."[189] He pointed out that, while the petitions presented by Hui Malama contained a few hundred signatures, there were "a few hundred thousand Native Hawaiians."[190]

The Review Committee agreed to rehear the dispute in Hawai'i so that all the people integral to the controversy would have the opportunity to address the Committee and agreed to hold all actions and consequences of their previous decisions on the matter in abeyance until the dispute was reheard.[191]

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[183] Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., Minutes, 11 (Nov. 2, 2004), http://www.cr.nps.gov/nagpra/review/meetings/RMS028.pdf.

[184] Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., Minutes, 29 (Sept. 17-18, 2004), http://www.cr.nps.gov/nagpra/review/meetings/RMS027.pdf.

[185] Kunani Nihipali, remarks at the meeting of the Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., 29 (Sept. 17-18, 2004)(minutes available at http://www.cr.nps.gov/nagpra/review/meetings/RMS027.pdf).

[186] Ho'oipo Pa, remarks at the meeting of the Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., 29 (Sept. 17-18, 2004)(minutes available at http://www.cr.nps.gov/nagpra/review/meetings/RMS027.pdf).

[187] *Id.*

[188] Edward Halealoha Ayau, remarks at the meeting of the Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., 30 (Sept. 17-18, 2004)(minutes available at http://www.cr.nps.gov/nagpra/review/meetings/RMS027.pdf).

[189] La`akea Suganuma, remarks at the meeting of the Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., 31 (Sept. 17-18, 2004)(minutes available at http://www.cr.nps.gov/nagpra/review/meetings/RMS027.pdf).

[190] *Id.*

[191] Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., Minutes, 32 (Sept. 17-18, 2004), http://www.cr.nps.gov/nagpra/review/meetings/RMS027.pdf.

The Committee also agreed to instruct the OIG on the scope of its authority regarding Review Committee decisions.[192]

On November 29, 2004, La'akea Suganuma, on behalf of seven claimant groups, sent a letter to the Inspector General's office accusing the NAGPRA Review Committee of attempting to "circumvent the law to the benefit of" Hui Malama.[193] Suganuma asserted that there was no legal basis for the Review Committee's decision to reconsider its 2003 findings.[194] He further stated that the Committee had committed a "travesty" by not enforcing the 2003 orders, and that the ability of the Committee to reverse its decisions "threaten[ed] the integrity" of the entire repatriation process.[195]

Hui Malama responded to the attack in writing, avowing that the Committee's 2003 recommendations affected twelve claimant-owners who were not parties to the dispute at the 2003 meeting.[196] Hui Malama cited the lack of input from other claimants at the 2003 meeting as "clear procedural error."[197] The group also pointed to many claimants' late entries into the repatriation process, writing that, "[the other claimants'] continual assertion that their legal 'rights' were denied does not explain their own lack of *kuleana* and commitment to these *iwi kupuna* and their funerary possessions from the outset."[198]

In the midst of the infighting between already-affiliated claimants, another party entered the fray. Abigail Kawananakoa, a descendent of the royal line of Kalakaua, formed a group called Na Lei Ali'i Kawananakoa.[199] On November 18, 2004, the Museum's board of directors voted unanimously to recognize the group as a Native Hawaiian organization and found the group eligible to become involved with a different dispute regarding items found on the island of Moloka'i.[200] Hui Malama immediately questioned the group's motivations, asking, "[w]here have they been all of these years while we have been fighting for repatriation?"[201]

It was against this continued backdrop of impasse and fiery accusations that the Review Committee's reconsideration of the dispute began on March 13,

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[192] *Id.* at 31-32.

[193] Vicki Viotti, *Burials Panel Accused of Bias*, HONOLULU ADVERTISER, Dec. 1, 2004, at B1.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] Sally Apgar, *Campbell Heir Ups Stakes for Artifacts*, THE HONOLULU STAR BULLETIN, Nov. 21, 2004, *available at* http://starbulletin.com/2004/11/21/news/story2.html.

[200] *Id.*

[201] *Id.*

2005, in Honolulu.[202] The Review Committee admitted at the outset that the final disposition of the Kawaihae Caves objects might be a matter for the courts to decide.[203] The Committee listened to three days of impassioned testimony from claimants on all sides of the dispute and from the public before reaching its final decision on the matter.[204] The final decision reaffirmed all of the Committee's May 2003 findings and recommendations by a unanimous vote.[205] One member of the Committee expressed his hope that all the parties would work "in good faith in the traditions of Native Hawaiians and Native Hawaiian culture" to arrive at an equitable solution that would be in the best interests of past and future Native Hawaiians and Native Hawaiian culture and traditions.[206]

This hope failed to be realized, however, as the claimants were still unable to arrive at a resolution. On August 19, 2005, the Royal Academy of Traditional Arts and Na Lei Ali'i Kawananakoa filed suit in federal court against Hui Malama and the Museum.[207] The plaintiffs accused Hui Malama and the Museum of violating NAGPRA and sought declaratory relief and an injunction to require Hui Malama to return the Kawaihae Caves items to the Museum so that the process of consultation and repatriation could resume.[208]

On September 7, 2005, U.S. District Court Judge David A. Ezra granted the plaintiffs' motion for a preliminary injunction.[209] The court concluded that the plaintiffs had raised serious questions regarding whether NAGPRA had been violated and that the items were at serious risk of irreparable harm while being held in the cave.[210] Thus, the court held, the interests of justice would best be served by returning the items to the Museum where they were to be kept in a secure, private location and to remain undisturbed until questions regarding their appropriate final disposition were resolved.[211] The order required that Hui Malama either return the items to the Museum itself or cause them to be

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[202] *See* Vicki Viotti, *Battle Begins over Burial Artifacts*, HONOLULU ADVERTISER, Mar. 14, 2005, at B1.

[203] *Id.*

[204] *See* Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., Minutes, 23-29 (Mar. 13-15, 2005), http://www.cr.nps.gov/nagpra/review/meetings/RMS029.pdf.

[205] *Id.* at 29.

[206] *See* Dan Monroe, remarks at the meeting of the Native American Graves Protection and Repatriation Review Committee, U.S. Nat'l Park Serv., 29 (Mar. 13-15, 2005) (minutes available at http://www.cr.nps.gov/nagpra/review/meetings/RMS029.pdf).

[207] *See* Order Granting Preliminary Injunction, *supra* note 8, at 9.

[208] *See id.*

[209] *Id.* at 19.

[210] *Id.*

[211] *Id.* at 19-20.

returned to the Museum by some method procured by the group.[212] The order also required Hui Malama to disclose to the court, the plaintiffs, and the Museum the location of the items and to ensure that all parties could be present and monitor the removal of the items from the caves.[213]

Judge Ezra expressed his reticence to have the matter decided by the courts. He wrote that he was "cognizant of the emotional impact" of the ruling and appreciated the concerns of those who observe Native Hawaiian religious and cultural practices.[214] Judge Ezra's decision made it clear that it was his preference that "such sensitive matters might be resolved by an entity composed solely of those persons who have the strongest cultural affinity for and concern about" the items in question, but that, nonetheless, it was his duty to uphold federal law.[215]

The Ninth Circuit affirmed Judge Ezra's order on December 12, 2005, holding that because the District Court did not apply an incorrect legal standard, misapprehend the law, or rely on clearly erroneous findings of facts, it did not abuse its discretion in granting the plaintiffs' motion.[216]

Hui Malama, however, continued to refuse to comply with the order, saying that, "Our responsibility is not to Judge Ezra, it's to the *Kupuna* . . . . He is directing us to be an accomplice to a theft and we will not do it."[217] On December 20, 2005, Judge Ezra ordered Hui Malama to provide the court with "a full and specific inventory of each and every item loaned to it by the Bishop Museum" as well as the names and addresses of every person who knew the location of the items.[218] Hui Malama refused to provide the court with precise information regarding the location of the items or the identities of those who reinterred them.[219]

On December 27, 2005, while expressing the court's desire that "sensitive matters such as this might be resolved by the parties themselves," Judge Ezra found Hui Malama and Edward Halealoha Ayau in contempt of court for refusing to obey the court's orders to turn over information regarding the reburied items.[220] Ayau was remanded to the custody of the U.S. Marshall and ordered to remain in custody until either: (1) Hui Malama provided the court, under seal, with the precise location of each and every item loaned to Hui

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[212] *Id.* at 20.

[213] *Id.*

[214] *Id.* at 21.

[215] *Id.* at 22.

[216] *See* Kawananakoa v. Hui Malama Na Kupuna O Hawai`i Nei, No. 05-16721, 2005 U.S. App. Lexis 27575, at *3 (9th Cir. Dec. 12, 2005).

[217] Gordon Y.K. Pang, *Hui Malama Leader Vows to Defy Judge*, HONOLULU ADVERTISER, Dec. 21, 2005, at A1.

[218] *Id.*

[219] *See* Declaration of Edward Halealoha Ayau, *supra* note 20, at 8.

[220] Contempt Order, *supra* note 4, at 5.

Malama by the Museum and the name and address of all persons with knowledge of the exact location of any of the items; or (2) each and every item loaned to Hui Malama by the Museum was returned to the Museum.[221]

The arrest of Ayau ignited a firestorm of controversy in the press and the Hawaiian community. Lee Cataluna of the *Honolulu Advertiser* categorized Hui Malama as "the go-to organization for the repatriation of Native Hawaiian remains," and suggested that, rather than criticizing the group, people would be better served by asking questions such as, "who are these other groups who claim rights to the burial objects taken from Forbes Cave[?]"[222] Dr. Jonathan Osorio, Director of the Kamakakukalani Center for Hawaiian Studies at the University of Hawai'i at Manoa, wrote that the decision "demonstrated the inability of the American judicial system to deal with issues of religious belief," and that Hawaiian burial practices and beliefs were places where Judge Ezra's court and opinions "[did] not belong."[223] Twice-daily vigils of support were held across the street from the Federal Detention Center where Ayau was held.[224] In February of 2006, a statement signed by several dozen Hawaiian organizations, families, and individuals was published in *Ka Wai Ola*, the newspaper of the Office of Hawaiian Affairs.[225] The statement expressed support for Hui Malama and affirmed the signatories' belief that the Kawaihae Caves repatriation process was complete.[226]

Others, however, were not so kind to the group. Van Horn Diamond, a member of the Diamond 'Ohana, one of the other claimants in the dispute, implied that Hui Malama was more interested in resolving the dispute quickly than in resolving it correctly:

> One of the shortcomings of Hui Malama is that they seem not to know the difference between expediting something and expediency. They always seem to be in a rush. And when you get caught up in that rush thing, you're going to lose out on certain details and it's going to come back and bite you in the butt.[227]

Cy Kamuela Harris, another claimant in the dispute, charged that Hui Malama was "making it up as they go along."[228] La'akea Suganuma said that Judge

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[221] *Id.* at 6.

[222] Lee Cataluna, Commentary, *Group Key in Fight for Repatriation*, HONOLULU ADVERTISER, Dec. 30, 2005, at B1.

[223] Osorio, *supra* note 13.

[224] Gordon Pang, *Dispute Delivers Praise and Scorn to Hui Malama*, HONOLULU ADVERTISER, Jan. 13, 2006, at A1.

[225] Advertisement, *He Ho'oloha—Declaration Calling for the Protection Of The Iwi Kupuna (Ancestral Remains) and Moepu (Funerary Objects) of the Honokoa, Kawaihae Burial Cave*, KA WAI OLA A OHA, Feb. 2006, *available at* http://www.oha.org/pdf/kwo06/0602/18.pdf.

[226] *See id.*

[227] Pang, *supra* note 224.

[228] *Id.*

Ezra had "bent over backwards to accommodate all sides."[229] Professor Haunani-Kay Trask compared the dispute to "a bad divorce" and categorized it as "a case of an irreconcilable difference."[230]

As controversy flowed throughout the community, Ayau remained in custody for three weeks before being set free on January 18, 2006, to participate with other claimants in a modified form of the traditional Hawaiian dispute resolution process known as *ho'oponopono* in order to try to resolve the dispute.[231] Judge Ezra reiterated his belief that "[t]his is an issue for Hawaiians to decide" and expressed the hope that the involved parties could work together to achieve a consensus that would reflect the wishes of their community.[232]

While the mediation was taking place, three new groups filed papers in U.S. District Court asking to intervene in the lawsuit over the Kawaihae Caves artifacts, saying that their "ongoing exclusion" from the lawsuit was "inappropriate" because the involved parties were unlikely to guard the legal rights of other claimants.[233]

In late April of 2006, the *ho'oponopono* process ground to a halt with the competing claimants unable to reach a resolution of their dispute.[234] Plaintiff Abigail Kawananakoa called the four-month effort at mediation "a complete farce"[235] and said that Edward Halealoha Ayau should be returned to prison.[236] Ayau responded by saying he would "be willing to go back to prison if [Kawananakoa was] willing to drop the lawsuit and leave the *kupuna* alone."[237] Judge Ezra said that, while Ayau was still in contempt of court, no purpose would be served by returning him to jail.[238] Rather, Ezra said, the court would

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[229] Wong, *supra* note 14.

[230] Alexandre Da Silva, *Artifacts Case Tests Isle Traditions*, HONOLULU STAR-BULL. (Jan. 24, 2006), *available at* http://starbulletin.com/2006/01/24/news/story12.html.

[231] *See id.* It was difficult for interested outsiders to determine exactly what form of *ho'oponopono* was used or what progress was being made in the case, because the federal court ordered the parties and their attorneys to remain silent about the process. *See Silence Ordered in Artifacts Mediation*, HONOLULU ADVERTISER, Jan. 14, 2006, at B1. *Ho'oponopono* is discussed more exhaustively in Part IV.B.2 of this comment.

[232] Pang, *supra* note 2.

[233] Sally Apgar, *Three New Groups Seek Inclusion on Burial Lawsuit*, HONOLULU STAR-BULL., Feb. 15, 2006, *available at* http://starbulletin.com/2006/02/15/news/story9.html.

[234] *See* Sally Apgar, *Judge Orders Disputed Cave Artifacts Retrieved*, HONOLULU STAR-BULL., Apr. 29, 2006, *available at* http://www.starbulletin.com/2006/04/29/news/story06.html; Gordon Y.K. Pang & Ken Kobayashi, *Search for Artifacts to Resume*, HONOLULU ADVERTISER, Apr. 29, 2006, at A1.

[235] Apgar, *supra* note 235.

[236] Pang & Kobayashi, *supra* note 235.

[237] *Id.*

[238] Apgar, *supra* note 235.

resume efforts to enter the caves and retrieve the hidden objects "in the safest manner possible."[239]

By early September, the sacred objects, previously stolen from a Big Island cave and sold to the Museum for profit, were once again in the Museum's possession—this time, purportedly, for the objects' own protection.[240] The Museum, with the blessing of Judge Ezra and the court, apparently undertook the effort of excavating the objects.[241] La'akea Suganuma said it took the Museum over a week to complete the task.[242] He explained that some of the objects "were buried under rocks or behind cement walls [and] [i]t took them a while to get through all that junk."[243] Suganuma praised the development, saying that it would help to satisfy the plaintiffs' objective of making sure that "every claimant [and] each [N]ative Hawaiian organization, [was] treated fairly and equally."[244] Hui Malama's Charles Kauluwehi Maxwell, meanwhile, said that someone would have to "pay spiritually" for removing the items from the caves.[245] He maintained that all Hui Malama had done was "put back what was stolen by Forbes."[246]

As of this writing, the District Court has yet to decide the Kawaihae Caves case on its merits.

### *E. The Kawaihae Caves Dispute and Public Opinion*

It is very difficult to determine what the true public sentiment is regarding the Kawaihae Caves controversy. A poll of Native Hawaiians taken in June of 2000 found that most wanted the Forbes Caves items to be returned to the Museum and made available for public view and for study.[247] To date, no one has conducted a more recent poll that would give an accurate view of how the litigation and publicity in this case have affected public opinion. Editorials,

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[239] *Id.*

[240] *See* Gary T. Kubota, *Reburied Cave Items Finally Back at Museum*, HONOLULU STAR-BULL., Sep. 8, 2006, *available at* http://starbulletin.com/2006/09/08/news/story02.html.

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] Jan Tenbruggencate, *Most Hawaiians Want Artifacts from Bishop Museum Returned*, HONOLULU ADVERTISER, June 4, 2000, at A26. The poll specifically referred to burial artifacts rather than human remains. *Id.* Fifty-one percent of poll participants said that burial objects should be kept in collections; forty-one percent said that they should be reburied where they came from. *Id.* Poll participants with a larger percentage of Hawaiian blood favored keeping the items in museums for view and study; those with less than one-quarter Hawaiian blood were split on the issue. *Id.*

letters to the editor, and commentaries by Native Hawaiians, however, reflect a wide variety of viewpoints and many fractures within the community.[248] The rifts within the community concern both the substance of the dispute and the way that it is being resolved.

One of the major substantive disagreements about the dispute stems from conflicting opinions regarding the original intent of those who originally placed the items in the Kawaihae Caves complex.[249] Some people believe that not all of the objects in question were placed in the caves as part of a funeral or burial rite.[250] Rather, they argue, the items were hidden in the caves for safekeeping following the dissolution of the kapu system and the arrival of Christian missionaries.[251] Others, however, argue that all of the objects are almost certainly funerary objects, and that they had long been considered to be such by the Museum.[252]

Though the debate rages on, it remains unclear to many Native Hawaiians, and to many interested observers, which, if any, of the objects in question were originally placed in the cave for safekeeping and which were originally associated with burials.[253] A number of people who believe that the items were

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[248] *See, e.g.*, J. Keawe'aimoku Kaholokula, Letter to the Editor, *Court Shouldn't Force Ayau to Violate Beliefs*, HONOLULU STAR-BULL. (Jan. 2, 2006), *available at* http://starbulletin.com/2006/02/02/editorial/letters.html; Osorio, *supra* note 13; Pang, *supra* note 224; Scott Crawford, *Ho'oponopono*, HAWAIIAN INDEPENDENCE BLOG, http://www.hawaiiankingdom.info/C259362623/E20060101235929/index.html (Jan. 1, 2006); *Seek Solution*, *supra* note 15; Cataluna, *supra* note 221; Po'ohina, *supra* note 22; Our Opinion, *Hui Malama's Unyielding Tactics Are Hurtful to Hawaiians*, HONOLULU STAR-BULL., (Jan. 2, 2006), *available at* http://starbulletin.com/2006/01/02/editorial01.html.

[249] *See, e.g.*, Crawford, *supra* note 248.

> [T]he crux of the disagreement seems to be whether the items really are *moepu* or not. Were they originally buried with the *iwi* and intended for eternal rest, or were they placed there later as a way to protect them for a time but perhaps for future generations to find and retrieve? And if the latter, are they still *moepu* or not? What was the intention of the *kupuna* who placed them there? Of course, the problem is that we cannot know that for sure, and it comes down to a matter of cultural interpretation. I believe that those from various perspectives are probably all quite sincere in their beliefs.

*Id.*

[250] *See, e.g.*, John Cotton Wright, Letter to the Editor, *Perhaps Artifacts Meant to be Found*, HONOLULU ADVERTISER, Jan. 2, 2006, *available at* http://the.honoluluadvertiser.com/article/2006/Jan/02/op/FP601020309.html.

[251] *See, e.g.*, *id.*; *see also* Richard W. Rogers, Letters to the Editor, *Cave Items Bring the Ancients Closer*, HONOLULU STAR-BULL., Jan. 2, 2006, *available at* http://starbulletin.com/2006/02/02/editorial/letters.html.

[252] *See, e.g.*, Opinion, Kunani Nihipali, *Seeking the Rightful Home for Bones, Burial Items*, HONOLULU ADVERTISER, May 25, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/May/25/op/op05a.html.

[253] *See, e.g.*, Osorio, *supra* note 13 ("There are . . . Hawaiians who do not share Hui Malama's belief that the items stolen from the Kawaihae caves in 1905 were all [burial objects.]"); *see also*, Crawford, *supra* note 248.

placed in the cave for safekeeping following the abolition of the *kapu* system also believe that the items should be preserved and displayed as an example of the sophistication and craftsmanship of early Hawaiians.[254]

Hui Malama believes, however, that the issue of whether or not the objects are *moepu* (funerary objects) has long been settled. Hui Malama's attorney argues, "There is no dispute that Bishop Museum and David Forbes conspired to loot that burial site of what the museum at that time classified as funerary objects . . . ."[255] Therefore, Hui Malama "firmly believes" that the objects must not be disturbed again.[256] The group and its supporters believe that the classification and repatriation of the artifacts was settled years ago, and that the issue should never have been reopened by the courts.[257] These supporters argue that Judge Ezra's order to return the items to Bishop Museum for safekeeping was an unconscionable edict to, yet again, violate a Hawaiian gravesite, thereby ignoring Native Hawaiian religious and cultural prerogatives.[258]

The very legitimacy of the federal court as a decision making body in cases involving Hawaiian issues has also been publicly called into question.[259] Dr. J. Keawe'aimoku Kaholokula, for example, opined that the federal courts have no business participating in the dispute:

> The courts cannot be allowed to dictate 'what is' and 'what is not' a valid Hawaiian cultural belief and practice or that of any other belief system. The courts cannot be allowed to force an individual to betray his or her belief system and commit perjury to one's religious convictions.[260]

Other commentators went further, asserting that the federal court's actions in the case amounted to little more than another chapter in the ongoing cultural oppression of Native Hawaiians at the hands of an occupying force:[261]

> [T]he larger context is that the U.S. federal courts are most certainly not the proper venue to resolve this issue. [This issue] has been reduced to . . .

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[254] *See, e.g.*, Rogers, *supra* note 251 ("It seems a shame that our museums are being gutted of these treasures at the height of the Hawaiian Renaissance."); Wright, *supra* note 250 ("These items provide documentary evidence to the vibrant, creative, holistic and unique way of Hawaiian life that was fast slipping away."); Apgar, *supra* note 235 ("Kawananakoa said yesterday that the wooden carved images would have been the property of the chiefs, but should be preserved and studied for all Hawaiians.")

[255] Alan Murakami, *Hui Malama*, HONOLULU ADVERTISER, Jan. 15, 2006, at B2.

[256] *Id.*

[257] *Id.*

[258] *See, e.g.*, Osorio, *supra* note 13 ("When Ezra ordered Hui Malama to return to the burial site and violate a gravesite, again, he presented the organization with a choice of forsaking their consciences or their liberty.").

[259] *E.g.*, *id.*; Kaholokula, *supra* note 248; Crawford, *supra* note 248.

[260] Kaholokula, *supra* note 248.

[261] For more on this perspective, and its historical antecedents, see *infra* Part IV.B.1.

> Hawaiians fighting Hawaiians over sacred matters in the occupier's court, with the court depriving one of his freedom. Though they are forced to deal with the venue that has been imposed, this issue epitomizes what the U.S. courts should NOT be deciding, and highlights the whole occupation. But of course the parties can't bring that up, even if they wanted to, for fear of running further afoul of the "judge." But the power he wields to decide the fate of important Hawaiian cultural items and imprison Hawaiians for their religious beliefs is a direct result of the long string of illegal force and fraud, and the very presence of the U.S. court system in Hawai'i is more illegal than the actions of either side that it is trying to adjudicate.[262]

## IV. NAGPRA IN HAWAI'I: WHAT WENT WRONG? CAN IT BE FIXED?

The Kawaihae Caves dispute reflects a failing of the NAGPRA process and a historical distrust on the part of many Native Hawaiians with regard to the U.S. Government's role in adjudicating Native Hawaiian issues. The dispute has dragged on for years while becoming no closer to resolution than it was from the very beginning. As it has rolled on, it has gathered new parties and generated new controversy at nearly every turn. It started as a fairly well-defined issue involving a small number of claimants and somehow became a giant, confused ball of string that has entangled the Native Hawaiian community and created divisions that may not be resolved for years.

Certainly, there must be a better way to implement a law designed to repair the injuries suffered by Native Hawaiian and Indian communities. No single statutory or procedural change can alleviate all of the problems encountered during the Kawaihae Caves dispute. A careful and comprehensive overhaul of NAGPRA and the procedures used in implementing it, however, can improve the way that it works in Hawai'i and help to add legitimacy to the process.

### *A. The Categories of Native Hawaiian Claimants Do Not Reflect the Reality of the Native Hawaiian Community*

NAGPRA, which was designed primarily to address Indian tribes with defined tribal governments, encounters problem when it is applied to Native Hawaiians, who have no federally recognized governing body and no community consensus on self-governance. NAGPRA also fails to take into account the difficulty that Native Hawaiians may have in proving that they are "lineal descendents" as NAGPRA defines that term. The law has been

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[262] Crawford, *supra* note 248.

described as a "disaster" as it applies to Hawaiians.[263] There are a number of possible statutory amendments that could result in the law being more effectively applied in Hawai'i. Statutory amendments by themselves are very unlikely, however, to function as a panacea to resolve all of the problems demonstrated by the Kawaihae Caves case.

NAGPRA contains definitions for "Native Hawaiian organization" and "lineal descendent" because "there [is] no counterpart [in Hawai'i to] Indian tribal government to serve as the principal agent for repatriation."[264] Under the law, lineal descendents have priority over Native Hawaiian organizations when making repatriation claims.[265] Traditional Native Hawaiian burial practices, however, make it extremely difficult or impossible for most interested parties to establish a claim to repatriation as a lineal descendent.[266] As Ronald Mun of the Office of Hawaiian Affairs explained, "The unique circumstances surrounding Native Hawaiian burial practices, such as secreting burial site identification and utilizing communal burial areas such as sand dunes, can make claims on lineal descent very difficult to establish under the current act and associated regulations."[267] This means that in many cases *'ohana*, or family members, who are unable to establish themselves as lineal descendents must try to fit within the statutory definition of a Native Hawaiian organization.[268] Thus, claimants who base their claim to artifacts on genealogy, but are unable to conclusively establish their claims, are often given no preference within the process over organizations with no genealogical ties to the artifacts in question.

NAGPRA should reflect the reality of Native Hawaiian burial practices by creating within its definitions some space for *'ohana* groups that cannot meet the law's rigid standards for lineal descendency, but who still wish to assert their claims under the law. This could be accomplished by either expanding the current definition of Native Hawaiian organization to include family groups with genealogical or geographical ties to the remains or items to be

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[263] Vicki Viotti, *Decision Today on Hawaiian Artifacts*, HONOLULU ADVERTISER, Mar. 15, 2005, at B1. NAGPRA Review Committee member Garrick Bailey said of the law, "[It] doesn't even work that well with the eastern tribes . . . [a]nd it's even more of a disaster with the Hawaiians." *Id.*

[264] *Application of Native American Graves Protection and Repatriation Act in the State of Hawai'i: Hearing Before the Senate Comm. on Indian Affairs*, 108th Cong. 2 (2004) (statement of Sen. Daniel K. Inouye).

[265] *Id.* ("[T]he Department [of the Interior] places a higher priority on the repatriation petitions of lineal descendents, higher than those of Indian tribes and Native Hawaiian organizations[.]").

[266] *See, e.g., id.* (statement of Ronald Mun, Deputy Administrator, Office of Hawaiian Affairs).

[267] *Id.*

[268] *Id.* (statement of Anthony H. Sang, Chairman, State Council of Hawaiian Homelands).

repatriated or by creating a new category of affiliated claimants to allow *'ohana* groups to participate more fully in the consultation and repatriation process.

Ironically, given my assertion that perhaps it should be expanded, another of the problems associated with NAGPRA in Hawai'i is that its definition of "Native Hawaiian organization" might be thought of as being too broad and too inclusive. The law defines a Native Hawaiian organization as: "any organization which: (A) serves and represents the interests of Native Hawaiians; (B) has as a primary and stated purpose the provision of services to Native Hawaiians; and (C) has expertise in Native Hawaiian affairs[.]"[269]

NAGPRA contains no requirement that a Native Hawaiian organization have any members who are actually Native Hawaiian. At least one scholar has argued that this omission was intentional,[270] but this does not mean that such a requirement should not be added to NAGPRA. One can hardly imagine a situation where repatriation decisions regarding Indian artifacts or remains would be left to a person of non-Indian descent. Likewise, the possibility of such a situation should not be allowed to persist in Hawai'i. A requirement that the members of a Native Hawaiian organization under NAGPRA be comprised of a majority of Native Hawaiians would, however, almost certainly be subject to challenges that it was illegal or unconstitutional. Given recent federal court rulings striking down "Hawaiians only" programs as unconstitutional or violative of civil rights legislation,[271] lawmakers must be wary of including any provision in the law that might be seen by the courts as an unlawful racial restriction. Thus, Congress must use caution, careful drafting, and express a clear legislative intent regarding the role of NAGPRA in Hawai'i should it elect to adopt such a requirement.

The definition also includes no provision requiring that a Native Hawaiian organization demonstrate that it has any knowledge or experience regarding traditional Hawaiian burial practices. Some might argue that only a group that is aware of and has an understanding of Native Hawaiian burial practices and the religious customs that relate thereto can be an effective consultant in the repatriation process. A restriction requiring Native Hawaiians organizations to establish knowledge of traditional burial practices and customs might serve to exclude organizations that are not culturally aware while still allowing a broad range of committed groups to meet the statutory definition.

Adding such a restriction, however, may not be as simple as it first appears. For instance, who would determine what traditional and religious knowledge would be required? How would groups demonstrate such knowledge? Who

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[269] Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(11) (2000).

[270] McKeown & Hutt, *supra* note 23, at 161-62.

[271] *See infra* text accompanying notes 285-305.

would set the standards for what is the "correct" understanding of traditional burial practices? One can easily imagine the battles that might take place as groups try to prove that their knowledge of burial practices meet the standards set by the law or that they, rather than another potential Native Hawaiian organization, has the correct understanding of Hawaiian custom. This is not to say that such a requirement would be impossible to draft or enforce. Instead, interested parties should bear in mind the complexities of such an amendment when weighing its drawbacks against its potential positive effects.

As currently written, the definition of Native Hawaiian organization is so broad and so inclusive that the Museum was able to assert at one point that it too was a Native Hawaiian organization entitled under NAGPRA to claim cultural objects that were a part of its collection.[272] The Museum argued that it was a "Native Hawaiian organization under NAGPRA because it 'serves and represents the interests of native Hawaiians' and 'has expertise in native Hawaiian affairs.'"[273] The Museum went so far as to amend its bylaws in 2003 so that it would meet the statutory requirement that it have as a "stated purpose the provision of services to native Hawaiians."[274]

The Museum, once it amended its bylaws, may have been able to technically qualify as a Native Hawaiian organization entitled to claim objects under NAGPRA. Allowing it to do so, however, would have created at least two major problems that would have frustrated the repatriation of funerary objects under the law. First, if the Museum were allowed to claim objects from its own collection as a Native Hawaiian organization, a clear conflict of interest would be created as the Museum would need to operate as both a claimant and as the organization with the statutory authority to determine the final disposition of claimed objects. Second, the Museum's status as a claimant would allow it to effectively frustrate the repatriation process by refusing to agree to a resolution with other claimants. Under NAGPRA, a museum is allowed to retain objects if they are claimed by multiple claimants and the museum cannot determine which of the claimants is the most appropriate recipient.[275] An unscrupulous organization, operating as both the museum in possession of funerary objects and as a Native Hawaiian organization claiming those objects, could use this provision to effectively nullify all other Native Hawaiian organizations' claims to the objects. Other claimants would have

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[272] *See* Editorial, *Does Museum Have a Valid Claim to Native Antiquities*, HONOLULU ADVERTISER, Aug. 8, 2004, *available at* http://the.honoluluadvertiser.com/article/2004/Aug/08/op/op09a.html.

[273] Sally Apgar, *Group Opposes Museum Plan*, HONOLULU STAR-BULL., Sept. 1, 2004, *available at* http://www.starbulletin.com/2004/09/01/news/story6.html.

[274] *Id.*

[275] *See* McKeown & Hutt, *supra* note 23, at 192-97.

few options other than filing suit in federal court to loosen the museum's stranglehold on the objects.

The Museum's attempt to classify itself as a Native Hawaiian organization for the purpose of claiming objects under NAGPRA drew criticism from many corners. The Museum received a petition signed by 361 people opposing their effort.[276] Former OHA trustee Frenchy DeSoto called the plan "an outrage."[277] Edward Halealoha Ayau called the Museum's actions "extremely colonial and paternal," saying that they reopened wounds that NAGPRA was designed to heal.[278] Senator Daniel Inouye, who helped to author the original NAGPRA legislation, also publicly opposed the Museum's effort.[279]

Eventually, the Museum, saying that it "acknowledge[d] concerns over conflicts in judging and making claims on objects in its own collection," decided "not to recognize itself to be a Native Hawaiian Organization that may make claims pursuant to NAGPRA."[280] There is currently, however, no legal impediment should the Museum decide to once again advance this argument, which seems wholly contrary to the intent of NAGPRA. A museum would certainly not be able to claim objects as an Indian tribe. Likewise, museums should not be able to claim objects as Native Hawaiian organizations. To prevent this from happening, NAGPRA's definition of Native Hawaiian organization should be amended to specifically exclude any federally funded museum or agency subject to its mandates.

Statutory changes, however, cannot and will not solve all of the problems associated with the application of NAGPRA in Hawai'i. Many problems will not be solved without the cooperation of both the federal courts and Native Hawaiians. Both the courts and Native Hawaiians must work together to seek and develop creative solutions to the problems of NAGPRA in Hawai'i highlighted by the Kawaihae Caves dispute.

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[276] BISHOP MUSEUM, FINAL GUIDANCE—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (2004), http://www.bishopmusuem.org/Final_NAGPRA_Guidelines.html.

[277] Apgar, *supra* note 273.

[278] *Id.*

[279] See Vicki Viotti, *Inouye Against Museum Claim*, HONOLULU ADVERTISER, Aug. 14, 2004, at B1. Sen. Inouye was quoted as saying, "It (the Museum) is not a Hawaiian organization, it's a museum .... The incorporation of the museum makes it clear that it's not a Native Hawaiian organization ... and I think the law is clear." *Id.*

[280] BISHOP MUSEUM, *supra* note 276.

### B. The Role of the Federal Courts

#### 1. The problem of history

The Kawaihae Caves dispute does not, and should not, be discussed in a historical vacuum. Rather, we must examine the Kawaihae Caves case, and the public reaction to it, through the lens of the complicated historical relationship between Hawai'i and the United States. Only by doing so can we begin to understand the belief held by many Native Hawaiians that an illegitimate federal court is unwarrantedly intervening in what is an essentially Hawaiian dispute between Hawaiians. That perception must be addressed, or else any litigation related to NAGPRA in Hawai'i is destined to suspect in the eyes of the Hawaiian people.

From the beginning of the relationship, the United States has violated many of the rights of Native Hawaiians. In 1893, the U.S. government was complicit in what Congress has acknowledged was an illegal overthrow of the Hawaiian monarchy that resulted in "the deprivation of the rights of Native Hawaiians to self-determination . . . ."[281] Congress has further acknowledged "indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum . . . ."[282] Other scholars have extensively chronicled the historical facts of the overthrow of the Hawaiian monarchy and the subsequent annexation of Hawai'i, and I shall not attempt to duplicate their work here.[283] Suffice it to say that the illegal overthrow of the sovereign Nation of Hawai'i and its subsequent annexation by the United States is viewed by a great number of Native Hawaiians as wholly illegitimate. In fact, many Native

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[281] Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510, 1513 (1993) [hereinafter Apology Resolution].

[282] *Id.* at 1512.

[283] Readers interested in a brief introduction to the history of the overthrow and annexation may wish to consult: Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POLY. REV. 95, 95-112 (1998). Another brief introduction, written from a Native Hawaiian perspective can be found at HawaiianKingdom.Org, Political History, http://www.hawaiiankingdom.org/political-history.shtml (last visited Oct. 21, 2006). A more extensive chronicle of the overthrow and subsequent Hawaiian sovereignty movement can be found in: NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004). An alternate perspective on the history of the Hawaiian sovereignty movement can be found in: THURSTON TWIGG-SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? (1998).

Hawaiians have come to think of Hawai'i not as a state, but as a sovereign nation under military occupation by the United States.[284]

Adding to the distrust and suspicion generated by the uneasy, unsettled history of what might be perceived as the domination of Hawaiians by the United States is the fact that a number of recent, high-profile federal court cases have seemingly further disenfranchised Native Hawaiians. In 2000, for example, the Supreme Court in *Rice v. Cayetano*[285] held that it was unconstitutional to restrict voting for Office of Hawaiian Affairs ("OHA") trustees to Native Hawaiians, even though OHA was created specifically for the betterment of that group.[286] In coming to this conclusion, the majority seems to have at least acknowledged the long and sordid history of the relationship between Hawai'i and the United States[287] before quickly determining that the losses suffered by Native Hawaiians must be subjugated to the law of the United States.[288] The decision seemed, to many, to pay lip service to Hawai'i's history before swiftly brushing it aside in the name of the U.S. Constitution:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawai'i attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawai'i.[289]

Community reaction to *Rice* was angry and abrupt. Mililani Trask, then an OHA trustee, called for "civil disobedience and resistance" by Hawaiians in response to the Court's holding.[290] She urged Native Hawaiians to, "rise up and demand the reinstitution of the Hawaiian Nation and federal recognition of our Nation."[291] Other Native Hawaiian leaders looked at the decision as a "wake-up call and encouraged differing sovereignty factions to unite," but

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[284] *See, e.g.*, Complaint of David Keanu Sai to the United Nations Sec. Council (Jul. 5, 2001) (available at http://www.hawaiiankingdom.org/pdf/Hawaiian_UN_Complaint-only.pdf); Memorial of Lance Paul Larsen filed with the Permanent Court of Arbitration, the Hague, Netherlands (May 22, 2000) (available at http://www.alohaquest.com/arbitration/pdf/Memorial_Larsen.pdf); Petro Hoy, Letter to the Editor, *Kanaka Maoli Have a Legal Right to the Islands*, THE MAUI NEWS, Dec. 22, 2005, *available at* http://mauinews.com/print_version.aspx?id=15402.

[285] 528 U.S. 495 (2000).

[286] *Id.* at 499.

[287] *Id.* at 499-511.

[288] *Id.* at 523-24.

[289] *Id.* at 524.

[290] Walter Wright, *Trustees Won't Budge; Hee Seeks Discussion*, HONOLULU ADVERTISER, Feb. 25, 2000, at A1.

[291] *Id.*

urged against any violent reaction.[292] Many Native Hawaiians and their allies greeted the decision with dismay, anger, and a sense that it was merely the latest in a long line of injustices perpetrated against Native Hawaiian people by the United States.[293] Dr. Noenoe K. Silva summed up the feelings of many Native Hawaiians when she said, "Even though I wasn't surprised, I'm still dismayed that the United States at this level, at the Supreme Court, would fail to recognize us, meaning Hawaiians, as a distinct people, as a distinct nation . . . . It's a part of the overall attempt over 100 years to extinguish us."[294]

Native Hawaiians' confidence in the ability of the federal judiciary to fairly adjudicate Hawaiian issues was further eroded by a Ninth Circuit panel's holding in *Doe v. Kamehameha Schools*.[295] The Kamehameha Schools are a system of private, nonsectarian schools founded by a bequest of Beatrice Pauahi Bishop, the last direct descendant of Kamehameha I.[296] In *Kamehameha Schools*, a Ninth Circuit panel held that Kamehameha's "Hawaiians First"[297] admissions policy "operate[d] as an absolute bar to

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[292] *Id.*

[293] *See, e.g.*, Dan Nakaso, *The* Rice v. Cayetano *Decision*, HONOLULU ADVERTISER, Feb. 24, 2000, at A3 ("[M]any Hawaiians saw [the decision] as one more insult from a Western government that illegally overthrew their kingdom 107 years ago and fails to understand their needs today."); *see also* Chris K. Iijima, *Beyond* Rice v. Cayetano*: Its Impacts And Progeny: New Rice Recipes: The Legitimization of Continued Overthrow*, 3 ASIAN-PAC. L. & POL'Y J. 8 (July, 2002), which states:

> [T]he ultimate tragedy of the *Rice* decision is not only what it reveals about the racial and social ignorance of the Supreme Court. The tragedy is also to what the decision gives legitimacy. Despite the fact that since the illegal overthrow of the Hawaiian Kingdom and the United States government's concession that the "indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty," the *Rice* decision has legitimized a legal discourse and strategy that continues to assault Hawaiian sovereignty claims through the perpetuation of "colorblind" ideology. This ideology simultaneously assaults the justice claims of people of color, and permits an unrelenting political attack on Native Hawaiian sovereignty in the disguise of equal protection claims. *Rice* is both the product and facilitator of an underlying right-wing political agenda against the claims for racial equity by people of color.

*Id.*

[294] Nakaso, *supra* note 293.

[295] *Doe v. Kamehameha Sch.* 416 F.3d 1025 (9th Cir. 2005) *vacated and rehearing en banc. granted*, 441 F.3d 1029 (9th Cir. 2006).

[296] *Kamehameha Sch.*, 416 F.3d at 1027; *see also* 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. 393-94 (1999) (describing the trust that established the Kamehameha Schools); Jon M. Van Dyke, Opinion, *Judges Should Study Isle History*, HONOLULU ADVERTISER, Aug. 7, 2005, at B1 (providing a brief history of Kamehameha Schools and its creator).

[297] The Kamehameha Schools' admissions policy expressly stated that applicants having no aboriginal blood would not be admitted to the school so long as there were sufficient numbers of qualified Native Hawaiian applicants to fill all the spaces at the schools. *Kamehameha Sch.*,

admission for non-Hawaiians" and "categorically 'trammel[led]' the rights of non-Hawaiians".[298] The court further held the admissions policy constituted unlawful race discrimination in violation of 42 U.S.C § 1981.[299] In so holding, the court seemingly disregarded the District Court's findings that "the admissions policy had a legitimate remedial purpose, given the 'exclusion and marginalization' of Native Hawaiians, and that the policy furthered this purpose by improving Native Hawaiian test scores, increasing Native Hawaiian college enrollment, and producing Native Hawaiian leaders . . . ."[300] The Ninth Circuit also "refused to evaluate the admissions policy in light of congressional legislation indicating a special trust relationship between the United States and Native Hawaiians."[301]

The *Kamehameha Schools* decision created shock and sadness in a great number of Native Hawaiians and their allies. One scholar expressed the feelings of many when he commented that the decision, if allowed to stand, would, "mark another event in the long process whereby Native Hawaiian lands have been taken from the Native Hawaiians."[302] Native Hawaiians and their supporters gathered together in large groups to express their displeasure with the ruling and what they perceived as another attack on one of their most precious cultural institutions.[303] An estimated 20,000 people on five Hawaiian islands marched in support of the school, which was characterized by one of its trustees as, "the last hope of the Hawaiian people."[304]

Hawaiians' reactions to *Rice* and *Kamehameha Schools* foreshadowed and paralleled the reactions of many to Judge Ezra's order to jail Edward Halealoha Ayau in the Kawaihae Caves dispute. All three cases touched a nerve in the Native Hawaiian community—dredging up historically legitimate feelings of disenfranchisement and oppression, and all three cases raised the question of what right the U.S. Government has to dictate the proper and/or the

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416 F.3d at 1039. Kamehameha Schools argued that the racial preference policy was "not an absolute bar to the admission of non-Hawaiians because if spaces exceed the number of qualified native Hawaiian applicants," the schools would admit non-Hawaiian students. *Id.* at 1039 n.8. The Ninth Circuit panel was not swayed by this argument, stating that, "[w]hether or not the policy is, in the abstract, an absolute bar to admission for those of the non-preferred race, it certainly operates as one." *Id.*

[298] *Id.* at 1041.

[299] *Id.* at 1027.

[300] *See, e.g., Recent Case: Civil Rights—Section 1981—Ninth Circuit Holds That Private School's Remedial Admissions Policy Violates 1981*, 119 HARV. L. REV. 661, 662-63 (2005).

[301] *Id.* at 663-64.

[302] Van Dyke, *supra* note 296.

[303] *See, e.g.*, Gordon Y.K. Pang, *Hawaiians Uniting in Anger*, HONOLULU ADVERTISER, Aug. 4, 2005, at A1.

[304] Gordon Y.K. Pang & Will Hoover, *Statewide Support for Kamehameha Schools: Rally Cry: Justice Now*, HONOLULU ADVERTISER, Aug. 7, 2005, at A1 (quoting Kamehameha Schools trustee Nainoa Thompson).

legal expression of Hawaiian culture and religion. Within the unique context of Hawaiian history, is there any possible way for the federal courts to deal with future NAGPRA litigation in Hawai'i in a way that will render their decisions more legitimate in the eyes of a larger percentage of Native Hawaiians?

*2. Can federal courts hearing NAGPRA disputes ever achieve legitimacy in the eyes of Native Hawaiians?*

As soon as the Kawaihae Caves lawsuit was filed in federal court, it seemed inevitable that it would run headlong into this general feeling of historical distrust and suspicion, regardless of the eventual result of the case. Given the United States' historical legacy in Hawai'i, the federal judiciary's role in any dispute involving Native Hawaiian religion or culture will be viewed as suspect by a significant proportion of the Native Hawaiian community. Only through significant procedural changes can federal courts hearing NAGPRA disputes in Hawai'i address the questions of legitimacy and sovereignty raised by the historical record. And even then the results are likely to be mixed in the minds of many Native Hawaiians.

One of the first procedural changes the federal courts should make is to formally adopt a policy of offering Native Hawaiian disputants in NAGPRA cases the option of trying to resolve the dispute on their own through a court-supervised form of *ho'oponopono*.[305] Judge Ezra, admirably, made such an offer in the Kawaihae Caves case.[306] While efforts at mediation failed in this case, *ho'oponopono* may greatly aid in the satisfactory resolution of other NAGPRA disputes in Hawai'i.

*Ho'oponopono* is a Hawaiian family problem-solving process designed to restore harmony.[307] The central metaphor of *ho'oponopono* is that of a tangled net: a family is a net of relationships and any disturbance in one part will pull on all other parts.[308] Traditionally, *ho'oponopono* is a "highly structured process with four distinct phases": an opening stage that includes prayer and a statement of the problem; a discussion phase where the involved parties calmly share their feelings and listen to the feeling of the others as they speak; a resolution phase involving confession, forgiveness, and release; and a closing

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[305] *Ho'oponopono* is defined, literally, as "to correct." PUKUI & ELBERT, *supra* note 76, at 82.

[306] Pang, *supra* note 232.

[307] E. VICTORIA SHOOK, HO'OPONOPONO: CONTEMPORARY USES OF A HAWAIIAN PROBLEM-SOLVING PROCESS 10 (University of Hawai'i Press 2002) (1985). The term *ho'oponopono* means, "setting to right . . . to restore and maintain good relationships among family, and family and supernatural forces." *Id.*

[308] *Id.* at 10-11.

phase featuring summary and the exchanging of thanks.[309] The goal of *ho'oponopono* is not merely to resolve dispute, but to loosen entanglements, to repair relationships, and to create harmony within the group.[310]

The appeal of *ho'oponopono*, and what endows it with the power to add legitimacy to NAGPRA litigation, is that it gives its participants a chance to solve their dispute on their own, with little involvement by the federal court. According to Judge Ezra, "The whole idea [was] to take the matter out of the courtroom and into the hands of Hawaiians . . . I want[ed] to make this case a healing rather than a divisive circumstance for the Hawaiian community."[311]

Because disputants in NAGPRA cases would be resolving the dispute on their own, if a resolution was reached through *ho'oponopono*, it could not be seen as anything but legitimate by the disputants and most Native Hawaiians. *Ho'oponopono* provides a perfect opportunity for Native Hawaiians to use a Hawaiian process to resolve a Hawaiian dispute and to heal rifts within their community.

Judge Ezra's willingness to utilize *ho'oponopono* in the Kawaihae Caves case drew praise from some Native Hawaiians. Edward Halealoha Ayau, leader of Hui Malama, commented, "I believe this latest development in the case is the most promising and important because it seeks to return the dispute back to where it rightfully belongs: In the Hawaiian cultural realm and not in the courts."[312] Commentator Scott Crawford addressed the legitimacy of the federals courts more directly, "I do hope some kind of process can occur with those closely involved, mainly the lineal descendants, to get the matter out of the occupier's court . . . and resolve the fate of the items in a way that truly does *ho'oponopono*."[313] Judge Ezra himself has said that he hoped that the groups would be able to resolve their dispute outside of his court and would be able to work together "despite a history of disharmony."[314] His optimism was tempered, however, as he acknowledged that *ho'oponopono* also gave the groups "an opportunity to fail."[315]

And, of course, the groups did fail to reach an agreement using *ho'oponopono*. Even though *ho'oponopono* failed to produce a solution to the impasse, however, it may still assist the participants as they work to repair the

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[309] *Id.* at 12.

[310] *Id.* at 10-11.

[311] Gordon Pang, *Artifacts Litigants Consider Old Ways*, HONOLULU ADVERTISER, Jan. 6, 2006, at B1.

[312] Gordon Pang, *Hui Leader Calls Mediation Promising*, HONOLULU ADVERTISER, Jan. 12, 2006, at B1.

[313] Crawford, *supra* note 248.

[314] Pang, *supra* note 2.

[315] *Id.*

relationships that have been strained during the emotional, often divisive, and sometimes ugly wrangling over the Kawaihae Caves objects:

> Finding common ground—or at least making the effort—could lower the tensions generated over the jailing of Edward Halealoha Ayau, leader of the group opposing retrieval of the artifacts . . . . The true casualty here is not a single man but the cohesion of the Hawaiian community. Divisions will only grow wider with continuing rancor.[316]

Judge Ezra remained optimistic following the break down of efforts at *ho'oponopono*, saying, "I am, of course, disappointed that the matter was not resolved to a conclusion . . . . But that doesn't mean that I think the process was a failure."[317] He also noted that the parties were, at least, able to agree on some issues.[318]

One unavoidable effect of the breakdown of the *ho'oponopono* process in the instant case is that the district court has now become the decision-making body charged with the final resolution of the dispute. NAGPRA vests final jurisdiction in the federal courts,[319] and Judge Ezra cannot simply refuse to make a decision when there is a justiciable issue before him. Does this mean that any final decision made by Judge Ezra in this case will be viewed by many as illegitimate, or is there some other way for the federal courts to address the lingering questions about their legitimacy and their role in resolving questions related to Hawaiian religion and culture?

First of all, the act of simply providing the parties with the chance to do *ho'oponopono* should add legitimacy to further proceedings now that the parties have failed to reach a resolution on their own. Since the parties could not or would not reach agreement through *ho'oponopono*, they must understand that their failure to do so has resulted in the ceding of decision-making authority back to the court. The parties' failure to reach an agreement might be viewed by some as implicitly saying that they believed that the court was more likely to reach an equitable solution than they were able to on their own.

In addition, there may also be other avenues besides *ho'oponopono* for courts in Hawai'i to use traditional Hawaiian dispute resolution methods as they adjudicate NAGPRA controversies. Creative, culturally cognizant judges may seek opportunities to make procedural changes that incorporate traditional practices while still maintaining the court's role as the final arbiter of disputes. If courts are able to effectively do so, they should certainly make the final

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[316] Editorial, *Cooldown is Needed in Forbes Burial Case*, HONOLULU ADVERTISER, Jan. 7, 2006, at A6.

[317] Pang & Kobayashi, *supra* note 235.

[318] *Id.*

[319] *See* Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3013 (2000).

resolution of NAGPRA litigation in Hawai'i more palatable to the parties and to the Hawaiian community as a whole.

Judges may be interested in integrating traditional, indigenous conflict resolution practices into the federal courts' procedural structure while still maintaining control over the final resolution of litigated NAGPRA disputes. Those judges may wish to look at similar successful models as they develop their procedures. First Nation circle sentencing provides one example of such a model.

First Nation circle sentencing was developed by Canadian judges as an alternative to conventional sentencing hearings in certain types of criminal cases involving aboriginal defendants.[320] It has since been utilized by judges in Minnesota for use in both Indian and African-American communities.[321] The judges who developed circle sentencing were motivated primarily by overwhelming evidence that the conventional criminal justice system was dismally failing First Nation communities.[322] The process allows for direct community involvement in the sentencing process, with a final objective of arriving at an appropriate sentence that reflects the consensus of the sentencing circle.[323] The purpose of the circle sentencing process is "to have the aboriginal community regain a measure of control over the justice system in a manner more conducive to [the community's] traditional methods of dispute resolution."[324]

The exact parameters of the circle sentencing process vary from judge to judge, but some general aspects remain consistent.[325] Put simply, circle sentencing involves a process where "individuals are invited to sit in a circle with the accused and discuss together what sentences should be imposed."[326] "Participants in a sentencing circle usually include the offender, the judge, the victim, the prosecutor and the defendant's lawyer, along with a cross-section of the community (including family members of the offender and the

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[320] *See, e.g.*, Luke McNamara, *The Locus of Decision-Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines*, 18 WINDSOR Y.B. ACCESS JUST. 60, 71-74 (2000).

[321] Gretchen Ulrich, *Current Public Law and Policy Issues: Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLINE J. PUB. L. & POL'Y 419, 438-40 (1999). For some criticisms of circle sentencing, *see id.* at 440-46.

[322] McNamara, *supra* note 320, at 72.

[323] *Id.* at 73.

[324] *Id.* at 76 (quoting L. Chartrand, *The Appropriateness of the Lawyer as Advocate in Contemporary Aboriginal Justice Initiatives*, 33 ALTA. L. REV. 874, 878 (1995)).

[325] McNamara, *supra* note 320, at 72.

[326] *Id.* at 71-72 (quoting R. DUSSAULT, ROYAL COMMISSION ON ABORIGINAL PEOPLES, BRIDGING THE CULTURAL DIVIDE: A REPORT ON ABORIGINAL PEOPLE AND CRIMINAL JUSTICE IN CANADA (Ottawa Royal Commission on Aboriginal People, 1996)).

victim)."[327] The basic organizing principle of the sentencing circle "is that everyone is eligible and welcome to attend, and that the community takes primary responsibility for ensuring that there is appropriate representation amongst the participants."[328] A number of judges also require evidence that the circle be non-partisan and representative of the community as a whole.[329]

"While circle sentencing involves a conscious departure from a number of the practices which define the conventional style of sentencing, it remains, formally and legally, a sentencing hearing within the court system" with the judge retaining final authority over the sentence imposed.[330] Circle sentencing provides for a blending of aboriginal practice with a formalized, Western justice system. The result is that circle sentencing, as used by Canadian courts, is a dispute resolution practice that is neither wholly aboriginal nor wholly Western.[331]

Judge Barry Stuart of Yukon Territorial Court has stated that among the benefits of circle sentencing are that it:

> [1] challenges the monopoly of professionals; [2] enhances the range and quality of information on which a sentencing decision can be made; [3] increases the likelihood that creative sentencing options will be identified; [4] promotes shared responsibility for the making and implementation of sentencing decisions; [5] encourages offender and victim participation in the sentencing decision; [6] facilitates improved understanding of the limitations of the conventional justice system; [7] broadens the conventional criminal justice system's narrow focus on the conduct of the offender; [8] encourages identification of productive ways to use community resources; and [9] involves greater recognition of Aboriginal cultures and values.[332]

In Judge Stuart's final appraisal of the process he says that, "The circle contributes the basis for developing a genuine partnership between aboriginal communities and the justice system by according the flexibility for both sets of values to influence the decision-making process . . . ."[333]

It would be a mistake to argue that federal courts hearing NAGPRA cases in Hawai'i should adopt a form of circle sentencing taken whole cloth from the Canadian courts with minor adjustments to fit the categories of disputes involved. In their attempts to develop a method of combining traditional Hawaiian dispute resolution with western methods of resolving legal disputes judges should guard against the belief that what has worked for other

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[327] McNamara, *supra* note 320, at 72-73.

[328] *Id.* at 84.

[329] *Id.*

[330] *Id.* at 73.

[331] *Id.* at 72.

[332] *Id.* at 75 (citing R. v. Moses, 71 C.C.C.3d 347, 357-67 (Y. Terr. Ct. 1993)).

[333] *Id.* at 72 (quoting *Moses*, 71 C.C.C.3d at 366-67).

indigenous peoples will necessarily work for Native Hawaiians.[334] There can never be a simple one-to-one transfer of traditional practices from one distinct indigenous group to another distinct indigenous group when those groups are separated by time, geography, history, and tradition.

Instead, judges interested in blending traditional Hawaiian practices with the formal judicial procedures must work cooperatively with Native Hawaiians to develop creative procedural solutions to the problems associated with NAGRPA litigation in Hawai'i. Such solutions may originate with and be dependent upon federal judges, but they must ultimately be based in and owned by the Hawaiian community. The success of these solutions depends not upon whether or not they are wholly "Hawaiian" in their scope and process, but rather upon whether or not the Hawaiian community ultimately takes ownership of them and sees their results as legitimate.

### *C. The Role of Native Hawaiians*

The most conclusive way, of course, for Native Hawaiians to see the results of this or any other NAGPRA dispute as legitimate is for Native Hawaiians themselves to retain the final decision-making authority. Something that strikes me as extremely disappointing about the Kawaihae Caves dispute is that throughout the process, at nearly every level of review, the decision-making bodies have encouraged the claimants to resolve the dispute amongst themselves, and the claimants have been utterly unable to do so. It is both ironic and heartening that the last, best chance to resolve the Kawaihae Caves dispute in a way that will be satisfying to the Native Hawaiian community may exist completely outside of the formal structure of NAGPRA and the judicial apparatus.

Almost fifteen years ago, a scholar observed that, "[t]he central task under NAGPRA will be the interpretation and meaning of the tribe's own cultural and legal standards."[335] This is still the task facing Native Hawaiians today, the key distinction being that Native Hawaiians must undertake to interpret

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[334] One scholar has described the notion that one form of indigenous dispute resolution will work for all indigenous peoples, regardless of culture as being based on:

> [T]he spurious assumption that there are homologous social structures among Indigenous cultures. In other words, Indigenous people all over the world are seen as the same. Family group conferencing grew out of Maori traditions; Maori people are Indigenous; therefore all Indigenous people will benefit from family group conferencing. Ultimately such a view is racist, ascribing as it does some essentialist core to what it is to be authentically "Indigenous" without cultural, spatial or temporal difference.

*Id.* at 80 (quoting C. Cunneen, *Community Conferencing and the Fiction of Indigenous Control*, 30 AUS. & N.Z. J. CRIM. 292, 300 (1997)).

[335] Rennard Strickland & Kathy Supernaw, *Back to the Future: A Proposed Model Tribal Act to Protect Native Cultural Heritage*, 46 ARK. L. REV. 161, 163 (1993).

and define their cultural and legal standards without the homogenizing and controlling influence of a tribal governing structure. This seems a daunting task, perhaps unlike anything ever before attempted. Native Hawaiians must undertake to resolve their disputes in the absence of tribal courts or a single governing body that represents their interests.[336] This challenge, and how it is met, may ultimately define what it is to be Hawaiian.

NAGPRA itself recognizes that the federal courts are ill prepared to decide issues related to Indian and Native Hawaiian culture and traditions.[337] The federal courts ultimately control whether or not they will choose to adopt traditional practices as a part of their resolution of NAGPRA disputes. If they do not, it is highly unlikely that any decision made by the courts with regard to the Kawaihae Caves dispute, or any other Native Hawaiian dispute involving NAGPRA, will be satisfying to most Native Hawaiians.[338] And, even if they do, there is no real reason to believe that the federal courts are any more able to resolve these disputes amicably and correctly than is the Native Hawaiian community.

In fact, given their collective knowledge of Hawaiian tradition, religion, and culture, it seems obvious that Native Hawaiians are the only group adequately equipped to determine the appropriate disposition of objects repatriated under NAGPRA. The federal courts have the authority to decide should Native Hawaiians fail to agree, but a serious effort must be made to try to ensure that the courts rarely need to exercise that authority. The only way that Native Hawaiians can ensure that NAGPRA issues are decided in a way that

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[336] *See, e.g.*, Matthew J. Petrich, Comment, *Litigating NAGPRA in Hawai'i: Dignity or Debacle*, 22 U. HAW. L. REV. 545, 553 (2000), which states:

> NAGPRA allows for the substitution of some Native American concepts for Anglo-American legal understandings. For example, NAGPRA recognizes that in some cases, Tribal courts are the better decision-makers to interpret factual and legal issues under NAGPRA. Thus, Native American concepts and values can become the controlling standards. Unfortunately, there are currently no Tribal courts in Hawai'i, nor is there an organized Native Hawaiian government that represents all Native Hawaiians. Native Hawaiians do not fit NAGPRA's mold.

*Id.*

[337] *See, e.g.*, Strickland & Supernaw, *supra* note 335, at 162. The authors argue:

> The Act is important not only because it acknowledges the significance of tribal historic and sacred traditions but because it focuses upon the Native community as the center for factual determination and interpretation of many legal questions. The Act represents a legislative recognition that Native Americans, through their own codes of law and Indian tribal courts, are the best prepared decision-makers to evaluate factual issues under NAGPRA.

*Id.*

[338] *See* Petrich, *supra* note 336 ("The fact that issues such as those envisioned by NAGPRA require a resolution process that 'makes sense' to the culture whose dignity is at stake cannot be overstated.").

satisfactorily reflects Hawaiian cultural and religious traditions is to attack the problems inherent in NAGPRA as a community. The federal courts simply lack the requisite historical, cultural, and religious knowledge to resolve Native Hawaiian disputes in a satisfactory manner. Only Native Hawaiians, working cooperatively, have the knowledge to do so.[339]

The challenge is for Native Hawaiians to arrive at their own definition of themselves and their cultural values. There is no singular Native Hawaiian perspective and no singular set of Native Hawaiian beliefs or customs.[340] Indian tribes have an organized and official governing body designed to take into account the different perspectives, beliefs, practices, and interests of their members and to formulate a set of guiding principles and governing structures that reflect the significant similarities that they share. Native Hawaiians lack a formal structure to define and interpret the values, culture, and protocols of their community. I do not believe, however, that this means that disputes within the community can only be resolved through the Anglo-American legal structure.

*Ho'oponopono* provides one model for Native Hawaiians to begin to think of alternate forums for the resolution of internal NAGPRA disputes. Surely other models must exist within the community. Perhaps they are simply waiting to be discovered.

Native Hawaiians, and their cultural institutions, should make an effort to prioritize, discuss, and resolve issues involving the repatriation of cultural property via NAGPRA. Papers must be written, symposia must be staged, *kupuna* must be consulted, and knowledge must be given and received freely and openly. If given the opportunity, Native Hawaiians should work cooperatively with the federal courts to develop procedures that would incorporate key aspects of traditional Hawaiian culture into NAGPRA litigation. The Kawaihae Caves dispute may, eventually, be seen as providing the opening for Native Hawaiians to come together as a group to protect their cultural treasures in a way that respects the desires of their ancestors and strengthens the culture of today. If they do not, the issues will likely continue to be decided in the courts, where it seems that no one wants them to be.

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[339] *See, e.g.*, Strickland & Supernaw, *supra* note 335, at 163 ("The tribe is the only agency with the ability to obtain the historical facts and interpret their cultural means relating to the return of sacred objects, objects of cultural patrimony, and unassociated funerary objects.").

[340] *See, e.g.*, Eric Yamamoto, Moses Haia, & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 6 n.21 (1994) ("There is no one Native Hawaiian group, or community, or perspective. There is no singular Native Hawaiian identity. Culture, class, lineage, historical memory, geography, and gender are among the many factors contributing to vast differences in lifestyles, group relations, cultural practices and political outlooks.").

## V. CONCLUSION

The Kawaihae Caves controversy raises serious and meaningful concerns about culture, religion, tradition, authority, and responsibility. Some may look at the each of the events surrounding the eighty-three objects found in 1905 by David Forbes as disheartening examples of avarice, selfishness, and the misuse of power. One might, however, look at them in a different way. One might look at them as potentially inspiring a revolutionary new way of improving the application of NAGPRA in Hawai'i. The opportunity to improve legislation designed to restore and revalidate respect for important cultural values and traditions is before us. The responsibility for community leaders and concerned outsiders to come together to work together in culturally sensitive appropriate ways for the betterment of all must be met.

The Kawaihae Caves case may provide the impetus for the diverse and caring Hawaiian community to come together and speak seriously and debate earnestly about duty, responsibility, and important cultural and religious *kuleana*; it may provide the impetus to look for more effective ways to resolve disputes involving the most integral aspects of cultural life; the chance to search for empowerment and renewal; and it may provide the impetus for all of us to figure out what the right thing is to do and, finally, to do it. In time, history may look back at the Kawaihae Caves dispute as a turning point. It may one day be seen as the call to arms that inspired changes that vastly improved NAGPRA's operation in Hawai'i. Perhaps by the time that the smoke, light, and sound of fireworks fills the sky over Honolulu next New Years' Eve, Hawai'i will have one more thing to celebrate rather than one more thing to mourn.

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# Hawai'i's Workers' Compensation Scheme: An Employer's License to Kill?

## I. INTRODUCTION

A legal secretary lands a job with a sole practitioner who asks the secretary to type a letter. The employer notes some errors in the letter completed by the secretary and, in a fit of rage, punches his secretary in the face. The secretary suffers a broken jaw requiring surgery. Remarkably, if this abusive employer were practicing law in Hawai'i, the workers' compensation statutes would likely shield the employer from any tort liability for his intentional act.[1] Although this scenario is merely hypothetical, employers do indeed commit intentional torts such as assault and battery against their employees from time to time.[2]

The secretary in the hypothetical would not be left completely without a remedy because the employee would probably be eligible for workers' compensation benefits.[3] However, in Hawai'i, the employee's tort suit against the employer would probably be barred.[4] Hawai'i, like all states, has an exclusive remedy provision within its workers' compensation law, which prohibits lawsuits by employees against their employers for work-related

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[1] *See* HAW. REV. STAT. § 386-5 (2004); *see also* discussion *infra* Part IV.

[2] *See, e.g.*, Gagnard v. Baldridge, 612 So. 2d 732, 733 (La. 1993) (fast food employee claimed that her employer hit her on the back because she filled an order with nineteen chicken nuggets instead of twenty); Kennedy v. Parrino, 555 So. 2d 990, 992 (La. Ct. App. 1989) (following an argument between an employee and his employer, the employer allegedly pushed the employee "hard in the back, just above the area where surgery had [recently] been performed, with both hands," causing the employee to fall); Searway v. Rainey, 709 A.2d 735, 736 (Me. 1998) (employee sued his employer alleging the employer assaulted him during an argument about back pay); Diaz v. Darmet Corp., 694 A.2d 736, 737 (R.I. 1997) (the president of the corporation that the employee worked for allegedly shoved him against a counter, causing back injuries); Wood v. Lowe's Home Ctrs., Inc., 63 Va. Cir. 461, 461 (Cir. Ct. 2003) (after the employee brushed off her manager's instruction, the manager allegedly got angry and bit the employee on her arm).

[3] *See* HAW. REV. STAT. § 386-3(a) (2004) (defining the injuries covered by workers' compensation as those "arising out of and in the course of the employment"); *see also* Zemis v. SCI Contractors, Inc., 80 Hawai'i 442, 447, 911 P.2d 77, 82 (1996) (quoting 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 11.21(a), at 3-274 (1995) ("A personally motivated assault of an employee by a third person may be considered as having occurred 'because of the employee's employment,' if the animosity or dispute which culminated in the assault was 'exacerbated by the employment.'")).

[4] *See* discussion *infra* Part IV.B., which explains the current state of the law in Hawai'i regarding intentional torts.

injuries.[5] The exclusive remedy provision creates two significant concerns when work injuries are caused by intentional conduct. First, when it comes to intentional torts, the benefits the injured worker will likely receive will provide less than complete compensation for his injuries.[6] Second, and even more distressing, is the message sent to employers—that Hawai'i courts will protect you from lawsuits when you intentionally injure your employees.

Because of the unfairness to injured workers and the public policy implications of immunizing employers who intentionally injure their employees, a majority of states have either established statutory exceptions to their exclusivity provisions or have judicially created exceptions for intentional torts.[7] While Hawai'i has created a statutory exception for two specific intentional torts (sexual harassment and sexual assault),[8] it remains among a minority of states that has failed to create an exception for all intentional torts.[9]

This Comment begins in Part II with a brief history of the enactment of workers' compensation statutes. Workers' compensation legislation was enacted as a reaction to a dramatic rise in worker injuries that accompanied the Industrial Revolution.[10] Thus, rectifying the harsh effects of *accidents* was the underlying premise upon which workers' compensation was devised.[11] The system was a quid pro quo between employers and employees—in exchange for employers compensating workers for all workplace accidents, employees were prevented from bringing lawsuits against their employers.[12]

Part III surveys how workers' compensation laws in other jurisdictions treat intentional torts committed by employers. Most states recognize an exception to their exclusivity provisions, but there is a split in these jurisdictions

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[5] *See* HAW. REV. STAT. § 386-5 (2004) (providing that the remedies granted by workers' compensation "exclude all other liability of the employer to the employee . . . at common law or otherwise, on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto").

[6] Workers' compensation is a limited remedy—it does not have as complete a spectrum of damages as tort claims. Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 180-83, 205-10 (1994). The two main benefits provided by workers' compensation are payment of medical treatment and wage loss. *See* HAW. REV. STAT. §§ 386-21, 386-31 (Supp. 2006). Pain and suffering and punitive damages are not available through workers' compensation. Spieler, *supra* at 209. In addition, the wage loss benefit to which an injured worker in Hawai'i is entitled amounts to two-thirds of the employee's average weekly wage. *See* HAW. REV. STAT. § 386-31 (Supp. 2006).

[7] *See* discussion *infra* Part III.

[8] *See* HAW. REV. STAT. § 386-5 (2004).

[9] *See* discussion *infra* Parts III, IV.

[10] *See* discussion *infra* Part II.

[11] *See id.*

[12] *See id.*

regarding what constitutes "intent."[13] While a majority require a showing that the employer acted with a deliberate intention to cause injury, a growing number of states are permitting suits under the intentional tort exception even without specific intent to injure if the employer knows injury is "substantially certain" to result.[14]

Part IV examines the current state of workers' compensation in Hawai'i, including an explanation of the applicable statutes and case law. While it appeared settled that no intentional tort exception existed in Hawai'i, a 1997 Hawai'i Supreme Court decision suggested that intentional torts are not barred by exclusivity.[15] Subsequently, the federal district courts in Hawai'i have interpreted the decision as having created an exception for all intentional torts; however, state courts have held that the exception is more limited— applying it only to employment discrimination claims.[16]

Part V argues that the Hawai'i legislature should clear up the confusion by amending the exclusivity statute to create an intentional tort exception in order to establish an equitable system for compensating employees who are intentionally injured by their employers. The exception would create a deterrent for employers while still reflecting the original intent of workers' compensation of providing a separate system to redress workplace accidents.

## II. HISTORY OF THE ENACTMENT OF WORKERS' COMPENSATION

One of the unfortunate side effects of the Industrial Revolution was an increase in job-related injuries and deaths stemming from increased worker interaction with dangerous machinery.[17] In the United States, the problem of industrial accidents was considered a "crisis of world-historical proportions" that even eclipsed the injuries and deaths experienced during the Civil War.[18] The accidental death rate for men aged ten to fifty increased by more than seventy percent between 1850 and 1880.[19] The public was acutely aware of

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[13] *See* discussion *infra* Part III.B.

[14] *See id.*

[15] *See* Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 18, 936 P.2d 643, 654 (1997) (holding that an employee's intentional infliction of emotional distress claim was not barred by workers' compensation in part because the injury was not the result of an accident); *see also* discussion *infra* Part IV.

[16] *See* discussion *infra* Part IV.B.3.

[17] JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC 22 (2004); PETER M. LENCSIS, WORKERS COMPENSATION 6-7 (1998).

[18] WITT, *supra* note 17, at 22-24.

[19] *Id.* at 26.

the dangers because of improvements in the government's collection and reporting of workplace accidents.[20]

Momentum for a statutory remedy for injured workers was further fueled by the harsh results imposed by the existing common law tort system.[21] Injured workers who sued their employers for accidental injuries they sustained at work rarely succeeded in obtaining compensation.[22] Even when the employee had strong evidence pointing to the employer's negligence as the cause of the injury, three common law defenses often frustrated their efforts in American courtrooms—the fellow servant rule, contributory negligence, and assumption of risk.[23] The most troublesome for employee-plaintiffs was the fellow servant rule, which absolved the employer of liability when injuries resulted from the negligence of a fellow employee.[24] Contributory negligence was also frequently invoked by employers because it served as a complete bar to recovery where the employee was found to be even slightly negligent.[25]

### *A. The Introduction of State Workers' Compensation Statutes*

Because of the tort system's harsh results, which included dire economic conditions for families whose sole wage earner was permanently disabled or killed,[26] states began enacting mandatory workers' compensation laws in the 1910s.[27] The workers' compensation movement spread across the country quickly, reflecting the urgent and universal need for a remedy for injured

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[20] Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & ECON. 305, 315-16 (1998).

[21] *Id.* at 316.

[22] Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 777 (1982) (arguing that "an ironclad rule" existed during the nineteenth century that "no employee could ever recover from any employer for any workplace accident—period"); *see also* Kamanu v. E.E. Black, Ltd., 41 Haw. 442, 452 (1956) (reciting the details of a New York report, which found that in 1908, of seventy-four cases involving fatal industrial accidents, "there was no compensation whatever in 43.2 per cent of the cases, compensation under $500 in 40.5 per cent, and only 16.3 per cent received between $500 and $5,000").

[23] LENCSIS, *supra* note 17, at 7; Fishback & Kantor, *supra* note 20, at 308-09.

[24] *See* LENCSIS, *supra* note 17, at 7; Farwell v. Boston & Worcester Rail Road Corp., 45 Mass. (4 Met.) 49 (1842).

[25] LENCSIS, *supra* note 17, at 7.

[26] WITT, *supra* note 17, at 37 (explaining that "[i]ndustrial accidents . . . disproportionately affected wage-earning men supporting dependent wives and children," forcing many families to depend on family or charities for basic subsistence needs).

[27] LENCSIS, *supra* note 17, at 11; Fishback & Kantor, *supra* note 20, at 319.

workers.[28] By 1920, the legislatures in forty-two states had adopted workers' compensation statutes.[29]

The basic features of these statutes were fairly similar and remain in place today. They provide a limited and exclusive remedy for employees injured in work-related accidents.[30] These universal provisions reflect the policy and purpose behind workers' compensation—essentially a bargain or quid pro quo between employer and employee.[31] The employer agrees to provide compensation for injured workers regardless of who is at fault for the accident; in return for this fairly swift and guaranteed remedy, the employee accepts limited benefits and gives up the right to sue the employer for potentially higher damages.[32]

Benefits are limited in that they provide only a portion of lost wages (usually two-thirds of the employee's weekly wage) and medical payments.[33] Thus, the objective of workers' compensation differs from the common law tort system's goal of making the victim whole.[34] Injured workers are not compensated for pain and suffering or for other injuries that do not impact the employee's ability to work.[35] In addition, accepting workers' compensation often limits which medical providers the injured employee can see for treatment.[36] While limited, the benefits come fairly quickly and without the employee having to prove that the employer was at fault.[37] Not having to prove the employer's negligence is important because statistics indicate that the negligence of the employee is more often the cause of workplace accidents.[38]

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[28] Fishback & Kantor, *supra* note 20, at 319; LENCSIS, *supra* note 17, at 13; WITT, *supra* note 17, at 127.

[29] LENCSIS, *supra* note 17, at 13; WITT, *supra* note 17, at 127. In 1948, Mississippi became the last state to adopt workers' compensation. Fishback & Kantor, *supra* note 20, at 319-20. The Federal Employees' Compensation Act provides benefits to injured federal workers. LENCSIS, *supra* note 17, at 11.

[30] Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1642-43 (1983) [hereinafter Harvard Note]; *see generally* LENCSIS, *supra* note 17, at 35-50.

[31] LENCSIS, *supra* note 17, at 9; WITT, *supra* note 17, at 128.

[32] LENCSIS, *supra* note 17, at 9; Epstein, *supra* note 22, at 800-01; Fishback & Kantor, *supra* note 20, at 309-10.

[33] Harvard Note, *supra* note 30, at 1642; LENCSIS, *supra* note 17, at 51-54; *see also* HAW. REV. STAT. § 386-31 (Supp. 2006). Workers are not required to pay federal income tax on wage loss benefits. LENCSIS, *supra* note 17, at 57.

[34] LENCSIS, *supra* note 17, at 6-9.

[35] Harvard Note, *supra* note 30, at 1643.

[36] LENCSIS, *supra* note 17, at 51.

[37] *See id.* at 1-2.

[38] *See* Melendez v. Johns, 76 P.2d 1163, 1170 (Ariz. 1938) (Lockwood, J., dissenting) (citing statistics showing that seventy percent of work related accidents are caused by the employee's negligence); Kamanu v. E.E. Black, Ltd., 41 Haw. 442, 456 (1956) (citing statistics

The trade-off for the employee's guaranteed remedy is that the employer is granted immunity from uncertain and potentially costly litigation and jury verdicts.[39] The exclusive remedy provision that exists in all workers' compensation statutes is considered "one of the cornerstones" of the system.[40] Thus, even in the few states which permit employers the option of not participating in workers' compensation, most employers choose to do so because the system protects them from negligence suits.[41]

In addition to the contractual bargain, ethical considerations also provided an undercurrent for the passage of workers' compensation laws.[42] To many of the social reformers of the time, it seemed only fair that the industries, which were benefiting from the risks encountered daily by employees, should absorb the costs of progress.[43] Industries, in turn, could share the burden with consumers through increased costs and with employees through lower wages.[44]

### *B. Hawai'i's Workers' Compensation History*

Hawai'i's workers' compensation provisions developed around the same time as the rest of the nation and as a result of the same concerns about harsh results for employees and policies regarding redistribution of accident costs.[45] The legislature for the Territory of Hawai'i enacted a Workmen's Compensation Act in 1915 to cover industrial workers.[46] Amendments shortly thereafter expanded the coverage to a broader class of workers.[47]

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that "show that the greatest cause of accidents is by fault or negligence of the injured employee . . . while the negligence of the employer ranks third in the cause of accidents").

[39] LENCSIS, *supra* note 17, at 42; Fishback & Kantor, *supra* note 20, at 309.

[40] LENCSIS, *supra* note 17, at 42.

[41] SAFETY AND THE WORK FORCE 3 (John D. Worrall ed., 1983).

[42] WITT, *supra* note 17, at 127-28.

[43] *Melendez*, 76 P.2d at 1170 (Lockwood, J., dissenting); WITT, *supra* note 17, at 127-28; Harvard Note, *supra* note 30, at 1646-48.

[44] Harvard Note, *supra* note 30, at 1647 & nn.45-46; Fishback & Kantor, *supra* note 20, at 309-10.

[45] Kamanu v. E.E. Black, Ltd., 41 Haw. 442, 449-59 (1956) (providing an extensive discussion of the history and reasons for the implementation of workers' compensation in Hawai'i).

[46] Workmen's Compensation Act, No. 221, § 1 (1915), *reprinted in* 1915 Haw. Sess. Laws 323. The Workmen's Compensation Act provided compensation for "personal injury by accident arising out of and in the course of [industrial] employment." *Id.* Injured workers could not recover if the injury was caused "by the employee's wilful intention to injure himself or to injure another, or . . . by his intoxication." *Id.* § 3. Section 4 of the Act contained the exclusive remedy provision, which provided that "[t]he rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this Act shall exclude all other rights and remedies of such employee . . . ." *Id.* § 4.

[47] LEGISLATIVE REFERENCE BUREAU, STUDY OF THE WORKMEN'S COMPENSATION LAW IN HAWAII 7-8 (1963).

The statute was largely based on a uniform act, which was drafted by Commissioners on Uniform State Laws in 1914.[48] Workers' compensation was mandatory for employers and provided the sole remedy for employees injured on the job.[49] Although the constitutionality of the workers' compensation law was challenged early on, the Hawai'i Supreme Court held that the act was constitutional as well as a "reasonable and valid exercise of the [state's] police power."[50]

Just two years after Hawai'i's Workmen's Compensation Act was enacted, the act was challenged in *Anderson v. Hawaiian Dredging Co.*, by a construction worker who was injured after falling fifty feet from a narrow plank.[51] The injured worker argued that the exclusivity of the act was unconstitutional in part because it denied him the right to have his damages determined by a jury, a right bestowed by the Seventh Amendment.[52] The court disagreed, highlighting the ways in which employees benefit under the quid pro quo of the compensation scheme.[53] The court explained:

> It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. When he enters into the contract of employment, he is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer and is afforded a remedy, which is prompt, certain and inexpensive. In return for those benefits he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyers' fees.[54]

Further, the court found that workers' compensation contained laudable goals in that it secured protection for injured workers, permitted the sharing of costs of industrial progress, and ensured that "'workmen or his dependents [would] not become a public charge.'"[55]

In 1956, the Hawai'i Supreme Court reiterated the important values of workers' compensation in a case brought by the dependents of a worker killed

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[48] *Id.* at 5.

[49] *Id.* at 6.

[50] Anderson v. Hawaiian Dredging Co., 24 Haw. 97, 109-15 (1917); *see also Kamanu*, 41 Haw. at 455 (noting that the constitutionality of Hawai'i's workers' compensation statutes was well-settled).

[51] *Anderson*, 24 Haw. at 100.

[52] *Id.* at 109.

[53] *Id.* at 111.

[54] *Id.* (quoting Jensen v. S. Pac. Co., 215 N.Y. 514, 526 (1915)).

[55] *Id.* at 113-14 (quoting 1 HONNOLD ON WORKMEN'S COMPENSATION, § 2).

when the Wilson Tunnel collapsed during construction.[56] Like it did in *Anderson*, the court again premised its analysis on the assumption that workers' compensation was designed to provide a remedy for accidental injuries.[57] The court held that the deceased workers' dependents could be denied the right to sue, focusing on the fact that employees and their dependents as well as employers gave up certain rights in exchange for significant benefits under the workers' compensation system.[58]

## III. THE INTENTIONAL TORT EXCEPTION IN OTHER JURISDICTIONS

Because workers' compensation was developed to cope with workplace accidents, two difficult issues arose when workers were injured due to the intentional acts of their employers. First, it was questionable whether those employees were even eligible for benefits given that workers' compensation statutes usually defined compensable injuries as those suffered "by accident," and an intentional act is not accidental.[59] Second, because the quid pro quo of workers' compensation was premised on employees giving up *negligence* claims, it was uncertain whether legislatures intended exclusivity provisions to also exclude intentional torts.[60] Recognizing that workers' compensation statutes were developed to contend with a rise in industrial accidents, judges and policy makers determined that a separate scheme was necessary for redressing intentional torts in the workplace.

The ambiguity surrounding the scope of workers' compensation combined with knowledge of employer abuses caused many courts and legislatures to recognize or create intentional tort exceptions.[61] The thought of denying an employee's suit because of the exclusivity provision concerned many judges because of a fear that providing employers with immunity from suit would constitute approval by the court for outrageous and abusive conduct.[62]

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[56] Kamanu v. E.E. Black, Ltd., 41 Haw. 442, 443-44 (1956).

[57] *Id.* at 459.

[58] *Id.*

[59] *See, e.g.*, HAW. REV. STAT. § 386-3 (2004) (providing that compensation shall be paid to an employee who "suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment"); *see also* 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.01 (2006).

[60] Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572, 577 (Ohio 1982), *superseded by statute*, Act of Jan. 6, 2005, 2004 Ohio Legis. Serv. Ann. 143 (West) (codified at OHIO REV. CODE ANN. § 2745.01 (LexisNexis Supp. 2006)).

[61] *See* discussion *infra* Part III.A.

[62] Elliott v. Brown, 569 P.2d 1323, 1327 (Alaska 1977) (citing Bryan v. Utah Int'l, 533 P.2d 892, 894 (Utah 1975)) ("The socially beneficial purpose of the workmen's compensation law would not be furthered by allowing a person who commits an intentional tort to use the

However, even after the exception was created, the debate continued with courts and legislatures divided regarding how to define "intentional" for purposes of the workers' compensation exception.[63] Some jurisdictions require that the employer have acted with the "deliberate intention" to cause injury while others are satisfied if the act was "substantially certain" to injure the employee.[64] There was also disagreement about what remedies an intentionally injured employee should have—some jurisdictions require employees to elect either workers' compensation benefits or tort damages while others permit workers to pursue both sources.[65]

### *A. Statutory and Judicial Recognition of the Intentional Tort Exception*

A majority of states have intentional tort exceptions—created either judicially or legislatively by amending exclusivity statutes.[66] Where exclusivity statutes do not contain intentional tort exceptions, many courts have looked to the definitions of compensable injuries to reach the conclusion that an employer is not immune from suit when the injuries are intentional.[67] Most states' workers' compensation statutes explain that employees are entitled to

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compensation law as a shield against liability."); Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271, 1274 (Ind. 1994) (explaining that an intentional tort exception provides an important deterrent to employers); *Blankenship*, 433 N.E.2d at 577 ("[T]o hold that intentional torts are covered under the [Workers' Compensation] Act would be tantamount to encouraging such conduct, and this clearly cannot be reconciled with the motivating spirit and purpose of the Act."); Stewart v. McLellan's Stores Co., 9 S.E.2d 35, 37 (S.C. 1940) ("To say that an intentional and malicious assault and battery by an employer on an employee is . . . an accident is a travesty on the use of the English language. . . . Such construction gives to the employer who committed the assault and battery complete immunity for his offense, because it deprives the employee of his right of action at common law.")

[63] *See* discussion *infra* Part III.B.

[64] *Id.*

[65] *See* discussion *infra* Part III.C.

[66] *See* 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.01 (2006) (listing twenty-six states with judicially-created exceptions, fourteen states with statutory exceptions and ten states with no intentional tort exception).

[67] *See, e.g.*, Quela v. Payco-General Am. Credits, Inc., 84 F. Supp. 2d 956, 960 (N.D. Ill. 2000); Coello v. Tug Mfg. Corp., 756 F. Supp. 1258, 1265 (W.D. Mo. 1991); Fenner v. Municipality of Anchorage, 53 P.3d 573, 575 (Alaska 2002); *Baker*, 637 N.E.2d at 1272; *see also* McCoy v. Liberty Foundry Co., 635 S.W.2d 60, 62 (Mo. Ct. App. 1982) (quoting 2A ARTHUR LARSON, WORKMEN'S COMPENSATION § 68 (1976)) ("Intentional injury inflicted by the employer in person on his employee may be made the subject of a common-law action for damages on the theory that, in such an action, the employer will not be heard to say that his intentional act was an 'accidental' injury and so under the exclusive provisions of the compensation act.").

compensation for work-related injuries that occur "by accident."[68] Because an intentional act is not an accident, it follows that intentional torts do not fall within the scope of the workers' compensation statutes, and thus, are not barred by exclusivity provisions.[69]

This logic indicates an understanding of the reasons for the enactment of workers' compensation—specifically, the goal of ameliorating the effects of accidents on employees and negligence claims on employers.[70] Prior to workers' compensation, one of the biggest problems for injured workers was that the tort system rarely permitted recovery.[71] Employers had three strong defenses in negligence suits—the fellow servant rule, contributory negligence and assumption of risk.[72] However, these defenses were not available in intentional tort cases; therefore, there was no need to develop a separate scheme for dealing with those acts.[73] Because workers' compensation was structured only with negligence actions in mind, it follows that claims based on intentional acts fall outside of the statutory scheme, and thus, are not barred from adjudication by the courts.[74]

Courts in other jurisdictions have also created intentional tort exceptions using different rationales.[75] For example, the Ohio Supreme Court reasoned that because an intentional tort was not a contemplated risk of employment, it could not be considered a work-related injury to bring it within the workers' compensation statutory language.[76] The Texas Supreme Court danced around the exclusivity provision with regards to intentional infliction of emotional distress claims by determining that "the employees' injuries were caused by repetitive mental trauma rather than an ascertainable event" and finding that injuries compensable under the Texas workers' compensation statutes had to be linked to a "particular event."[77]

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[68] *See, e.g.*, HAW. REV. STAT. § 386-3 (2004); 820 ILL. COMP. STAT. 305/8 (West Supp. 2006); N.C. GEN. STAT. § 97-2(6) (2005).

[69] 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.01 (2006).

[70] *Baker*, 637 N.E.2d at 1273.

[71] *Id.* at 1274 (explaining that eighty percent of employees who sued their employers for negligence were denied recovery).

[72] *See id.* at 1273-74; *see also* text accompanying note 23.

[73] *Baker*, 637 N.E.2d at 1274 (citations omitted).

[74] *Id.*

[75] 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.01 (2006).

[76] Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572, 576-77 (Ohio 1982), *superseded by statute*, Act of Jan. 6, 2005, 2004 Ohio Legis. Serv. Ann. 143 (West) (codified at OHIO REV. CODE ANN. § 2745.01 (LexisNexis Supp. 2006)).

[77] GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 611 (Tex. 1999).

Several state legislatures have created intentional tort exceptions by amending the exclusivity provisions of their workers' compensation statutes.[78] A few states continue not to recognize an intentional tort exception at all.[79] In addition, federal courts have held that the Federal Employment Compensation Act ("FECA") similarly does not provide an exception for federal employees

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[78] *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1022(A) (1995) (providing an exception "if the injury is caused by the employer's wilful misconduct"); CAL. LAB. CODE § 3602(b)(1) (West 2003) (providing an exception for injuries "caused by a willful physical assault by the employer"); FLA. STAT. ANN. § 440.11(b) (West Supp. 2006) (providing an exception "[w]hen an employer commits an intentional tort that causes the injury or death of the employee"); LA. REV. STAT. ANN. § 23:1032B (1998) (providing that the exclusivity provision does not "affect the liability of the employer . . . resulting from an intentional act"); MICH. COMP. LAWS ANN. § 418.131(1) (West 1999) (providing that "[t]he only exception to this exclusive remedy [against the employer] is an intentional tort"); N.J. STAT. ANN. § 34:15-8 (West 2000) (providing an exception for "intentional wrong"); OHIO REV. CODE ANN. § 2745.01(A) (LexisNexis Supp. 2006) (providing an exception "for damages resulting from an intentional tort committed by the employer").

[79] *See, e.g.*, Miller v. CBC Cos., 908 F. Supp. 1054, 1068 (D.N.H. 1995) (holding that the New Hampshire workers' compensation exclusivity provision barred suits based on "both intentional and nonintentional torts"); *Ex parte* McCartney Constr. Co., 720 So. 2d 910 (Ala. 1998) (holding that even intentional and willful acts of the employer did not circumvent the exclusivity provision of workers' compensation); Baldwin v. Roberts, 442 S.E.2d 272 (Ga. Ct. App. 1994) (holding that an assault precipitated by work-related animosity was a compensable injury and thus was barred from suit); Searway v. Rainey, 709 A.2d 735, 736 (Me. 1998) (explaining that "'creation of such an [intentional tort] exception . . . is best left to the legislature'" (quoting Li v. C.N. Brown Co., 645 A.2d 606, 608 (Me. 1994))); Abbott v. Gould, Inc., 443 N.W.2d 591, 595 (Neb. 1989) (refusing to recognize an intentional tort exception because "'[t]he primary object of compensation acts was to do away with the inadequacies and defects of the common-law remedies, to destroy the common-law defenses, and, in the employments affected, to give compensation, *regardless of the fault of the employer*'" (quoting Ray v. Sch. Dist. of Lincoln, 181 N.W. 140, 142 (Neb. 1920))); Poyser v. Newman & Co., 522 A.2d 548, 549, 551 (Pa. 1987) (holding that the employee's claim was barred even though his injury was caused by the employer's "willfully disregarding governmental safety regulations and by deliberately exposing him to a known hazard" because the court could not "engraft upon [the exclusivity provision] of the [Pennsylvania Workmen's Compensation] Act an exception the legislature did not see fit to put there"); Diaz v. Darmet Corp., 694 A.2d 736 (R.I. 1997) (holding that summary judgment for the employer was proper because the exclusivity provision barred even intentional tort claims); Wood v. Lowe's Home Ctrs., Inc., 63 Va. Cir. 461, 463 (Cir. Ct. 2003) ("While the terms 'accident' and 'intentional' are contradictory in other contexts, the [Virginia] Supreme Court has repeatedly held that 'accident,' for purposes of the [Virginia Workers' Compensation Act], is construed to include even those injuries resulting from the 'willful and intentional assault of either a fellow-employee or a third person.'" (quoting Haddon v. Metro. Life Ins. Co., 389 S.E.2d 712, 713-14 (Va. 1990))); McKennan v. Wyoming Sawmills, Inc., 816 P.2d 1303, 1305 (Wyo. 1991) (explaining that although the result was "harsh," the court would not recognize an intentional tort exception to the exclusivity provision because "the remedy to more complete redress of a grievance such as this lies with the Wyoming State Legislature").

injured as a result of intentional employer conduct.[80] The rationale of courts refusing to recognize an exception even in the face of egregious employer conduct is either that creation of an exception must come from the legislature[81] or that giving up all claims against the employer is part of the quid pro quo upon which workers' compensation was founded.[82]

### *B. Conflicting Opinions Regarding the Definition of "Intentional"*

Courts in the states which recognize an intentional tort exception would almost certainly permit a suit by an employee who is punched in the face by an employer, as described in the hypothetical in the introduction.[83] However, these courts would likely be split on the issue of whether the plaintiff in the next scenario could proceed with a tort claim. The following hypothetical is based on the tragic facts detailed in several cases in which employees have been seriously injured by machines because employers removed safety features:[84]

> An employer removes a safety guard from an industrial shredding machine to enable employees to reach into the shredder while it is running in order to clear jams, thus increasing production speed. The employer's removal of the guard violates federal and state safety regulations, has caused previous accidents and has generated numerous complaints from workers. Nevertheless, the employer

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[80] *See* 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.01 (2006); *see also* McEntee v. Henderson, 154 F. Supp. 2d 1286, 1291 (S.D. Ohio 2001) (finding that "there is no intentional tort exception to FECA exclusivity").

[81] *See, e.g.*, *Searway*, 709 A.2d at 736; *McKennan*, 816 P.2d at 1305.

[82] *See, e.g.*, *Abbott*, 443 N.W.2d at 595.

[83] *See, e.g.*, Boek v. Wong Hing, 231 N.W. 233, 233 (Minn. 1930) (holding that the exclusivity provision did not bar the employee's suit where the employer "intentionally and maliciously struck at [the employee] with a heavy broom handle"); Sitzman v. Schumaker, 718 P.2d 657, 658-59 (Mont. 1986) (allowing a "narrow exception to the exclusiveness of the compensation remedy" where the employer hit his employee in the head several times with a pipe causing extensive head injuries); Stewart v. McLellan's Stores Co., 9 S.E.2d 35, 35, 37 (S.C. 1940) (permitting the employee's suit where it was alleged that the employer "with considerable force and violence maliciously struck and slapped [the female employee] on the right side of her face"); Richardson v. Fair, Inc., 124 S.W.2d 885, 886 (Tex. Civ. App. 1939) (explaining that when the employee is intentionally assaulted by the employer, workers' compensation cannot bar suit because "one cannot insure himself by taking out a policy of indemnity insurance against civil liability and responsibility for the results of his intentional crimes").

[84] *See* Jackson v. Kaminecki, No. 02-2405, 2004 U.S. Dist. LEXIS 28350, at *3-7 (D.N.J. Dec. 17, 2004); Suarez v. Dickmont Plastics Corp., 639 A.2d 507, 508 (Conn. 1994); Mull v. Zeta Consumer Prods., 823 A.2d 782, 783-84 (N.J. 2003); Laidlow v. Hariton Mach. Co., 790 A.2d 884, 887-88 (N.J. 2002).

> refuses to put the guard on the machine except when Occupational Safety and Health Administration ("OSHA") inspectors visit. The employer has even fired workers for refusing to work on the shredder without the guard. An employee subsequently loses an arm after reaching into the machine to clear a jam, as required by the employer.

The issue of whether removal of a safety device constitutes an intentional tort such that suit is not barred by workers' compensation exclusivity provisions requires a determination of whether "intentional" acts require a deliberate intention to injure or if some lower level of intent is sufficient. A majority of states that recognize an intentional tort exception require a specific intent to injure and thus, have adopted the "deliberate intention" standard while a smaller, but growing, number of jurisdictions find that intent exists if injury to the employee was "substantially certain" to result.[85] At least one state legislature has provided that deliberate removal of a safety device creates a rebuttable presumption of intent to injure.[86]

When left to decide the issue on their own, some courts have permitted broader definitions of intent, only to be reined in later by their legislatures. The Florida Supreme Court created an intentional tort exception and determined that to come within this exception, the employee needed to prove that the employer engaged in conduct that was "substantially certain" to cause injury.[87] Three years later, the Florida legislature codified the exception for intentional torts, but required a stricter standard—that the employer's conduct was "virtually certain" to cause injury.[88]

Similarly, the Michigan Supreme Court adopted the "substantial certainty" standard,[89] but was overruled a year later when the legislature amended the exclusivity provision to require a showing that the employee's injury resulted

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[85] 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.03 (2006).

[86] *See* OHIO REV. CODE ANN. § 2745.01(C) (LexisNexis Supp. 2006) ("Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.").

[87] Turner v. PCR, Inc., 754 So. 2d 683, 687 (Fla. 2000), *superseded by statute*, FLA. STAT. § 440.11(b) (2003), *as recognized in* Travelers Indem. Co. v. PCR Inc., 889 So. 2d 779, 784 n.5 (Fla. 2004).

[88] Feraci v. Grundy Marine Constr. Co., 315 F. Supp. 2d 1197, 1205 n.11 (N.D. Fla. 2004) (citing FLA. STAT. § 440.11(b) (2003)).

[89] Beauchamp v. Dow Chem. Co., 398 N.W.2d 882, 893 (Mich. 1986), *superseded by statute*, MICH. COMP. LAWS § 418.131(1) (1987), *as recognized in* Gray v. Morley, 596 N.W.2d 922, 924 n.2 (Mich. 1999).

from "a deliberate act of the employer and the employer specifically intended an injury."[90]

The West Virginia Supreme Court had a slightly different interpretation of its exclusivity provision, holding that it did not apply "when death or injury results from wilful, wanton or reckless misconduct."[91] The legislature responded by amending the exclusivity provision to require the employee to show the employer acted with "deliberate intention" to injure.[92]

The deliberate intention standard or a specific intent requirement appears to be the majority position taken by the courts and legislatures that recognize an intentional tort exception.[93] In requiring such a stringent standard, judges and lawmakers seem to be concerned about eroding the protections of exclusivity.[94] Arthur Larson, a prominent legal scholar in the area of workers' compensation law, argues that requiring actual intent comports with the rationale for exclusivity—maintaining the quid pro quo and reducing litigation.[95] Larson seems to support this strict standard even in situations with extremely egregious facts, such as where an employer allegedly "ordered [an] employee to work with his bare hands in an acid vat whose dangerous propensities the employee was unaware of, in order to punish him for refusing to divulge the names of other employees who had attended a union organization meeting."[96]

Although still a minority, a growing number of states are using a "broader definition of 'intentional,'" with most of these states choosing the substantial

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[90] MICH. COMP. LAWS ANN. § 418.131(1) (West 1999); Shipman v. Fontaine Truck Equip., 459 N.W.2d 30, 34 (Mich. Ct. App. 1990).

[91] Mandolidis v. Elkins Indus., 246 S.E.2d 907, 914 (W. Va. 1978), *superseded by statute*, W. VA. CODE § 23-4-2 (1983), *as recognized in* Gallapoo v. Wal-Mart Stores, Inc., 475 S.E.2d 172 (W. Va. 1996).

[92] Knox v. Laclede Steel Co., 861 F. Supp. 519, 522 (N.D. W. Va. 1994) (citing W. VA. CODE § 23-4-2 (1983)).

[93] 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.03 (2006); *see, e.g.*, ARIZ. REV. STAT. ANN. § 23-1022 (1995) (providing an exception to exclusivity for an employer's "wilful misconduct," which it defines as "an act done knowingly and purposely with the direct object of injuring another"); Fenner v. Municipality of Anchorage, 53 P.3d 573, 577 (Alaska 2002) (requiring "a specific intent to injure" to avoid exclusivity); Hill v. Patterson 855 S.W.2d 297, 298 (Ark. 1993) (citing Griffin v. George's, Inc., 589 S.W.2d 24 (Ark. 1979)) (explaining that a "deliberate act" by an employer who desires to cause injury is required to bring suit, and that "[a] mere allegation of willful or wanton conduct will not suffice"); Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271, 1275 (Ind. 1994) (holding that "nothing short of deliberate intent to inflict injury, or actual knowledge that an injury is certain to occur, will suffice").

[94] *See* 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.03 (2006).

[95] *Id.*

[96] *Id.* (citing Fowler v. S. Wire & Iron, Inc., 122 S.E.2d 157 (Ga. Ct. App. 1961)).

certainty standard.[97] Many of these courts look to the Restatement (Second) of Torts for assistance in defining "intent" and discover that the definition includes situations in which the actor is "substantially certain" the consequence will result.[98] Equally well-versed in the quid pro quo underlying workers' compensation, these jurisdictions have determined that the substantial certainty standard is not only consistent with those principles, but also "serv[es] as a deterrent to intentional wrongdoing and promot[es] safety in the workplace."[99]

Judges have also argued that when an employer is substantially certain a course of action will injure or kill an employee, workers' compensation was not designed to offer protection to the employer.[100] The West Virginia Supreme Court concluded that "when death or injury results from wilful, wanton or reckless misconduct such death or injury is no longer accidental in any meaningful sense of the word, and must be taken as having been inflicted with deliberate intention for the purposes of the workmen's compensation act."[101]

Allowing too much behavior to fall within the intentional tort exception would undermine workers' compensation, but even proponents of the "deliberate intention" standard admit that jurisdictions adopting the "substantial certainty" standard have not harmed their workers' compensation

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[97] *Id.*; *see, e.g.*, Coello v. Tug Mfg. Corp., 756 F. Supp. 1258, 1265-66 (W.D. Mo. 1991) (holding that allegations of an intentional removal of a safety device satisfied the "substantial certainty" standard imposed by Missouri courts to permit a suit against an employer); Laidlow v. Hariton Mach. Co., 790 A.2d 884, 892 (N.J. 2002) (reaffirming its adoption of the "substantial certainty" standard and rejecting the "deliberate intention to injure" standard because it would "sweep under its protection employer conduct that the Legislature never intended to insulate"); Woodson v. Rowland, 407 S.E.2d 222, 228 (N.C. 1991) (holding that suit is permitted "when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees").

[98] *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965) ("The word 'intent' is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."); *see, e.g.*, Speck v. Union Elec. Co., 741 S.W.2d 280, 283 (Mo. Ct. App. 1987); *Woodson*, 407 S.E.2d at 229; Mandolidis v. Elkins Indus., 246 S.E.2d 907, 914 (W. Va. 1978), *superseded by statute*, W. VA. CODE § 23-4-2 (1983), *as recognized in* Gallapoo v. Wal-Mart Stores, Inc., 475 S.E.2d 172 (W. Va. 1996).

[99] *Woodson*, 407 S.E.2d at 229 (citing N.C. GEN. STAT. § 95-126(b)(2) (1985)); *see also* Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572, 577 (Ohio 1982), *superseded by statute*, Act of Jan. 6, 2005, 2004 Ohio Legis. Serv. Ann. 143 (West) (codified at OHIO REV. CODE ANN. § 2745.01 (LexisNexis Supp. 2006)) (citing *Mandolidis*, 246 S.E.2d at 913) (finding that "the protection afforded by the [Workers' Compensation] Act has always been for negligent acts and not for intentional tortious conduct")).

[100] *See generally Mandolidis*, 246 S.E.2d at 914.

[101] *Id.*

systems.[102] Professor Larson warned nearly two decades ago that using the substantial certainty test would lead to a "flood of exceptions to exclusiveness" that would "threaten to destroy the defense altogether."[103] However, he now acknowledges that "in most instances, the predicted flood of litigation has not occurred, mainly because the courts, undoubtedly conscious of the dangers, have been quite conservative about allowing these kinds of exceptions to exclusivity. Most have been careful to limit their use to the most egregious cases."[104]

As a result, employees working in jurisdictions utilizing the substantial certainty standard who allege that their injuries were caused by their employers' intentional removal or omission of a safety device will not always be able to avoid the exclusivity provision.[105] While some courts will hold that the intentional removal of a safety device automatically satisfies the substantial certainty standard,[106] other jurisdictions will require a more careful analysis of the specific facts in making that determination.[107] The factors examined may include whether the employer warned the employee about the danger, whether prior accidents or near accidents had occurred on the machinery with the missing safety device, whether employees complained to the employer about the dangerous condition, whether serious injuries could be contemplated, whether the employer was knowingly violating safety regulations, and whether the employer engaged in any guilty behavior, such as re-engaging the safety device to pass OSHA inspections.[108]

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[102] 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.04[4] (2006).

[103] Arthur Larson, *Tensions of the Next Decade*, *in* NEW PERSPECTIVES IN WORKERS' COMPENSATION 21, 30 (John F. Burton, Jr., ed., 1988).

[104] 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.04[4] (2006).

[105] David B. Harrison, Annotation, *What Conduct is Willful, Intentional, or Deliberate Within Workmen's Compensation Act Provision Authorizing Tort Action for Such Conduct*, 96 A.L.R.3D 1064 §§ 4[a], 4[b] (2006) (citing cases which hold that omission or removal of a safety device does warrant a tort action and cases which hold that such an action by an employer would not warrant a tort action).

[106] *See* Coello v. Tug Mfg. Corp., 756 F. Supp. 1258 (W.D. Mo. 1991) (citing Sydenstricker v. Unipunch Prods. Inc., 288 S.E.2d 511 (W. Va. 1982); Stockum v. Rumpke Container Serv., Inc., 486 N.E.2d 1283 (Ohio Ct. App. 1985); Bradshaw v. Anco Insulation, Inc., 450 So. 2d 733 (La. Ct. App. 1984)).

[107] Laidlow v. Hariton Mach. Co., 790 A.2d 884, 895-96 (N.J. 2002).

[108] *Id.* at 897-98; 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.04[2][f] (2006).

### *C. Employee Remedies for Intentional Injuries*

States also disagree about whether intentionally injured employees should be required to elect between workers' compensation and tort law remedies or if they can pursue both remedies concurrently. Some states permit the filing of an intentional tort action even if the employee has already collected workers' compensation benefits for the injury.[109] Most courts will not permit a double recovery, instead providing the employer with a setoff from the tort damages awarded equal to the amount of workers' compensation benefits provided.[110] At least one court, though, has permitted the injured employer to collect both workers' compensation benefits and tort damages without providing a setoff.[111]

Permitting employees to pursue both options furthers the dual goals of deterrence and compensation by enabling even very poor workers to wait for the outcome of tort litigation. A primary concern is that requiring an election between a quick remedy (workers' compensation) and a drawn-out, uncertain remedy (tort suit), will have the effect of ensuring employers can avoid litigation because "[m]ost seriously injured workers are not in a financial position to wait out a lengthy, expensive, and risky court proceeding . . . due to the problems of pressing medical bills, and often the inability to work."[112] Thus, requiring an election between remedies would, in effect, invalidate one

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[109] 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.02 (2006); *see, e.g.*, Gagnard v. Baldridge, 612 So. 2d 732, 735-36 (La. 1993) (explaining that the injured employee should not be required to "forego the guaranteed benefits afforded under the compensation act in order to risk the possibility that he will prevail in an action in tort against the employer"); Woodson v. Rowland, 407 S.E.2d 222 (N.C. 1991) (concluding that the employee's death "was the result of both an 'accident' under the [Workers' Compensation] Act and an intentional tort").

[110] 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.02 (2006); *see, e.g.*, *Gagnard*, 612 So. 2d at 736; *Woodson*, 407 S.E.2d at 226.

[111] *See* Jones v. VIP Dev. Co., 472 N.E.2d 1046, 1055 (Ohio 1984), *superseded by statute*, OHIO REV. CODE ANN. § 4121.80 (LexisNexis Supp. 2006); *see also* 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.02 (2006). The *Jones* court held that "an employer who has been held liable for an intentional tort is not entitled to a setoff of the award in the amount of workers' compensation benefits received by the employee." 472 N.E.2d at 1055. The court rejected arguments that this scheme permits the employee a double recovery because "the common-law award represents a *supplemental* remedy for pain and suffering, and spousal loss of services. It also provides an avenue for the imposition of punitive sanctions on employers who engaged in intentional wrongdoing. None of these types of relief is available under the [Workers' Compensation] Act." *Id.*

[112] *Jones*, 472 N.E.2d at 1054.

of the goals of the intentional tort exception, which is discouraging egregious employer conduct.[113]

Other courts, however, hold that once an employee who has been intentionally injured opts for workers' compensation, the option of filing a tort claim disappears.[114] The rationale is predicated on one of the prime reasons for an intentional tort exception—that intentional torts are not accidents and thus do not fall within the workers' compensation scheme.[115] By accepting workers' compensation benefits, the employee is admitting the injury was accidental, and therefore, is barred under the principle of res judicata from later arguing that a tort action should be permitted because the employer acted intentionally.[116]

Another unique approach that a few states have instituted by statute is to require employers who commit intentional torts to provide benefits at levels above what is generally required by the workers' compensation statutes.[117]

## IV. HAWAI'I'S CURRENT WORKERS' COMPENSATION SCHEME

It is uncertain whether a general intentional tort exception currently exists in Hawai'i's workers' compensation scheme.[118] An examination of Hawai'i's workers' compensation law, contained in Chapter 386 of the Hawai'i Revised Statutes ("HRS"), reveals a narrow exception for specific types of intentional

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[113] *Id.* (finding that requiring an employee to elect between remedies "would not only be harsh and unjust, it would also frustrate the laudable purposes of the [Workers' Compensation] Act" in that "it would allow the employer to escape any meaningful responsibility for its abuses").

[114] *See* Werner v. State, 424 N.E.2d 541, 543-44 (N.Y. 1981).

[115] *See id.*

[116] *See id.* at 544 (holding that the workers' compensation board's finding of accidental death was binding on the claimant under the principle of res judicata); *but see* Young v. Libbey-Owens Ford Co., 214 Cal. Rptr. 400, 403 (Ct. App. 1985) (citations omitted) (holding that the employee's tort suit was not barred by the res judicata effect of the prior hearing at the workers' compensation board, and reasoning that the employee "could not litigate the issue of intentional infliction of emotional distress before the board because such tort constitutes 'an entire class of civil wrongs outside the contemplation of the workers' compensation system'").

[117] *See, e.g.*, CONN. GEN. STAT. ANN. § 31-307(b) (West 2003) (permitting recovery of 100% of the employee's weekly wage when the employer violates a health or safety regulation as opposed to 75%); KY. REV. STAT. ANN. § 342.165 (West 2006) (providing a 30% increase in compensation for employees injured as a result of an employer's intentional failure to comply with a safety regulation); MASS. GEN. LAWS ANN. ch. 152 § 28 (West 2005) (affording double recovery to employees injured because of an employer's "serious and wilful misconduct"); N.C. GEN. STAT. § 97-12(3) (2005) (allowing a 10% increase in compensation when the employer willfully fails to comply with state law).

[118] *See* discussion *infra* Part IV.B.

torts (sexual harassment and sexual assault).[119] But the Hawai'i Supreme Court's decision in *Furukawa v. Honolulu Zoological Society* indicates that a broader exception for all intentional torts may exist.[120] While the language in the 1997 *Furukawa* opinion hints that the court intended to join the majority of states in creating an intentional tort exception, that argument belies the history of Hawai'i's statutory and judicial development of workers' compensation law.[121]

To understand how the confusion has developed, this part begins by examining the key workers' compensation statutes. Most important in comprehending how the intentional tort exception fits into the workers' compensation scheme is understanding the statutes detailing what injuries are covered (HRS § 386-3) and explaining the extent of the exclusivity provision (HRS § 386-5). The part continues with an analysis of cases interpreting Hawai'i's workers' compensation law, including a discussion of the *Furukawa* decision, which Hawai'i's state and federal courts are interpreting differently.[122]

### *A. Hawai'i's Workers' Compensation Statutes*

#### *1. Injuries covered by Hawai'i's workers' compensation law*

Hawai'i's workers' compensation law, under HRS § 386-3, requires employers to compensate workers who "suffer[] personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment."[123] Because of policy considerations, Hawai'i judges have interpreted whether an injury is a work injury for the purposes of workers' compensation very broadly.[124] Employing what is described as a "unitary concept of work connection," the Hawai'i Supreme Court has concluded that injuries are

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[119] *See* HAW. REV. STAT. § 386-5 (2004).

[120] *See* 85 Hawai'i 7, 936 P.2d 643 (1997); *see also* discussion *infra* Part IV.B.2.

[121] *See* discussion *infra* Part IV.B.

[122] *Id.*

[123] HAW. REV. STAT. § 386-3 (2004).

[124] *See, e.g.*, Chung v. Animal Clinic, Inc., 63 Haw. 642, 636 P.2d 721 (1981) (holding that a heart attack suffered after work and away from the premises was a compensable injury because the heart attack had a causal connection to the stresses of the employee's job); *see also* Ostrowski v. Wasa Elec. Servs., Inc., 87 Hawai'i 492, 496, 960 P.2d 162, 166 (App. 1998) (explaining that Hawai'i Revised Statutes ("HRS") § 386-3 has been liberally construed because the Hawai'i "legislature has decided that work injuries are among the costs of production which industry is required to bear" and because "the paramount purpose of our workers' compensation law is to provide compensation for an employee for all work-connected injuries" (citations and internal quotation marks omitted)).

compensable as long as there is "a causal connection between the injury and any incidents or conditions of employment."[125] The broad interpretation is supported not only by the public policy consideration of ensuring compensation for injured workers, but also by a statutory presumption that workers' compensation claims made by employees are covered.[126]

While the language of HRS § 386-3 suggests two potential arguments that intentional torts are not compensable under workers' compensation, the courts' broad interpretation has caused these arguments to fail. The first argument, which has often been made successfully in other jurisdictions, is that intentional torts are not "accidents,"[127] and thus, not compensable injuries. Second, intentional torts arguably do not arise out of employment because workers do not contract for or anticipate assault when they accept work.[128]

Hawai'i courts have essentially ignored the "accident" language in the statute when analyzing whether intentional assaults are compensable.[129] On the other hand, judges have carefully analyzed whether an intentional assault could be work-related, and have found that the broad interpretation supports including intentional conduct in the definition of compensable injuries as long as the assault was precipitated by a work-related event or cause.[130] Hawai'i courts have recognized, however, that the broad definition can have severe consequences in that it results in a larger number of injuries (including those

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[125] *Chung*, 63 Haw. at 648, 636 P.2d at 725 (citations omitted). Professor Larson approves of the "unitary approach" in determining what injuries should be compensated. *Id.* (citing 1A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 29.22 (1979)).

[126] *See* HAW. REV. STAT. § 386-85 (2004); *see also Chung*, 63 Haw. at 650, 636 P.2d at 726 (explaining that this section "creates a presumption in favor of the claimant that the subject injury is causally related to the employment activity").

[127] *See* discussion *supra* notes 67-69 and accompanying text; *see also* BLACK'S LAW DICTIONARY 6 (2d pocket ed. 2001) (defining accident as "[a]n unintended and unforeseen injurious occurrence").

[128] *See* discussion accompanying note 76; *see also* 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 103.01 (2006) (explaining that one of the legal theories used to justify an exception to exclusivity is that "the assault does not arise out of the employment," but arguing that this theory is "fictitious . . . for if it is a work-connected assault, it is no less so because the assailant happens to be the employer").

[129] *See, e.g.*, Lui v. Intercontinental Hotels Corp., 634 F. Supp. 684 (D. Haw. 1986); Zemis v. SCI Contractors, Inc./E.E. Black, Inc., 80 Hawai'i 442, 911 P.2d 77 (1996); Ostrowski v. Wasa Elec. Servs., Inc., 87 Hawai'i 492, 960 P.2d 162 (App. 1998); *but see* Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 18, 936 P.2d 643, 654 (1997) (explaining that an employee's claims of discrimination and intentional infliction of emotional distress could not be considered "accidents" because they were based on alleged intentional conduct).

[130] *See Lui*, 634 F. Supp. at 687 (citation omitted); *see also Zemis*, 80 Hawai'i at 449, 911 P.2d at 84 (holding that an employee assaulted by a co-worker was not entitled to workers' compensation because the dispute that led to the assault was not work-related).

intentionally inflicted) being barred from civil litigation because of the workers' compensation exclusivity provision.[131]

*2. Hawai'i's exclusivity provision*

Prior to 1992, Hawai'i's exclusive remedy provision contained no exceptions.[132] HRS § 386-5 explained that the remedies provided by the workers' compensation system for work injuries "exclude[d] all other liability of the employer to the employee."[133] The results were harsh. Hawai'i courts were forced to dismiss claims by employees even though their injuries resulted from intentional behavior by their employers.[134] For example, in *Lui v. Intercontinental Hotels Corp.*,[135] the plaintiff alleged that the general manager of the hotel which employed her "committed multiple sexual assaults and batteries on Plaintiff and subjected her to sexual harassment during Plaintiff's working hours."[136] The court held that the plaintiff's claims were barred by the exclusivity provision.[137]

Perhaps in response to *Lui*, the Hawai'i legislature amended HRS § 386-5 in 1992, adding an exception to the exclusivity provision where the employee's injury resulted from "sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto."[138] This

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[131] *See, e.g.*, Wangler v. Hawaiian Elec. Co., 742 F. Supp. 1465, 1467 (D. Haw. 1990) (recognizing that other jurisdictions would permit the plaintiff's suit because she claimed assault, battery, and intentional infliction of emotional distress, but that in Hawai'i, these claims were barred because of the broad definition of work injury); *Lui*, 634 F. Supp. at 684 ("It is consistent with this liberal unitary approach to provide coverage under workers' compensation where the employee has suffered assault or battery at the hands of her supervisor during her working hours.").

[132] Act of June 19, 1992, No. 275, § 2, 16th Leg., Reg. Sess. (1992), *reprinted in* 1992 Haw. Sess. Laws 722.

[133] *Id.*

[134] *See, e.g.*, *Wangler*, 742 F. Supp. at 1467-68 (holding that the employee's claims for sexual harassment, assault, and battery, among others, were barred by the exclusivity provision); Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 851 (9th Cir. 1990) (dismissing the employee's claims for racial discrimination and intentional infliction of emotional distress because HRS § 386-5 "was a clear expression of legislative intent to absolve the employer of *all liability save that imposed by statute*" (citation and internal quotation marks omitted)); *Lui*, 634 F. Supp. at 687-88 (holding that the plaintiff's claims of sexual assault, battery, and intentional infliction of emotional distress were barred).

[135] 634 F. Supp. 684 (D. Haw. 1986).

[136] *Id.* at 685.

[137] *Id.* at 688.

[138] Act of June 19, 1992, No. 275, § 2, 16th Leg., Reg. Sess. (1992), *reprinted in* 1992 Haw. Sess. Laws 722; *see also* Nelson v. Univ. of Haw., 97 Hawai'i 376, 394, 38 P.3d 95, 113 (2001) (explaining that the legislature's amendment of § 386-5 was based in part on the *Lui* decision); Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 18, 936 P.2d 643, 654 (1997) (determining that the 1992 amendment was the legislature's response to *Lui*).

change permits employees who suffer sexual harassment or sexual assault to collect workers' compensation benefits and file suit.[139] And because the language does not require a showing of intent, courts have interpreted the exception to permit even negligent infliction of emotional distress claims when the distress results from sexual harassment or sexual assault.[140]

### *B. Compensation Case Law Confusion*

It seemed fairly well-settled that, with the limited exception of sexual harassment and sexual assault claims, intentional torts were barred from suit by Hawai'i's exclusive remedy provision.[141] However, the 1997 Hawai'i Supreme Court decision in *Furukawa v. Honolulu Zoological Society*,[142] put a question mark next to that seemingly decided issue. The following discussion will begin with a survey of the law prior to *Furukawa* and will then turn to how that decision has created confusion about the existence of the intentional tort exception.

#### *1. The fairly settled era where an intentional tort exception did not exist*

Prior to the 1997 *Furukawa* decision, injured workers made several attempts to dodge the bar imposed by Hawai'i's exclusive remedy provision, but these efforts were generally unsuccessful[143] as the Hawai'i Supreme Court "consistently rejected challenges to the exclusivity of the Workers' Compensation Act."[144] One creative argument was that claims for non-physical injuries (e.g. emotional distress) were not barred based on the erroneous belief that those types of injuries were not compensable under the workers' compensation

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[139] *See* H.R. CONF. COMM. REP. No. 21, 16th Leg., Reg. Sess. (1992), *reprinted in* 1992 HAW. HOUSE J. 799.

[140] *See Nelson*, 97 Hawai'i at 392-95, 38 P.3d at 111-14 (holding that "the exclusive remedy provision of the workers' compensation law does not bar claims for NIED related to sexual harassment").

[141] *See* discussion *infra* Part IV.B.1.; *see also* Chun v. Continental Rehabilitation Res., Inc., No. 96-00542, 1997 WL 367217, at *2 (D. Haw. Feb. 3, 1997) (granting an employer's motion for summary judgment on an employee's intentional tort claim because "[t]here is no intentional tort exception, nor is there any distinction between the negligent and intentional torts under Haw. Rev. Stat. § 386-5"). The *Chun* decision came two months before *Furukawa*. *See id.*; *Furukawa*, 85 Hawai'i 7, 936 P.2d 643.

[142] 85 Hawai'i 7, 936 P.2d 643 (1997).

[143] *See* discussion *infra* notes 145-55 and accompanying text; *but see* Hough v. Pac. Ins. Co., 83 Hawai'i 457, 927 P.2d 858 (1996) (permitting an employee to sue his employer's workers' compensation insurer because the claim was based on failure to pay benefits and not a work injury).

[144] Marshall v. Univ. of Haw., 9 Haw. App. 21, 35, 821 P.2d 937, 945 (1991).

system.[145] The concern was that in barring these types of claims employees would be left with absolutely no remedy, and it seemingly would enable employers "to intentionally inflict emotional injuries without fear of a claim against them."[146]

One judge, at least temporarily, found this reasoning persuasive. In *Lapinad v. Pacific Oldsmobile-GMC, Inc.*,[147] the court held that an employee's claim for intentional infliction of emotional distress was not barred by the exclusivity provision because "[w]orker's compensation does not . . . provide any remedy for non-disabling emotional injury."[148] The federal district judge deciding *Lapinad* explained that while he was "reluctant to imply an exception to the exclusivity provisions of worker's compensation when the Hawai'i courts have not addressed the issue," he nevertheless determined that "such an exception appears to be a reasonable solution to the problem of leaving a class of plaintiffs with emotional injuries without a remedy at all."[149] However, the *Lapinad* court subsequently retreated from this position,[150] and courts thereafter held that intentional infliction of emotional distress claims were barred by the exclusivity provision.[151]

The Hawai'i Supreme Court also rejected an argument that an employer should not be immune from suit if the employer was also the manufacturer of a defective product that injured the employee.[152] While a few states have permitted such suits under the "dual capacity doctrine,"[153] the court noted that "[m]ost jurisdictions reject it as fundamentally unsound."[154] In refusing this exception to exclusivity, the court explained that "[t]he exclusiveness of

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[145] Lapinad v. Pac. Oldsmobile-GMC, Inc., 679 F. Supp. 991, 994-96 (D. Haw. 1988).

[146] *Id.* at 995.

[147] *Id.*

[148] *Id.*

[149] *Id.* (citing ARTHUR LARSON, WORKMEN'S COMPENSATION LAWS § 68.34(a) (1987)).

[150] *See* Leong v. Hilton Hotels Corp., No. 87-0840, 1989 U.S. Dist. LEXIS 12811, at *24-26 (D. Haw. Apr. 24, 1989) (barring an employee's intentional infliction of emotional distress claim upon finding that emotional injuries were compensable and that the reasoning in *Lapinad* was based on California decisions which courts subsequently retreated from); *see also* Morishige v. Spencecliff Corp., 720 F. Supp. 829, 837 n.13 (D. Haw. 1989) (explaining that the *Lapinad* court subsequently recanted its position in *Leong*).

[151] *See, e.g.*, Wangler v. Hawaiian Elec. Co., 742 F. Supp. 1465 (D. Haw. 1990); Morishige v. Spencecliff Corp., 720 F. Supp. 829 (D. Haw. 1989); Howard v. Daiichiya-Love's Bakery, Inc., 714 F. Supp. 1108 (D. Haw. 1989); Marshall v. Univ. of Haw., 9 Haw. App. 21, 821 P.2d 937 (1991).

[152] *See* Estate of Coates v. Pac. Eng'g, 71 Haw. 358, 791 P.2d 1257 (1990).

[153] *Id.* at 361, 791 P.2d at 1259. The court explained that "[u]nder the dual capacity doctrine an employer apparently protected by the exclusive liability principle may become liable to the employee in tort if, in respect to that tort, he occupies a position which places upon him obligations independent and distinct from his role as employer." *Id.* (citations omitted).

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

remedy is the 'keystone' of our Workers' Compensation plan and 'anything that tends to erode the exclusiveness of either the liability or the recovery strikes at the very foundation of statutory schemes of this kind, now universally accepted and acknowledged.'"[155]

### 2. *The* Furukawa *decision creates confusion*

The relative certainty that Hawai'i did not recognize an intentional tort exception (save sexual harassment and sexual assault claims) came to an end in 1997 with the Hawai'i Supreme Court's decision in *Furukawa v. Honolulu Zoological Society*.[156] In *Furukawa*, the plaintiff sued his employer, the Honolulu Zoological Society ("Zoo Society"), for race and gender discrimination and emotional distress.[157] The trial court excluded evidence supporting Furukawa's emotional distress claim, holding that the claim was barred by the workers' compensation exclusivity provision,[158] and that Furukawa's allegations did not fall within the narrow exception to exclusivity carved out by the legislature in 1992 for sexual harassment or sexual assault.[159] The Zoo Society argued that the legislature's 1992 amendment to the exclusivity provision made clear that claims for all other injuries were barred.[160]

The *Furukawa* court essentially offered two reasons for rejecting the Zoo Society's argument,[161] and it is this dual reasoning that has created the subsequent confusion. The court's first reason for allowing Furukawa's emotional distress claim was that the workers' compensation system only encompasses accidents.[162] Specifically, the court explained that:

> We agree with the [Zoo] Society that the workers' compensation scheme serves to bar a civil action for physical and emotional damages resulting from work-related injuries and accidents. However, Furukawa's claims are not based on any such "accident," but rather on the alleged intentional conduct of members of the [Zoo] Society. Most states recognize that "all or virtually all intentionally tortious acts committed by an employer against an employee in the course of employment are excluded from the workers' compensation system."[163]

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[155] *Id.* at 365, 791 P.2d at 1261 (quoting Costa Minors v. Flintkote Co., 42 Haw. 518, 531 (1958) (internal quotation marks omitted)).

[156] 85 Hawai'i 7, 936 P.2d 643 (1997).

[157] *Id.* at 9-11, 936 P.2d at 645-47.

[158] *Id.* at 16-17, 936 P.2d at 652-53.

[159] *Id.* at 18, 936 P.2d at 654.

[160] *Id.*

[161] *Id.* at 18-19, 936 P.2d at 654-55.

[162] *Id.* at 18, 936 P.2d at 654.

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

In recognizing that intentional torts were an exception to exclusivity, the court cited three cases, none of which involved discrimination claims.[164] The court's second reason for rejecting the argument that Furukawa's emotional distress claim was barred was that the legislature had clearly authorized compensatory damages as a remedy for victims of employment discrimination.[165]

The court's first reason for allowing Furukawa's claim seems to indicate that any employee claim which alleges intentional (and thus non-accidental) conduct by the employer would not be barred by the exclusive remedy provision. While it would represent a shift in Hawai'i's workers' compensation jurisprudence,[166] it is not exactly shocking because it would bring Hawai'i in line with the majority of states in recognizing that intentional torts were not intended to be barred by exclusive remedy provisions.[167] However, the court did not indicate that it was changing course, and its discussion of the intentional tort exception was limited to a single paragraph.[168]

Proponents of a narrower reading of *Furukawa* would likely also contend that the court's cursory discussion indicates that the court did not intend to make a broad policy change, and that the exception was not for all intentional torts, but only for discrimination, as set out in Hawai'i's discrimination statutes.[169] Thus, *Furukawa* would represent only another narrow exception

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[164] *Id.* (quoting Fermino v. Fedco, Inc., 872 P.2d 559 (Cal. 1994) (holding that a false imprisonment claim was not barred by exclusivity); and citing Van Biene v. ERA Helicopters, Inc., 779 P.2d 315 (Alaska 1989) (recognizing an exception to exclusivity for intentional torts, but holding that the employer's conduct was not intentional for purposes of the exception); Medina v. Herrera, 927 S.W.2d 597 (Tex. 1996) (acknowledging that intentional torts fell outside the workers' compensation scheme, but barring an employee's claim because he had already accepted workers' compensation benefits)).

[165] *Id.* at 18-19, 936 P.2d at 654-55.

[166] *See* discussion *supra* Part IV.B.1.

[167] *See* discussion *supra* Part III.A.

[168] *Furukawa*, 85 Hawai'i at 18, 936 P.2d at 654.

[169] This interpretation, that the *Furukawa* exception is limited, is more in line with the court's pronouncement less than ten months earlier in *Iddings v. Mee-Lee*, 82 Hawai'i 1, 919 P.2d 263 (1996). In *Iddings*, the plaintiff, who was a nurse in a psychiatric hospital, was injured while trying to subdue a violent patient. *Id.* at 4, 919 P.2d at 266. Iddings sued a co-worker, Dr. Mee-Lee, alleging that Mee-Lee was at fault for allowing the unit to become overcrowded despite the fact that Mee-Lee had notice of the danger and knew the injury risks posed by overcrowding. *Id.*

In determining whether Iddings' suit against Mee-Lee was barred, the court was required to interpret HRS § 386-8, which provides that co-employees are not immune from suit when injuries result from their "wilful and wanton misconduct." *Id.* at 6, 919 P.2d at 268 (quoting HAW. REV. STAT. § 386-8 (1993)). The court held that suit could be brought even though the co-worker had no specific intent to cause injury. *Id.* However, the court emphasized that "the holdings and rationale expressed in this case are strictly limited to the context of the 'wilful and wanton misconduct' exception to co-employee immunity in HRS § 386-8," and the court "express[ed] no opinion regarding, nor . . . acknowledge[d] the existence of, any analogous exceptions to employer immunity." *Id.* at 8 n.5, 919 P.2d at 270 n.5.

to exclusivity, one which requires a plaintiff to demonstrate both the first and second reasons given by the *Furukawa* court in order to get beyond the exclusivity bar.

### *3. The* Furukawa *aftermath*

As a result of the ambiguity in the *Furukawa* reasoning, courts in Hawai'i have adopted different interpretations. While state courts have determined *Furukawa* has created only another narrow exception to exclusivity for employment discrimination claims, the federal district court seems to have concluded it applies broadly to create an exception for all intentional torts.[170] So far, the Hawai'i Supreme Court has not ruled on which interpretation is correct.

State courts seem to be interpreting *Furukawa* narrowly to create an exception to exclusivity only for employment discrimination claims. In *Takaki v. Allied Machinery Corp.*,[171] the Intermediate Court of Appeals held that the employee's intentional infliction of emotional distress claim was not barred by the exclusivity provision.[172] The court explained that based on the Hawai'i Supreme Court's decision in *Furukawa*, "the exclusivity of remedies provision under our workers' compensation law does not bar an employee's claim against an employer for intentional infliction of emotional distress *when the employer has unlawfully discriminated against the employee in violation of HRS § 378-2.*"[173] Although *Takaki* presented analogous factual circumstances to *Furukawa*, the fact that the court took time to describe the limited nature of the *Furukawa* exception is noteworthy.

The litigation that followed the infamous Xerox mass murder in Honolulu provides evidence that at least one state trial court judge has also determined that the *Furukawa* exception applies only to employment discrimination claims. In that case, Byran Uyesugi, a Xerox employee, who had been described as "actively psychotic," walked into his workplace with a semi-automatic weapon and gunned down seven co-workers, killing them.[174] Lawsuits were filed naming, among others, the employer, Xerox Corp., as a defendant.[175]

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[170] *See* discussion *infra* notes 171-92 and accompanying text.

[171] 87 Hawai'i 57, 951 P.2d 507 (App. 1998).

[172] *Id.*

[173] *Id.* at 59, 67, 951 P.2d at 509, 517 (emphasis added).

[174] Plaintiffs' Memorandum in Opposition to Defendant Xerox Corp.'s Motion to Dismiss with Prejudice All Claims in Plaintiffs' First Amended Complaint at 3, Kanehira v. Uyesugi, No. 01-1-3175-10 EEH (Haw. Cir. Ct. Feb. 11, 2003) [hereinafter Xerox Plaintiffs' Memo].

[175] *Id.* at 1.

The plaintiffs alleged, inter alia, that Xerox Corp. engaged in willful and wanton misconduct by failing to protect employees and ignoring serious threats made by Uyesugi.[176] Xerox moved to dismiss, arguing that plaintiffs' claims were barred by the exclusivity provision.[177] The plaintiffs argued that *Furukawa* created an exception for intentional torts.[178] The defendant countered, however, that the exception recognized in *Furukawa* applied only to emotional distress caused by employment discrimination.[179] The court agreed with the defendant and granted Xerox's summary judgment motion, holding that "the exclusivity provisions of the workers' compensation law preclude suit against Xerox."[180]

However, three of Hawai'i's federal judges seem to be reading the *Furukawa* exception more broadly.[181] Judge David Ezra's decision in *Kahale v. ADT Automotive Services, Inc.*[182] is illustrative. In *Kahale*, the plaintiff sued his employer for discrimination based on his age, ancestry, race, and disability.[183] Kahale's employer moved to dismiss his claims for intentional and negligent infliction of emotional distress, arguing that both were barred by the exclusivity provision.[184] Judge Ezra held that the intentional infliction of emotional distress claim was not barred, citing *Furukawa*.[185]

Although the decision does, in fact, comport with the narrow interpretation of *Furukawa* as applied by the state courts, it is interesting to note that Judge Ezra did not indicate that the intentional tort exception recognized in

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[176] *Id.* at 2-9. The plaintiffs claimed that prior to the shooting Xerox Corp.

> knew that Uyesugi had been diagnosed with a delusional disorder, knew that Uyesugi posed a serious threat to the safety of his Xerox co-workers, knew that Uyesugi owned approximately seventeen (17) registered firearms, knew that Uyesgui had threatened to shoot his co-workers if he were fired by Xerox, and knew that Uyesugi possessed the ability to inflict serious bodily harm on his co-employees.

*Id.* at 3. And that despite this knowledge, Xerox Corp. "failed to take reasonable measures to avoid the risk of serious bodily harm to Xerox employees." *Id.* at 3-4 (citation omitted).

[177] Defendant Xerox Corp.'s Motion to Dismiss with Prejudice All Claims in Plaintiffs' First Amended Complaint at 1, Kanehira v. Uyesugi, No. 01-1-3175-10 (EEH) (Haw. Cir. Ct. Feb. 11, 2003) [hereinafter Xerox's Motion].

[178] Xerox Plaintiffs' Memo, at 14-17.

[179] Xerox's Motion, at 7.

[180] Order Granting Defendant Xerox Corp.'s Motion to Dismiss with Prejudice All Claims in Plaintiffs' First Amended Complaint at 3, Kanehira v. Uyesugi, No. 01-1-3175-10 (EEH) (Haw. Cir. Ct. Feb. 11, 2003).

[181] *See* discussion *infra* notes 182-92 and accompanying text; *see also* Antoku v. Hawaiian Elec. Co., 266 F. Supp. 2d 1233, 1236-37 (D. Haw. 2003) (recognizing that the exclusivity provision does not bar intentional tort claims).

[182] 2 F. Supp. 2d 1295 (D. Haw. 1998).

[183] *Id.* at 1297.

[184] *Id.* at 1301.

[185] *Id.* at 1302 (citing Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 18, 936 P.2d 643, 654 (1997)).

*Furukawa* was limited to discrimination claims, as the *Takaki* court did. In fact, Judge Ezra explained that two previous cases which held that employees' intentional infliction of emotional distress claims were barred by the exclusivity were "no longer good law" after *Furukawa*.[186] One of the cases mentioned, *Marshall v. University of Hawai'i*, did not involve a discrimination claim.[187]

Similarly, Judge Alan Kay, in examining whether an employee's intentional infliction of emotional distress claim was barred, noted that "in *Furukawa* . . ., the Hawai'i Supreme Court held that while the worker's compensation scheme bars a civil action for physical and emotional damages resulting from work related injuries and accidents, claims based on alledged [sic] intentional conduct of an employer are not barred."[188] While this case was also based on an employment discrimination claim, Judge Kay, like Judge Ezra, did not indicate that the *Furukawa* exception was limited to discrimination situations.[189]

Judge Samuel King also faced this issue in *Black v. City & County of Honolulu*, which did not involve a discrimination claim.[190] In determining whether the employee's claims were barred by exclusivity, Judge King explained that Hawai'i recognizes "that workers' compensation statutes do not bar actions based on intentional conduct," citing *Furukawa*.[191] Although the ultimate ruling in *Black* was based on the sexual harassment exception, the discussion is important because it reinforces the interpretations of Judges Ezra and Kay that the exception recognized in *Furukawa* pertains to all intentional torts.[192]

Although several cases contain language indicating that an exception to exclusivity exists for all intentional torts, the only intentional tort claims that have been permitted are those involving either the sexual harassment/assault exception or the employment discrimination exception created in *Furukawa*. This uncertainty preserves the grim but real possibility that an employer who punches an employee in the face in a fit of rage could be completely protected from tort liability.

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[186] *Id.* at 1301-02.

[187] 9 Haw. App. 21, 821 P.2d 937 (1991).

[188] Beaulieu v. Northrop Grumman Corp., 161 F. Supp. 2d 1135, 1148 (D. Haw. 2000).

[189] *Id.*

[190] 112 F. Supp. 2d 1041 (D. Haw. 2000).

[191] *Id.* at 1048 (citing Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 18, 936 P.2d 643, 654 (1997)).

[192] *Id.*

## V. A SUGGESTED REMEDY FOR THE HAWAI'I LEGISLATURE

Restricting a worker injured intentionally to the benefits provided by workers' compensation is an exceptionally harsh result that should be addressed by the Hawai'i legislature. In a usual tort case, the victim of an intentional tort can expect a higher level of compensation than the victim of negligence. This is because of the availability of punitive damages and because there is a presumed damage rule for certain intentional torts, which can provide substantial recoveries even when the physical harm is minimal.[193] Workers' compensation already provides less than complete compensation for a worker with a negligence claim;[194] thus, an intentional tort claimant faces an even greater loss when prevented from bringing suit.[195] An alternative perspective is that the employer who intentionally assaults an employee receives a windfall in that the compensation to be paid would be significantly less than had the employer assaulted a non-employee and was sued.

This harsh result is clearly not part of the quid pro quo of workers' compensation law. In that bargain, employees gave up the right to sue in part because the defenses provided to the employer (assumption of risk, fellow servant rule and contributory negligence) in the tort system made recovery next to impossible.[196] However, those defenses were not available in intentional tort cases.[197] Further supporting the notion that only accidental injuries were contemplated is the fact that most workers' compensation statutes use the word "accident" to describe what injuries are compensable.[198]

In addition, the important deterrent value of the American tort system is completely abrogated when intentional tort victims are excluded from the courtroom.[199] Public policy considerations are abandoned when grievous,

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[193] *See* DAN B. DOBBS, LAW OF REMEDIES § 7.3(2) (2d ed. 1993).

[194] *See* discussion *supra* notes 33-36 and accompanying text.

[195] *See also* Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572, 577 (Ohio 1982), *superseded by statute*, Act of Jan. 6, 2005, 2004 Ohio Legis. Serv. Ann. 143 (West) (codified at OHIO REV. CODE ANN. § 2745.01 (LexisNexis Supp. 2006)) ("[T]he [workers'] compensation scheme was specifically designed to provide less than full compensation for injured employees. Damages such as pain and suffering and loss of services on the part of the spouse are unavailable remedies to the injured employee. Punitive damages cannot be obtained.").

[196] *See* discussion *supra* notes 22-25 and accompanying text.

[197] *See* Beauchamp v. Dow Chem. Co., 398 N.W.2d 882, 885-87 (Mich. 1986), *superseded by statute*, MICH. COMP. LAWS § 418.131(1) (1987), *as recognized in* Gray v. Morley, 596 N.W.2d 922, 924 n.2 (Mich. 1999).

[198] *See generally* discussion *supra* Part III.

[199] *See Blankenship*, 433 N.E.2d at 577 ("Affording an employer immunity for his intentional behavior certainly would not promote [a safe work] environment, for an employer could commit intentional acts with impunity with the knowledge that, at the very most, his workers' compensation premiums may rise slightly.").

premeditated acts are given safe harbor. It is for this reason that insurance policies do not provide coverage for intentional acts.[200] Neither should workers' compensation, a program which was founded on insurance principles.[201]

At this point, the only real solution to the problems of under-compensation for intentional tort victims and the confusion about the scope of the exclusivity provision is for the Hawai'i legislature to amend HRS § 386-5 to explicitly provide an exception when employers intentionally injure their employees. While several states have created these exceptions judicially, the logic used in those jurisdictions could not intelligently be applied here because of the current structure of Hawai'i's workers' compensation law.

The strongest and most widely recognized argument for such an exception is that in using the word "accident" in the compensable injury definition, the legislature indicated its intent to exclude intentional torts.[202] However, in Hawai'i, this argument is weak for two reasons. First, when the legislature amended the exclusive remedy provision in 1992, it created an exception for two specific intentional torts—sexual assault and sexual harassment.[203] This amendment contradicts the assertion that legislators intended all intentional torts to be excluded.

Second, Hawai'i's workers' compensation law contains an immunity provision for the co-employees of an injured worker analogous to that of employers.[204] However, this statute explicitly states that "if the personal injury is caused by [the co-employee's] wilful and wanton misconduct," the injured worker can bring a tort claim against that co-employee.[205] The fact that an immunity exception exists for certain egregious conduct by co-employees indicates that legislators did contemplate intentional torts when enacting the exclusivity provision, and thus, cuts against the argument that the workers' compensation law only covers non-intentional injuries.[206]

In amending the exclusivity provision to include an intentional tort exception, the Hawai'i legislature should define intent using the substantial certainty standard.[207] Although experts had warned that this standard would erode the workers' compensation system, experience in other jurisdictions that

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[200] *Id.*

[201] *See id.*

[202] *See* discussion *supra* Part III.A.

[203] *See* discussion *supra* note 138 and accompanying text.

[204] *See* HAW. REV. STAT. § 386-8 (2004).

[205] *Id.*

[206] *Cf.* Poyser v. Newman & Co., 522 A.2d 548, 551 (Pa. 1987) (explaining that the Pennsylvania legislature "was not unmindful of the issue of intentionally caused harm" when it drafted its workers' compensation law because it created exceptions to exclusivity for intentional injuries by third persons and co-employees).

[207] For a discussion of jurisdictions that have adopted the substantial certainty standard, see discussion *supra* notes 97-101 and accompanying text.

have adopted this standard has demonstrated that these dangers have not materialized.[208] Further, when an employer acts knowing that an employee's injury is substantially certain to result, the consequence is not an accident. Thus, it does not fall within the injuries contemplated as part of the quid pro quo when workers' compensation was adopted.

Utilizing the substantial certainty standard would also provide important protection for workers. To understand why, first consider that an employee punched in the face by an employer would clearly have a claim even if the state adopted the more conservative deliberate intention standard.[209] However, there is already a strong deterrent to employers contemplating such assaults provided by the criminal justice system. So, while the deliberate intention standard provides an important compensation option for injured workers, its value as a deterrent is small.

On the other hand, there is abundant case law indicating that some employers are willing to place their employees in extreme peril despite knowledge that injury is substantially certain to result.[210] These employers would be free from tort liability in a jurisdiction adopting the deliberate intention standard and would not likely need to worry about criminal prosecution. Thus, for some employers who envision they could increase profits by, for example, removing safety equipment on dangerous machinery, the consequences for taking risks with employees' lives may appear nominal. The substantial certainty standard, however, would provide a deterrent by enabling workers injured under those circumstances to file suit.

In addition to using the substantial certainty standard in defining intent, the legislature should draft the exception so that employees are not forced to choose between the tort system and workers' compensation benefits. Language could be added to enable employees who are intentionally injured by their employers to file suit to recover damages *in excess of* what is received, if anything, through workers' compensation.[211] This language would prevent double recovery.

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[208] *See* discussion accompanying notes 102-04; *see also* 48 AM. JUR. PROOF OF FACTS 2D 1 § 2 (1987) (commenting that "unless the case involves an assault or battery, the chances of successfully collecting damages from the employer under the intentional-tort theory are slim, even in jurisdictions in which the most lenient standard of proof obtains").

[209] For discussion of the deliberate intention standard, see discussion *supra* Part III.B.

[210] *See supra* note 84.

[211] *See* W. VA. CODE ANN. § 23-4-2(c) (LexisNexis 2005), which provides that:

> If injury or death result to any employee from the deliberate intention of his or her employer to produce the injury or death, the employee, the widow, widower, child or dependent of the employee has the privilege to take under this chapter and has a cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable in a claim for benefits under this chapter, whether filed or not.

Forcing an injured worker to choose between the two remedies would serve as a de facto exclusivity provision for many injured workers. America's most dangerous jobs often pay very low wages.[212] Thus, the employees most likely to be injured are the least likely to be able to afford to wait for compensation from the tort system. Simple economics will require acceptance of workers' compensation for the employees most likely to be injured. Therefore, for unscrupulous employers who pay low wages and expose workers to extreme danger, the intentional tort exception would present little deterrent value.

Amending the exclusivity provision is not only possible, as evidenced by the 1992 amendment, it is also a necessary step in protecting Hawai'i's workers. The legislature should join the majority of other states in establishing an intentional tort exception.

## VI. CONCLUSION

By not explicitly providing an intentional tort exception to exclusivity, Hawai'i's workers' compensation system is providing protection to employers who deliberately seek to injure or risk employees' lives to increase profits. The Hawai'i legislature is in the best position to fix the problem. The workers' compensation exclusivity statute, HRS § 386-5, should be amended to create an exception when injury or death results from the intentional misconduct of the employer. Intentional should be defined to include both consequences that the employer desired and those that the employer knew were substantially certain to result. This change would provide injured workers with the opportunity for full compensation and would establish a deterrent to employers who callously favor profits over employee health and safety.

Amanda M. Jones[213]

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[212] *See* Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 402 (1999) (explaining that "recent evidence suggests that dangerous jobs pay unusually low wages").

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# Protecting Hawai'i's Fisheries: Creating an Effective Regulatory Scheme to Sustain Hawai'i's Fish Stocks

## I. INTRODUCTION

For more than fifty years, the State of Hawai'i, through its Department of Land and Natural Resources ("DLNR"), has tried to find a successful solution to managing Hawai'i's fish stocks.[1] In recognition of the importance of sustaining Hawai'i's fisheries, the State has invested a substantial amount of money and undertaken numerous efforts to create an effective regulatory scheme that will ensure healthy fish stocks for future generations.[2] Despite good intentions and valiant efforts, however, the State has yet to implement an effective strategy that ensures the sustainability of Hawai'i's fish stocks.[3]

The State of Hawai'i has adopted countless fishing regulations including: creating geographical or area prohibitions,[4] seasonal prohibitions,[5] size limits,[6] and banning commercial sales of certain species.[7] DLNR currently manages more than forty-three marine protected areas within State waters[8] that have designated fishing regulations specific to that area only.[9] Additionally, more than twenty-two fish species have individualized restrictions ranging from

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[1] An Act Providing for the Conservation of Fish and Other Marine Life, No. 192, 28th. Reg. Sess. (1955), *reprinted in* 1955 Haw. Sess. Laws 168 (codified at HAW. REV. STAT. § 190 (1993 & Supp. 2005)).

[2] *See generally* DWAYNE MEADOWS ET AL., HAWAI'I STATEWIDE AQUATIC WILDLIFE CONSERVATION STRATEGY (Pacific Cooperative Studies Unit ed. 2005), http://www.hawaii.gov/dlnr/dar/pubs/sawcs/hi_sawcs.pdf; DIVISION OF AQUATIC RESOURCES, STATE OF HAWAII DEPARTMENT OF LAND AND NATURAL RESOURCES, EVALUATION OF THE STATUS OF THE RECREATIONAL FISHERY FOR ULUA IN HAWAI'I, AND RECOMMENDATIONS FOR FUTURE MANAGEMENT (2000), http://www.hawaii.gov/dlnr/dar/pubs/ulua02.pdf [hereinafter DLNR Ulua Study]; Denise Antolini, *Marine Reserves in Hawai'i: A New Call for Community Stewardship*, 19 SUMMER NAT. RESOURCES & ENV'T 36 (2004); State of Hawai'i Department of Land and Natural Resources Division of Aquatic Resources, http://www.hawaii.gov/dlnr/dar/ (last visited Oct. 22, 2006).

[3] *See* discussion *infra* Part II.B.

[4] HAW. CODE R. §§ 13-28 to -37, -47 to -58, -60, -60.3 to -64, -74, -94, -125, -209 (Weil 1998).

[5] *Id.* § 13-95.

[6] *Id.*

[7] *Id.* § 13-100.

[8] State waters extend three miles from shore. Submerged Lands Act, 43 U.S.C. §§ 1311-1312 (2000).

[9] HAW. REV. STAT. § 188-36 (1993); HAW. CODE R. §§ 13-28 to -60.3, -125, -209.

seasonal, size and weight, taking, to gear limitations per species.[10] Fishermen are also limited in the types of fishing gear they can use.[11] For example, DLNR prohibits the use of certain types of nets and traps when catching fish.[12] Notwithstanding the myriad of fishing regulations applicable in State waters, the State continues to struggle with managing its fisheries.[13] Specifically, the State has expressed concern with inadequate enforcement methods, lack of funding, and a lack of compliance from the general public as downfalls of its current system.[14]

This paper will examine the current regulatory scheme that the State of Hawai'i employs in managing its fisheries and identify factors that contribute to Hawai'i's declining fish population. It will also examine practices and principles that native Hawaiians adhered to in managing fish stocks prior to western influence and suggests that the State should incorporate some of the knowledge and insight from native Hawaiian traditions into the regulatory scheme today.

Section II will briefly discuss the cultural and economic importance of fishing to Hawai'i and describe the overall health of Hawai'i's fish stocks. Section III will discuss the State's jurisdiction, constitutional duties, and current regulatory scheme that govern Hawai'i's fisheries. It will also identify current issues within the regulatory scheme that contribute to Hawai'i's declining fish population. Section IV will discuss native Hawaiian fishing practices and principles and provide suggestions regarding how the State should incorporate native Hawaiian fishing principles into its current regulatory scheme.

This paper concludes that the State should expand current fishing regulations to ensure that Hawai'i's fisheries are sustained for future generations. It also concludes that the State should encourage community-based groups to take responsibility for specific fishing grounds and impose a tax scheme on all commercially sold fish to help fund conservation measures.

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[10] HAW. CODE R. §§ 13-74, -94, -95; *see also* State of Hawai'i Department of Land and Natural Resources Division of Aquatic Resources, Regulated Species–Marine Fishes, http://www.hawaii.gov/dlnr/dar/fish_regs/marfish.htm (last visited Oct. 22, 2006) [hereinafter DLNR Regulated Species].

[11] HAW. CODE R. §§ 13-49, -75.

[12] *Id.* § 13-75; *see also* State of Hawai'i Department of Land and Natural Resources Division of Aquatic Resources, Gear Restrictions, http://www.hawaii.gov/dlnr/dar/fish_regs/gear.htm (last visited Oct. 22, 2006).

[13] *See* MEADOWS ET AL., *supra* note 2, at 3-10 to -14.

[14] *Id.* at 3-12 to -13.

## II. HAWAI'I'S FISHERIES

### *A. Cultural and Economic Importance of Fishing in Hawai'i*

Fishing is intertwined with both native Hawaiian and non-Hawaiian local culture in the islands. The importance of fishing in the native Hawaiian community arises from its historical roots in ancient Hawai'i.[15] Many ancient Hawaiian fishing stories memorialize great fishermen of the past and instill valuable lessons, such as generosity and obedience, in readers today.[16] A majority of the ancient Hawaiian population participated in some type of fishing;[17] men often participated in canoe fishing, and women and children fished inshore.[18] Successful fishing gear was highly prized and often passed down from generation to generation.[19] Above all, marine resources were the primary source of protein for ancient Hawaiians.[20]

In addition to sustenance purposes, fishing was closely associated with religion in ancient Hawai'i.[21] Prior to the start of a fishing season, ancient Hawaiians held numerous ceremonies to present offerings to *'aumakua*, an ancestral or personal god.[22] Ancient Hawaiians also built fishing shrines, or *ko'a*, in fishing villages to ask fishing deities to bring fish to the area[23] and prior to using a new canoe, net, or hook, ancient Hawaiians held a religious ceremony to bless new fishing gear.[24] Also, each *heiau,* or temple, contained a *ku'ula*, or fishing god.[25]

Fishing is not only important to the native Hawaiian community, but to the non-Hawaiian community living in the islands as well. Residents of Hawai'i consume about ninety pounds of fish per year, more than double the national average of fish consumption.[26] Recreational fishing is also very popular in

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[15] *See generally* 1 KUMU PONO ASSOCS., KA HANA LAWAI`A A ME NA KO`A O NA KAI `EWALU (Kamehameha Schools Land Assets Division ed., 2003).

[16] *See generally* MOKU MANE ET AL., HAWAIIAN FISHING TRADITIONS, (Dennis Kawaharada ed., Esther Mookini trans., Kalamaku Press 1992).

[17] KUMU PONO ASSOCS., *supra* note 15, at iii.

[18] National Park Service, Overview of Hawaiian Prehistory, http://www.cr.nps.gov/history/online_books/kona/history1e.htm (last visited Oct. 22, 2006).

[19] MOKU MANE ET AL., *supra* note 16, at xi.

[20] *Id.*

[21] *See* MOKU MANE ET AL., *supra* note 16, at xvi, 77.

[22] *See id.*

[23] National Park Service, *supra* note 18.

[24] E.S. CRAIGHILL HANDY ET AL., ANCIENT HAWAIIAN CIVILIZATION 105 (Charles E. Tuttle Co. rev. ed., 1965).

[25] *Id.*

[26] NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, STRATEGIC PLAN FOR THE CONSERVATION AND MANAGEMENT OF MARINE RESOURCES IN THE PACIFIC ISLAND REGION SUMMARY 5 (2004),

Hawai'i. In 2004, the National Marine Fisheries Service reported that more than 407,000 recreational fishermen went on 2.9 million trips, catching approximately 4.5 million fish.[27] Fishing interests are also prevalent in modern culture through local television shows and publications.[28] For example, "Hawai'i Goes Fishing," a local television show, has been on the air since the 1960s.[29] The show takes its audience on fishing adventures, teaches viewers how to prepare local fish for consumption, and provides tips on catching fish.[30] "Hawaii Fishing News," a local magazine, has been published since 1977 and often reports the latest noteworthy catch, as well as voices concerns of local fishermen.[31]

The importance of fishing to Hawai'i's residents is exemplified by public reaction to a new regulation adopted at the end of 2005 that prohibits fishing in State waters surrounding the Northwest Hawaiian Islands.[32] In promulgating the regulation, DLNR held two rounds of public hearings and received more than 25,000 comments from the public.[33] Peter Young, DLNR's chairman, stated that "[t]he public input on these proposed rules has been astounding."[34] Throughout 2005, local newspapers and magazines also published numerous articles regarding this regulation.[35]

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http://www.wpcouncil.org/documents/FinalStrategicPlanSummary.pdf.

[27] OFFICE OF SCIENCE AND TECHNOLOGY, NATIONAL MARINE FISHERIES SERVICE, FISHERIES OF THE UNITED STATES 2004 22 (2005), http://www.st.nmfs.gov/st1/fus/fus04/fus_2004.pdf.

[28] *See* Hawai`i Goes Fishing, About Our Show, http://www.hawaiigoesfishing.com/about_hgf.html (last visited Oct. 22, 2006); Hawaii Fishing News, http://www.hawaiifishingnews.com/home.cfm?CFID=13159839&CFTOKEN=47844905 (last visited Oct. 22, 2006).

[29] Hawai`i Goes Fishing, *supra* note 28

[30] *Id.*

[31] Hawaii Fishing News, *supra* note 28.

[32] HAW. CODE R. § 13-60.5 (Weil 1998).

[33] James Gonser, *Lingle Signs Off on Fishing Ban*, HONOLULU ADVERTISER, Sept. 30, 2005, at B1, *available at* http://the.honoluluadvertiser.com/article/2005/Sep/30/ln/FP509300365.html [hereinafter Gonser, *Lingle Signs Off on Fishing Ban*].

[34] Press Release, Department of Land and Natural Resources, State Land Board Considers Proposed Regulations to Establish Marine Refuge in Northwestern Hawaiian Islands (May 5, 2005), *available at* http://www.hawaii.gov/dlnr/chair/pio/HtmlNR/05-N29.htm (internal citations omitted).

[35] *See id.*; Tara Godvin, *Fishing banned in NW isles*, HONOLULU STAR-BULL., Sept. 30, 2005, *available at* http://starbulletin.com/2005/09/30/news/story07.html; James Gonser, *Refugee Status Sought for Northwest Isles*, HONOLULU ADVERTISER, May 6, 2005, at A1, *available at* http://the.honoluluadvertiser.com/article/2005/May/06/ln/ln14p.html; *Hawaii: Northwest Isles' Federal Sanctuary Status Faces Critical Year*, PAC. MAG., December 26, 2005, *available at* http://www.pacificislands.cc/news/2005/12/26/hawaii-northwest-isles-federal-sanctuary-status-faces-critical-year.

In addition to recreational and sustenance interests in fishing, fishing plays an important role in Hawai'i's economy. In 2004, commercial fishermen caught approximately 18.2 million pounds of fish, valued at $44.6 million, which ranked Hawai'i's commercial fishery value eighth in the United States.[36] Prior to the fishing prohibition, bottom-fishing in the Northwest Hawaiian Islands produced approximately $1.5 million in bottom-fish annually and supplied about half of the bottom-fish consumed in Hawai'i.[37] Charter fishing is also an important element of Hawai'i's tourism economy. In 1999, charter fishing companies reported direct revenues of $17 million with 77,000 participants.[38]

In 2003, commercial fishermen caught approximately five million pounds of fish from State waters surrounding the main Hawaiian Islands,[39] three-hundred thousand pounds of fish from State waters surrounding the Northwest Hawaiian Islands,[40] and seventeen million pounds of fish from other ocean areas.[41] In terms of the classes of fish taken, fishermen caught: 13.6 million pounds of tuna, three million pounds of bill and swordfish, four millions pounds of pelagic fish, 520,000 pounds of deep bottom-fishes, and 750,000 pounds of *akule* and *'opelu*, big eyed scad and mackerel.[42]

In recognition of Hawai'i's dependence on its ocean resources, in September 2005, the Senate appropriated "$65.4 million for marine-resource protection and for marine management and research."[43] This money will be used to fund programs that research and attempt to find manageable solutions to sustain Hawai'i's fisheries.[44] In November 2005, the Senate gave an additional $73.4 million to Hawai'i that will further fund fishery conservation programs benefiting the islands.[45] Examples of fishery conservation funding from the

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[36] OFFICE OF SCIENCE AND TECHNOLOGY, NATIONAL MARINE FISHERIES SERVICE, *supra* note 27, at 7.

[37] Gonser, *Lingle Signs Off on Fishing Ban*, *supra* note 33.

[38] Ed Glazier, *Charter Fishing Partonage in Hawai`i—A Preliminary Analysis of Costs and Values*, 5 PELAGIC FISHERIES RES. PROGRAM, July-Sept. 2000, at 4, *available at* http://www.soest.hawaii.edu/PFRP/newsletters/July-Sept2000.pdf.

[39] The main Hawaiian Islands consist of Hawai`i, Mau`i, Kaho`olawe, Lana`i, Moloka`i, O`ahu, Kaua`i, and Ni`ihau. MEADOWS ET AL., *supra* note 2, at 4-1.

[40] The Northwestern Hawaiian Islands covers an area approximately 1,000 miles from Ni`ihau and Kaua`i to Kure Atoll and consists of ten main atolls. *Id.* at 6-1.

[41] *Id.* at 3-1.

[42] *Id.*

[43] Press Release, Dan Inouye, U.S. Senator from Hawai`i, Senate Appropriates $65.4 million for Protecting, Managing, and Researching Hawai`i's Marine Resources (Sept. 16, 2005), *available at* http://inouye.senate.gov/~inouye/05pr/20050916pr01.html.

[44] *See id.*

[45] Press Release, Dan Inouye, U.S. Senator from Hawai`i, Congress Approves $73.4 Million for Hawai`i Projects (Nov. 16, 2005), *available at* http://inouye.senate.gov/~inouye/05pr/20051116pr01.html.

Senate include $4 million for the Hawai'i Longline Observer Program, $2.5 million for the Pelagic Fisheries Research Program, $750,000 for the Hawai`i Fisheries Development Program, and $500,000 for the Hawai`i Stock Enhancement Program.[46]

### *B. Hawai'i's Declining Fish Stocks*

Despite numerous studies and economic investments in studying the health of Hawai'i's fisheries,[47] information regarding Hawai'i's fish stocks is often unreliable due to a lack of data from commercial, recreational, and subsistence fishermen.[48] Notwithstanding the lack of information regarding Hawai'i's fisheries, many ocean users and observers agree that Hawai'i's fish stocks are declining. For example, a local newspaper reported in 2003 that between 1955 and 2002, commercial *'ama'ama*[49] (mullet) catch decreased by ninety-one percent, *'oi'o*[50] (bone fish) catch decreased by eighty-eight percent, and *ulua*[51] and *papio*[52] (jack fish) catch decreased by sixty-seven percent.[53]

In-depth studies further revealed that certain species of Hawai'i's fish population are in serious trouble. A study on the *ulua* conducted by DLNR's Division of Aquatic Resources in 1987 reported that "[s]tocks of these important predators in the Main Hawaiian Islands are certainly depressed."[54] That study found that "[c]ommercial landings of [*ulua*] have declined by as

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[46] *Id.*

[47] *See generally* MEADOWS ET AL., *supra* note 2; DLNR ULUA STUDY, *supra* note 2; DENNIS HEINEMANN ET AL., BOTTOMFISH FISHING IN THE NORTHWESTERN HAWAI'IAN ISLANDS IS IT ECOLOGICALLY SUSTAINABLE? (2005), *available at* www.oceanconservancy.org/site/DocServer/NWHI_overfishing_full.pdf?docID=1182; State of Hawai'i Department of Land and Natural Resources Division of Aquatic Resources: Programs and Projects, http://www.hawaii.gov/dlnr/dar/programs.htm (last visited Oct. 23, 2006) [hereinafter DLNR Programs].

[48] *See* MEADOWS ET AL., *supra* note 2, at 3-12 to -13; *Akule Fishery in Hawai'i*, CURRENT LINE (Haw. State Dep't of Land & Natural Res. Div. of Aquatic Res., Honolulu, Haw.), July 1998, at 2, *available at* http://www.hawaii.gov/dlnr/dar/pubs/cl98_07.pdf; State of Hawai'i Department of Land and Natural Resources Division of Aquatic Resources: Background, http://www.hawaii.gov/dlnr/dar/surveys/background.htm (last visited Oct. 23, 2006) [hereinafter DLNR DAR Background].

[49] *'Ama'ama* is a type of mullet, also called the *mugil cephalus*. SPENCER WILKIE TINKER, FISHES OF HAWAI`I 187-88 (Hawaiian Service Inc. 1982) (1978).

[50] *'Oi'o* is a type of bone fish, also called the *albula vulpes*. *Id.* at 66.

[51] *Ulua* is a type of jack fish, also called the *caranx sexfasciatus*. *Id.* at 268-69.

[52] *Papio* is a young *ulua*. WILLIAM A. GOSLINE & VERNON E. BROCK, HANDBOOK OF HAWAIIAN FISHES 179 (University of Hawai'i Press 1971) (1960).

[53] Jan TenBruggencate, *More Fishing for Fewer Fish*, HONOLULU ADVERTISER, July 14, 2003, at 1A, *available at* http://the.honoluluadvertiser.com/article/2003/Jul/14/ln/ln04a.html.

[54] DLNR ULUA STUDY, *supra* note 2, at 1 (internal quotations and citations omitted).

much as 84% since the early 1900s,"[55] including a twelve pound decline in weight of *ulua* near O'ahu, an eighteen pound decline in weight of *ulua* near the Big Island and Kaua'i, and a forty pound decline in weight of *ulua* near Mau'i.[56] The Ocean Conservancy conducted a similar study in 2005 regarding bottom-fish in the Northwest Hawaiian Islands.[57] It concluded that "catch rates of bottom[-]fish in the [Northwest Hawaiian Islands] have declined significantly in the last half-century."[58] It further reported that "[i]n the last 10 years[,] the catch rates in the [Northwest Hawaiian Islands] have averaged less than 3,000 [pounds per] trip[;]"[59] much less than the average 6,000 pounds per trip caught prior to 1980.[60]

Observations by local fishermen and ocean users also indicate that Hawai'i's fisheries are declining. Jack Randall, a zoologist at Bishop Museum and author of several books on Hawaiian fishes, stated that "reef fishes were far more common [in the 1950s] than they are today."[61] Randall reports that he previously "could see large jacks and parrot[ ]fishes . . . every dive[,]"[62] but now those are "a rare sight."[63] Dwayne Costa, a local spear fisher, stated that in the "old days,"[64] he could "[s]wim [ten] feet out and there was fish . . . [but] [n]ow we gotta swim forever 'til we find fish."[65] Also, a study done by Kepa Maly, a local cultural historian and resource specialist, involving hundreds of interviews with native Hawaiian elders[66] found that the vast majority of interviewees after 1990 "commented on changes they had observed in the quality of the fisheries, and the declining abundance of fish--noting that there were significant declines in almost all areas of the fisheries, from streams, to near-shore, and the deep sea."[67]

Listening to this testimony and considering the statistics mentioned above, it is evident that Hawai'i's fish stocks are declining. Combined with the importance of fish stocks to the State, it is even more evident that something else needs to be done.

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[55] *Id.*

[56] *Id.* at 6.

[57] HEINEMANN ET AL., *supra* note 47.

[58] *Id.* at 12.

[59] *Id.*

[60] *Id.*

[61] TenBruggencate, *supra* note 53.

[62] *Id.*

[63] *Id.*

[64] Gina Mangieri, *Gone fishing or fish gone? Restrictions not answering shortage problem*, KHON 2 NEWS, Jan. 7, 2006, http://www.khon.com/khon/print.cfm?sid=1153&storyID=10356.

[65] *Id.*

[66] KUMU PONO ASSOCS., *supra* note 15, at ix.

[67] *Id.* at x.

## III. Overview of Applicable Laws

### A. Jurisdictional Authority

In the Federal Submerged Lands Act, the federal government gave individual states "title to and ownership of"[68] the land and natural resources within three miles of its shores.[69] Pursuant to the United Nations Law of the Sea Convention,[70] international law permits countries to manage and regulate ocean resources within two-hundred miles from shore, otherwise called the exclusive economic zone ("EEZ").[71] Although the United States has not ratified the United Nations Law of the Sea Convention, it does "adhere[] to almost all provisions of the Convention as a reflection of binding customary international law."[72] Accordingly, by Presidential Proclamation, the United States has asserted sovereign jurisdiction over waters within two-hundred miles of its shores.[73] Thus, the State of Hawai'i has the authority to regulate marine resources, including its fisheries, within three miles of its shores while the federal government has the authority to regulate Hawai'i's fisheries between three and two-hundred miles from Hawai'i's shore.

### B. State Authority in Managing Hawai'i's Fisheries

The Hawai'i Constitution gives the State of Hawai'i "power to manage and control the marine . . . resources" in State waters.[74] Coexisting with the State's power to manage marine resources, however, is the public's right to use marine resources stemming from the freedom of the seas notion[75] that marine resources belong to everyone.[76] The Hawai'i Constitution gives the public a

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[68] Submerged Lands Act, 43 U.S.C. § 1311 (2000).

[69] 43 U.S.C. § 1312.

[70] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[71] *Id.* arts. 56-57.

[72] Jordan J. Paust et al., International Law and Litigation in the U.S. 743 (2000).

[73] Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

[74] Haw. Const. art. XI, § 6. State marine waters are those waters "extending from the upper reaches of the wash of the waves on shore seaward to the limit of the State's police power and management authority, including the U.S. territorial sea, notwithstanding any law to the contrary." Haw. Rev. Stat. § 190-1.5 (1993).

[75] The freedom-of-the-sea doctrine was a "seventeenth century principle that limited national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coastline. The remainder of the seas was proclaimed to be free to all and belonging to none." United Nations Convention on the Law of the Sea, Oceans: The Source of Life 9 (2002), *available at* http://www.un.org/Depts/los/convention_agreements/convention_20years/oceanssourceoflife.pdf (last visited Sept. 4, 2005).

[76] *See* Haw. Const. art. XI, § 6.

constitutional right to utilize marine resources by stating that "*[a]ll fisheries* in the sea waters of the State not included in any fish pond, artificial enclosure[,] or state-licensed mariculture operation *shall be free to the public.*"[77] The Hawai'i Constitution also places an affirmative duty on the State legislature to "protect the public's use and enjoyment of the reefs."[78]

To fulfill its duty of balancing the public's right to use and access ocean resources with managing Hawai'i's fisheries, the Hawai'i State legislature designated DLNR as the primary authority for managing all State marine waters and resources.[79] The enabling legislation confers upon DLNR a tremendous amount of power over Hawai'i's marine resources by stating that "[n]o person shall fish for or take any fish"[80] except under State law, with a permit issued by DLNR, or under DLNR's promulgated rules.[81] The legislature reaffirmed DLNR's power over marine resources in a later statute that states, "all fishing grounds . . . belonging to the government . . . shall be and are forever granted to the people, for the free and equal use by all persons; *provided that for the protection of these fishing grounds, the [DLNR] may manage and regulate the taking of aquatic life.*"[82]

Accordingly, as long as a regulation protects public fishing grounds, DLNR may prohibit or severely limit fishing and access to previously public fishing areas[83] and adopt rules that impose size and catch limits, seasonal prohibitions, and limitations on the type of fishing gear that can be used.[84] Although State marine waters extend three miles from shore,[85] DLNR also has the police power to enforce any fishing rules applicable in State marine waters to "[r]esidents of the State; [a]ny commercial marine licensee; and [a]ny permittee or licensee"[86] that fish "within the federal conservation zone."[87] In addition to its managerial duties, DLNR is responsible for information

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

[78] *Id.*

[79] HAW. REV. STAT. § 190-1 (1993).

[80] *Id.*

[81] *Id.*

[82] *Id.* § 187A-21 (emphasis added).

[83] *Id.* § 187A-2(3). This section states that DLNR shall "[e]stablish, manage, and regulate public fishing areas, artificial reefs, fish aggregating devices, marine life conservation districts, shoreline fishery management areas, refuges, and other areas pursuant to title 12." *Id.*

[84] *Id.* § 187A-5.

[85] Submerged Lands Act, 43 U.S.C. § 1312 (2000).

[86] HAW. REV. STAT. § 187A-1.6.

[87] *Id.* There is no definition in the Hawai'i Revised Statutes clarifying what a federal conservation zone is.

gathering[88] and enforcement of all applicable laws relating to marine resources.[89]

### C. Specific Fishing Rules and Regulations in Hawai'i

DLNR's current strategies for managing Hawai'i's fisheries include imposing "[l]imited take, gear, size, season, and area restrictions" on fishermen.[90] As to area restrictions, DLNR has classified popular fishing spots into five basic categories: marine life conservation districts ("MLCDs"),[91] fishery management areas ("FMAs"),[92] fisheries replenishment areas ("FRAs"),[93] wildlife sanctuaries,[94] and natural area reserves.[95]

MLCDs are essentially no fishing zones.[96] DLNR has classified eleven fishing grounds in Hawai'i as MLCDs;[97] however, three MLCDs allow very limited fishing.[98] Some famous "no-take" MLCDs are Hanauma Bay[99] and Waikiki[100] on O'ahu, Kealakekua Bay[101] on the Big Island, and Molokini shoal[102] off the island of Mau'i. Generally, MLCDs prohibit persons from fishing, catching, taking, injuring, killing, possessing, or removing any marine life from the area.[103] The Manele-Hulopoe MLCD on Lana'i,[104] and the

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[88] *Id.* § 187A-2(6). This section states that DLNR shall "[g]ather and compile information and statistics concerning the habitat and character of, and increase and decrease in, aquatic resources in the State, including the care and propagation of aquatic resources for protective, productive, and aesthetic purposes, and other useful information, which the [DLNR] deems proper." *Id.*

[89] *Id.* § 187A-2(7). This section states that DLNR shall "[e]nforce all laws relating to the protecting, taking, killing, propagating, or increasing of aquatic life within State and the waters subject to its jurisdiction." *Id.*

[90] MEADOWS ET AL., *supra* note 2, at 4-10.

[91] HAW. CODE R. §§ 13-28-1 to -38-1 (Weil 1998).

[92] *Id.* §§ 13-47-1 to -60-1.

[93] *Id.* § 13-60.3-1.

[94] *Id.* § 13-125-1.

[95] *Id.* § 13-209-1; *see also* State of Hawai'i Department of Land and Natural Resources Division of Aquatic Resources, Hawai'i Fishing Regulations, http://www.hawaii.gov/dlnr/dar/fish_regs/index.htm (last visited Oct. 22, 2006) [hereinafter DLNR Fishing Regulations].

[96] HAW. CODE R. §§ 13-28 to -38.

[97] *Id.* §§ 13-28 to -38.

[98] *Id.* §§ 13-30, -35, -37.

[99] *Id.* § 13-28.

[100] *Id.* § 13-36.

[101] *Id.* § 13-29.

[102] *Id.* § 13-31.

[103] *Id.* §§ 13-28 to -38.

[104] *Id.* § 13-30.

Wailea Bay[105] and Old Kona Airport[106] MLCDs on the Big Island generally limit fishing by allowing only pole and line fishing.[107] Pole and line fishing is using "a pole and a length of fishing line" to catch fish.[108]

FMAs are areas with specific fishing regulations applicable to that area only.[109] DLNR has classified nineteen fishing grounds as FMAs in Hawai'i, all of which have different regulations.[110] One popular FMA is the Waikiki-Diamond Head shoreline FMA on O'ahu, which allows fishing every other year.[111] In Kahului Harbor, Mau'i, licensed fishermen may take baitfish or young mullet to stock fish ponds during those fisheries' open season.[112] In Waimea Bay, Kaua'i, fishermen cannot use nets to catch fish within fifty yards of the pier and are limited to two fishing poles while fishing on the pier.[113]

The State of Hawai'i technically has only one FRA, the West Hawai'i Regional FRA; however, this FRA encompasses nine separate fishing areas spanning the West coast of the Big Island.[114] The West Hawai'i Regional FRA imposes several limitations, including regulations regarding the taking of aquarium fish and the use of lay nets in all nine areas on the West coast.[115] DLNR has also created two fishing sanctuaries in Hawai'i that are both located on O'ahu: Moku-o-loe, or Coconut Island,[116] and Paiko lagoon.[117] The taking of any aquatic life is completely prohibited in these areas.[118] In addition to sanctuaries, DLNR has created two reserves in Hawai'i, the Kaho'olawe Island Reserve and the Ahihi-Kinau Reserve.[119] DLNR allows limited fishing within the Kaho'olawe Island Reserve with the approval from the Kaho'olawe Island Reserve Commission.[120] The Ahihi-Kinau Reserve on Mau'i also has applicable fishing regulations.[121] Fishing is completely prohibited in the Ahihi-Kinau Reserve.[122]

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[105] *Id.* § 13-35.

[106] *Id.* § 13-37.

[107] *Id.* §§ 13-30, -35, -37.

[108] *Id.* § 13-30-1.1.

[109] *See* HAW. REV. STAT. §§ 188-34 to -36 (1993 & Supp. 2005); HAW. CODE R. §§ 13-47 to -60.

[110] *See* HAW. REV. STAT. §§ 188-34 to -36; HAW. CODE R. §§ 13-47 to -60.

[111] HAW. CODE R. § 13-48-2.

[112] *Id.* § 13-51-3.

[113] *Id.* § 13-50-2.

[114] *Id.* §§ 13-60.3-13 to -21.

[115] *Id.* § 13-60.3.

[116] HAW. REV. STAT. § 188-36 (1993).

[117] HAW. CODE R. § 13-125.

[118] HAW. REV. STAT. § 188-36; HAW. CODE R. § 13-125.

[119] HAW. REV. STAT. § 6K (1993 & Supp. 2005); HAW. CODE R. §§ 13-209, -244-32.

[120] HAW. CODE R. § 13-261-2, -13.

[121] *See id.* §§ 13-209 to -244-32.

[122] *Id.* § 13-209-4.

In addition to the five types of management areas discussed above, DLNR has also designated nineteen areas as bottom-fish restricted areas,[123] where bottom-fishing is completely prohibited.[124] Some well known bottom-fish restricted areas are the Penguin Banks, Kane'ohe and Maunalua Bays on O'ahu, and Hanalei-Kilauea Point on Kaua'i.[125] Apart from the bottom-fish restricted areas, there are also separate regulations imposing catch limits and gear restrictions for general bottom-fishing in Hawai'i.[126] Currently, non-commercial fishermen are limited to catching a combined total of five *onaga*[127] and *ehu*,[128] two types of ruby snappers, per fishing trip.[129] Additionally, all fishermen are prohibited from bottom-fishing "with any trap, trawl, bottom [-] fish longline or net,"[130] other than a scoop net.[131]

As to species-specific regulations, DLNR regulates over twenty-two different marine fisheries with size, seasonal, and catch limitations.[132] Most of these fish specific regulations impose minimum size or weight limits for what can be caught[133] and some additionally impose minimum size limits on what can be sold.[134] Three types of fish, the *'ama'ama*[135] (mullet), *moi*[136] (thread-fin), and *akule* or *halalu*[137] (big-eyed scad), have seasonal limitations based on their respective spawning seasons.[138] Seven fish species have bag limits that limit the number of fish a fisherman may catch per trip.[139]

In addition to area and species specific regulations, DLNR has also promulgated general gear restrictions. DLNR mainly regulates the type of nets and traps that can be used when catching fish.[140] For example, DLNR requires gill net fishers to "visually inspect[] the net every two hours and releas[e] or

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[123] *Id.* § 13-94.

[124] *Id.* § 13-94-8.

[125] *Id.* § 13-94.

[126] *Id.* §§ 13-94-6, -7.

[127] *Onaga* is a type of ruby-colored snapper, also called the *ula'ula koa'e* or *etelis coruscans*. TINKER, *supra* note 49, at 223.

[128] *Ehu* is a type of ruby-colored snapper, also called the *ula'ula* or *etelis carbunculus*. *Id.*

[129] HAW. CODE R. §§ 13-94-5, -7.

[130] *Id.* § 13-94-6.

[131] *Id.*

[132] *Id.* §§ 13-74, -94, -95.

[133] *Id.* §§ 13-95-13 to -15, -17.

[134] *Id.* §§ 13-74, -94, -95.

[135] *'Ama'ama* is a type of mullet, also called the *mugil cephalus*. TINKER, *supra* note 49, at 187-88.

[136] *Moi* is a type of thread-fin fish, also called the *polydactylus sexfilis*. *Id.* at 190-91.

[137] *Akule* or *halalu* is a type of big-eyed scad fish, also known as *trachiurops crumenophthalmus*. *Id.* at 259.

[138] HAW. CODE R. §§ 13-95-8, -19, -23.

[139] *Id.* §§ 13-94-5, -95-14, -95-19, -95-21, -95-22 to -24.

[140] *Id.* § 13-75-12(a)(1).

remov[e] any undersized, illegal, or unwanted catch."[141] It also prohibits gill net fishers from "[l]eav[ing] the net in the water for a period of more than four hours in any twenty-four hour period."[142] A gill net is "a curtainlike net suspended in the water with mesh openings large enough to permit only the heads of the fish to pass through, ensnaring them around the gills when they attempt to escape."[143]

Although there are many current regulations protecting Hawai'i's fisheries, as will be explained below, the current regulatory scheme is inadequate and much more regulation is needed.

### *D. Current Issues in Managing Hawai'i's Fisheries*

In 2005, DLNR prepared a strategic plan to outline future steps that would be beneficial in managing Hawai'i's fish stocks.[144] Some of DLNR's goals are to "[r]eevaluate size limits to ensure species have sufficient reproductive potential"[145] and evaluate current MLCDs,[146] FMAs,[147] bottom-fish restricted areas,[148] and wildlife sanctuaries[149] "for purpose and management effectiveness and [to] consider [the] need for new marine protected areas."[150] In its strategic plan, DLNR also identified seven problem areas that impair its effectiveness in managing Hawai'i's fish stocks: (1) "Loss and Degradation of Habitat" from residential and shoreline development; (2) "Introduced Invasive Species[;]" (3) "Limited Information and Insufficient Information Management[;]" (4) "Uneven Compliance With Existing Conservation Laws, Rules, and Regulations[;]" (5) "Excessive Extractive Use[;]" (6) "Management Constraints[;]" and (7) "Inadequate Funding."[151]

As to uneven compliance with existing rules and regulations, DLNR names two primary sources for its cause, "limited capacity for enforcement and lack of respect and understanding for the value of protecting aquatic wildlife."[152] With respect to limited enforcement capacity, DLNR blames "[l]imited funding"[153] for its incapacity "to enforce existing laws, rules, and regulations

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[141] *Id.* § 13-75-12(a)(2).
[142] *Id.* § 13-75-12(b).
[143] *Id.*
[144] MEADOWS ET AL., *supra* note 2.
[145] *Id.* at 4-10.
[146] *Id.* at 4-11.
[147] *Id.* at 4-11 to -12.
[148] *Id.* at 4-12.
[149] *Id.*
[150] *Id.* at 4-11 to -12.
[151] *Id.* at 3-10 to -14.
[152] *Id.* at 3-12.
[153] *Id.* at 3-12 to -13.

protecting native wildlife and habitat."[154] Surprisingly, although Hawai'i has "the largest area of marine protected areas in the United States,"[155] it ranks forty-eighth "in the nation for state spending on fisheries and wildlife."[156] DLNR's 2006 budget totaled $76.8 million, or less than one percent of the State's total budget of $8.9 billion.[157]

Although it appears that DLNR has a large budget, its budget is grossly inadequate when compared to its tremendous responsibility in managing Hawai'i's resources.[158] Due to Hawai'i's unique environment and DLNR's vast areas of responsibilities, DLNR requires a considerable budget.[159] For example, programs to implement endangered species recovery plans alone costs upward of "tens of millions of dollars per year."[160]

DLNR's Division of Conservation and Resource Enforcement ("DOCARE") is the primary enforcement agency of DLNR.[161] DOCARE issued a report in 2005, which expressed numerous enforcement issues.[162] Some of DOCARE's complaints were that it was understaffed, underfunded, and responsible for too many tasks that had little to do with conservation measures.[163] For example, DOCARE employees had to partake in marijuana eradications and Homeland Security actions.[164] It also complains that "penalties for transgressions are often small."[165] Thus, as a result of the above mentioned factors, the public perceives that the State is not able to enforce regulations[166] and there is little compliance with conservation laws and regulations.[167]

DLNR also blames a lack of information from recreational fishermen as a major problem in trying to manage Hawai'i's fisheries.[168] The fact that

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[154] *Id.*

[155] *Id.* at 3-3.

[156] *Id.*

[157] *Id.*

[158] *See id.* at 3-3 to -4. DLNR has been assigned the responsibility of providing management "over public lands, the water resources, ocean waters, navigable streams, coastal areas[,] . . . state parks, historical sites, forests, forest reserves, aquatic life, aquatic life sanctuaries, public fishing areas, boating, ocean recreation, costal programs, wildlife, wildlife sanctuaries, game management areas, public hunting areas, [and] natural area reserves." HAW. REV. STAT. § 171-3 (Supp. 2005).

[159] MEADOWS ET AL., *supra* note 2, at 3-3 to -4.

[160] *Id.* at 3-4.

[161] *Id.* at 4-2.

[162] *Id.* at 3-13.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] DLNR DAR Background, *supra* note 48.

Hawai'i lacks a licensing program for recreational fishermen and does not require recreational fishermen to report their catches greatly contributes to the lack of information in the state.[169] DLNR states that there are an estimated 260,000 recreational fishermen, 130,000 of which are residents, compared to the 3,500 commercial fishermen in the islands.[170] The disparity between the number of recreational and commercial fishermen results in a considerable amount of fish being taken by recreational fishermen.[171] As recreational fishing information is unrecorded, population estimates and trends are either inaccurate or unavailable.[172] As a result, resource managers do not have complete information to make informed decisions[173] that very likely result "in a misallocation of extremely limited conservation dollars."[174]

Because of these shortcomings in Hawai'i's regulatory system, DLNR must expand its current regulations and consider other methods in order to sustain Hawai'i's fish stocks.

## IV. CREATING A REGULATORY SCHEME IN HAWAI'I

The State of Hawai'i and other environmental, native Hawaiian, and fisheries groups have undertaken numerous efforts in studying fish stocks to learn the best way to maintain their sustainability.[175] Although western science practices contribute to the assessment and management of Hawai'i's fisheries, a lot of information is already known and gathered within the native Hawaiian community.[176]

Hawaiian culture emphasized the "relationship between people and nature."[177] Thus, despite that "nearly every member of the Hawaiian population regularly participated in some form of fishing"[178] and prior to western contact, the native Hawaiian population reached one million people, fisheries in Hawai'i "were resilient and healthy."[179] For this reason, the State should incorporate native Hawaiian knowledge into its modern regulatory scheme.

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[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] MEADOWS ET AL., *supra* note 2, at 3-12.

[173] *Id.*

[174] *Id.*

[175] *See id.* at 3-12 to -13; DLNR ULUA STUDY, *supra* note 2, at 1; HEINEMANN ET AL., *supra* note 44; Antolini, *supra* note 2; *see also* DLNR Programs, *supra* note 47.

[176] *See infra* Part IV.A-D.

[177] KUMU PONO ASSOCS., *supra* note 15, at iii.

[178] *Id.*

[179] *Id.*

### *A. Seasonal Fishing Prohibitions*

The ancient Hawaiians employed a *kapu*, or prohibition system, as a conservation method for sustaining fish stocks.[180] Generally, the *kapu* system stopped people from fishing in certain areas or from catching certain fishes at certain times.[181] A *kapu* was normally signified with a coconut branch placed on shore that told fishermen that fishing was not allowed in that area.[182] Principles adhered to in the *kapu* system were: never catching baby fish or fish that were spawning, never taking all the fish from an area, and taking only what was needed.[183] *Kapu* enforcement was taken very seriously in ancient Hawai'i, with violations normally resulting in death.[184] By the late 1830s, however, a civil punishment was imposed. Originally, the 1839 Constitution and Laws of Hawai'i stated that any fishermen that violated fishing laws were completely prohibited from fishing for two years.[185] In the 1842 Constitution, that provision was amended and imposed a fee of five times the value of any fish criminally caught.[186]

An important fishing *kapu* adhered to in ancient Hawai'i was the *'opelu*[187] (mackerel) and *aku*[188] (skipjack tuna) fishing *kapu*.[189] In ancient Hawai'i, *'opelu* and *aku* were considered "highly prized fish caught in great numbers" and held religious importance.[190] An ancient Hawaiian legend told that both fish "were descendants of Pa'ao, a high priest, because the *aku* and *'opelu* saved him from storms sent by his brother Lonopele during a voyage from the South Pacific to Hawai'i."[191] Under this *kapu* system, fishermen were allowed to fish for only one of these species at a time. *'Opelu* were generally caught from August through January, with peak fishing season in October and November.[192] From January until July, *'opelu* were placed on *kapu* because this was its spawning season.[193] During the *'opelu kapu*, February to July, *aku* were available to be fished, and conversely, during the open season for *'opelu*,

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[180] MOKU MANE ET AL., *supra* note 16, at xii.

[181] *Id.*

[182] BETTY DUNFORD, THE HAWAIIANS OF OLD 107 (Bess Press 1980).

[183] *Id.* at 106-07.

[184] *Id.* at 40.

[185] KUMU PONO ASSOCS., *supra* note 15, at 244-245.

[186] *Id.* at 245.

[187] *'Opelu* is a type of mackerel scad fish, also called the *decapterus pinnulatus* or *decapterus maruadsi*. TINKER, *supra* note 49, at 258-59.

[188] *Aku* is a type of skipjack tuna fish, also called the *katsuwonus pelamis*. *Id.* at 324.

[189] MOKU MANE ET AL., *supra* note 16, at xii.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

*aku* were placed on *kapu*.[194] This alternating system allowed both fish species to regenerate and sustain themselves without greatly infringing on fishing rights because fishermen could always fish for one of these species.

Currently, there are no regulations limiting *aku* catch.[195] With respect to *'opelu*, there is only a minimal geographical limitation on *'opelu* fishing on the South Kona coast of the Big Island.[196] With similar fishing regulations to the Hawaiian *kapu* system regarding *'opelu* and *aku*, the State could more effectively manage these two fish species. Likewise, the principle of imposing a seasonal ban on fish species during its spawning season should be applied to all of Hawai'i's fishes.[197] Currently, only three of the more than twenty-two fish species regulated[198] have seasonal limitations:[199] the *'ama'ama*[200] (mullet), *moi*[201] (thread-fin), and *akule*[202] (big-eyed scad).[203] The State should incorporate the spawning seasons of other fish species into its regulatory scheme and impose seasonal prohibitions on all types of fish to help fish stocks regenerate.

A substantial benefit of incorporating native Hawaiian knowledge, such as spawning seasons, into today's regulatory scheme is that a wealth of information is already known and gathered.[204] Many currently regulated species have size or catch limits, but do not have seasonal prohibitions based on spawning seasons.[205] For example, DLNR imposes a ten inch size limit for catching *ulua*, a sixteen inch size limit for selling *ulua*, and a maximum catch limit of twenty *ulua* per fishing trip.[206] There is no seasonal prohibition on catching *ulua* despite the fact that it is known that *ulua* spawn between June

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[194] *Id.*

[195] *See* DLNR Regulated Species, *supra* note 10.

[196] HAW. CODE R. § 13-95-18 (Weil 1998). This section states that "[i]t shall be unlawful for any person at any time, to fish for or take, or be engaged in fishing or taking *opelu* with fish or animal bait within the waters off the coast of South Kona, island of Hawaii, between the Kiilae-Keokea boundary and the Kapua-Kaulanamauna boundary, except with hook and line." *Id.*

[197] *See generally* Kelson K. Poepoe et al., *The Use of Traditional Hawaiian Knowledge in the Contemporary Management of Marine Resources*, 11 FISHERIES CENTER RES. REPS. 328, 332 (2003).

[198] HAW. CODE R. §§ 13-94, -95; *see also* DLNR Regulated Species, *supra* note 10.

[199] HAW. CODE R. §§ 13-95-8, -19, -23.

[200] *'Ama'ama* is a type of mullet, also called the *mugil cephalus*. TINKER, *supra* note 49, at 187-88.

[201] *Moi* is a type of thread-fin fish, also called the *polydactylus sexfilis*. *Id.* at 190-91.

[202] *Akule* or *halalu* is a type of big-eyed scad fish, also known as *trachiurops crumenophthalmus*. *Id.* at 259.

[203] HAW. CODE R. §§ 13-95-8, -19, -23.

[204] *See* Poepoe et al., *supra* note 197, at 331-36.

[205] HAW. CODE R. §§ 13-95-4, -5, -7, -11, -16, -22.

[206] *Id.* § 13-95-22.

and August.[207] Other fish, such as *aholehole*[208] (flag-tail), *kumu*[209] (goat fish), *uhu*[210] (parrot fish), *kala*[211] (unicorn fish), and *manini*[212] (surgeon fish), are only regulated by size limitations,[213] although information regarding their spawning seasons is also well known by native Hawaiians.[214] *Aholehole*, *kala*, and *manini* spawn between February and April; *kumu* spawn between January and April; and *uhu* spawn between May and August.[215]

As one native Hawaiian proponent has stated, "[B]y identifying peak spawning periods for important resource species, traditional closures or *kapu* can be applied so as not to disturb the natural rhythms of these species."[216] An added benefit to seasonal prohibitions is that at any given time, fishermen will be able to fish for some species. Thus, instead of foreclosing on fishing rights completely, fishermen would always be able to fish for certain species depending on the season.

### *B. Expanded Fishing Regulations*

In ancient Hawai'i, fishing *kapu* and conservation principles mentioned above applied to all types of fish.[217] Accordingly, the State should regulate all types of fish caught in Hawai'i's waters. Although many fish species are regulated, many others are not. Amazingly, some of the most highly desirable fish caught in Hawai'i's waters are completely unregulated. For example, *'aweoweo*[218] (big-eye), *mahi mahi*[219] (dolphin fish), *ono*[220] (wahoo), *opah*[221]

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[207] Poepoe et al., *supra* note 197, at 333.

[208] *Aholehole* is a type of Hawaiian flag-tail fish, also called the *kuhlia sandvicensis*. TINKER, *supra* note 49, at 204-05.

[209] *Kumu* is a type of purplish goat fish, also called the *parupeneus porphyreus*. *Id.* at 235-36.

[210] *Uhu* is a type of large blue parrot fish, also called the *scarus perspicillatus*. *Id.* at 312-13.

[211] *Kala* is a type of large unicorn fish, also called the *naso unicornis*. *Id.* at 387.

[212] *Manini* is a type of sandwich island surgeon fish, also called the *acanthurus sandvicensis*. *Id.* at 379.

[213] HAW. CODE R. §§ 13-4, -5, -7, -11, -16 (Weil 1998).

[214] *See* Poepoe et al., *supra* note 197, at 332-34.

[215] *Id.* at 333.

[216] *Id.* at 332.

[217] DUNFORD, *supra* note 182, at 106-107.

[218] *'Aweoweo* is a type of big-eye fish, also called the *priacanthus boops*. TINKER, *supra* note 49, at 206-07.

[219] *Mahi mahi* is a type of dorado or dolphin fish, also called the *coryphaena hippurus*. *Id.* at 272-73.

[220] *Ono* is a type of tuna, also called the wahoo or *acanthocybium solandri*. *Id.* at 322.

[221] *Opah* is a type of moon fish, also called the *lampris regius*. *Id.* at 159.

(moon fish), and *a'u*[222] (marlin) have no fishing regulations limiting their catch. A lack of regulations for desirable species may lead fishermen to take advantage and exploit available fish stocks.

Exploitation of fish stocks is exemplified by fishermen reaction to a rare run of *'aweoweo* in 2003 off the Windward coast of O'ahu.[223] During the summer of 2003, large schools of *'aweoweo* ran around the Windward coast, drawing many fishermen to the area to catch as many *'aweoweo* as possible.[224] Although huge schools of *'aweoweo* have not been seen in Hawai'i since the 1970s, fishermen caught the fish without any sign of self-restraint.[225] Some fishermen fished until the wee hours of the morning, and others fished until they caught "close to 1,000 of the fish in a few days."[226] A local newspaper noted that "[w]ith no regulations limiting the number of *'aweoweo* that can be caught, anglers are casting their fishing rods and hauling in *'aweoweo* by the hundreds."[227] Stories, such as the one told above, demonstrate the need for some type of regulation, minimally a catch limit, for all of Hawai'i's fishes.

The *nairagi a'u*,[228] or striped marlin, is another fish species in need of regulation. The State of Hawai'i Department of Business, Economic Development & Tourism reports that "[c]ommercial landings of *nairagi* have increased in Hawai'i with expansion of the local longline fleet."[229] It also reports that "[l]andings are heaviest during the winter and spring."[230] Unfortunately, juvenile *nairagi* journey through Hawaiian waters during the spring as well.[231] As a result, fishermen are catching juvenile *nairagi* between forty and sixty pounds,[232] thereby breaking the native Hawaiian principle of not catching baby fish.[233]

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[222] *A`u* is a type of marlin or sail-fish, also called the *makaira indica*, *makaira nigricans*, or *tetrapterus audax*. *Id.* at 330-33.

[223] Kalani Wilhelm, *Influx of 'Aweoweo Brings Scores of Anglers to Windward Waters*, HONOLULU ADVERTISER, Aug. 30, 2003, at A1, *available at* http://the.honoluluadvertiser.com/article/2003/Aug/30/ln/ln06a.html.

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Nairagi* is a type of *a`u* or marlin, also called the *tetrapturus audax*. State of Hawai'i Department of Business, Economic Development, & Tourism, Seafood, Nairagi, http://www.state.hi.us/dbedt/seafood/nairagi.html (last visited Oct. 26, 2006).

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] DUNFORD, *supra* note 182, at 106.

Similarly, *mahi mahi* are generally caught year round, with peak catching season between March through May, and September through November.[234] Normally, "[l]arge specimens [of *mahi mahi*] will reach a length of about six feet and a weight of about [seventy] pounds."[235] Regrettably, a typical *mahi mahi* catch is between eight and twenty-five pounds,[236] far below the average weight of seventy pounds for larger *mahi mahi.* The *nairagi* and *mahi mahi* are just two examples of the need for expanded regulations covering all species of fish caught in Hawai'i's waters. The State of Hawai'i should at least consider expanding its regulations to encompass all commercially sold fish.

### *C. Community Based Management*

In ancient Hawai'i, land was divided into *ahupua'a*, or sections of land that could independently sustain its inhabitants, usually running from mountain to sea.[237] In each *ahupua'a*, a *konohiki*, or lesser chief, was responsible for enforcing the fishing *kapu* through *ilamuku*, or present day police officers.[238]

Today's fishing regulatory system does not have overseers in each fishing community. Instead, one agency, DLNR's Division of Conservation and Resource Enforcement ("DOCARE"), carries out all enforcement of fishing regulations.[239] DOCARE is responsible for enforcing DLNR regulations on 1.3 million acres of state land and ocean area, ranging from the mountain areas to three miles off-shore.[240] In addition to enforcing DLNR regulations, DOCARE must also help with crime and drug prevention in the islands.[241] As a result, DOCARE officers are "spread thin, undertrained, underequipped and mismanaged,"[242] which leads to "ineffective and inefficient"[243] enforcement measures.[244] Because of its inability to enforce fishing regulations, DOCARE primarily relies on voluntary compliance from the public.[245] Unfortunately, with little or no consequences arising from violations[246] and a lack of

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[234] State of Hawai'i Department of Business, Economic Development, & Tourism, Seafood, Mahimahi, http://www.state.hi.us/dbedt/seafood/mahimahi.html (last visited Oct. 22, 2006) [hereinafter DBED, Mahimahi].

[235] TINKER, *supra* note 49, at 272.

[236] DBED, Mahimahi, *supra* note 234.

[237] DUNFORD, *supra* note 182, at 41.

[238] *Id.* at 31; HANDY ET AL., *supra* note 24, at 38.

[239] HAW. REV. STAT. § 199-3 (Supp. 2005).

[240] Mary Vorsino, *Auditor Slams State Conservation Efforts*, HONOLULU STAR-BULL., Jan. 6, 2006, *available at* http://starbulletin.com/2006/01/06/news/story01.html.

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] MEADOWS ET AL., *supra* note 2, at 3-13.

[246] *Id.* at 3-12 to -13.

understanding by the public of the importance of sustaining marine wildlife and their habitat, voluntary compliance with fishing regulations is low.[247]

Clearly, the best solution to this problem is giving DLNR an increased budget to hire more enforcement officers. Absent sufficient funding, however, DLNR must find cheaper alternatives or utilize more effective enforcement strategies. A logical solution to enforcement issues is involving the community into the State's regulatory scheme.[248]

DLNR recognizes the importance of involving the community in managing marine resources. It has expressly stated that "[t]he success of voluntary compliance depends heavily on local community involvement."[249] The goal of community-based management is to provide the "local community [with] an understanding of the importance and values of native wildlife and their habitat and a sense of pride and ownership or stewardship that encourage[s] voluntary compliance."[250]

Community-based management is essentially a modern day *ahupua'a* system. The main problem in an *ahupua'a* type system is getting the community involved in educating fishers about the importance of abiding by fishing regulations and in enforcement of currently promulgated fishing regulations. Although this is a difficult task, Hawai'i has other community-based programs that help the State carry out its duties that DLNR can learn from.

The "adopt-a-highway" program in Hawai'i asks volunteers, such as "[c]ommunity groups, churches[,] or businesses,"[251] to pick up litter on sections of a highway for a two-year period.[252] This helps the State of Hawai'i Department of Transportation alleviate the $2 million annual cost of picking up litter.[253] The "adopt-a-highway" program appears to be successful with volunteers ranging from Starbucks workers[254] and firefighters[255] to high school clubs[256] participating in the program.

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[247] *Id.*

[248] *Id.*

[249] *Id.* at 3-13.

[250] *Id.*

[251] HIGHWAYS DIVISION, STATE OF HAWAII DEPARTMENT OF TRANSPORTATION, ADOPT-A-HIGHWAY GENERAL INFORMATION 1 (2005), http://www.state.hi.us/dot/highways/Adopt-A-Highway/1_Adopt-A-Highway%20General%20Information.pdf.

[252] *Id.*

[253] *Id.*

[254] Starbucks Coffee Company Hawai'i, Community Commitment, Environment, http://starbuckshawaii.com/index.php?id=29 (last visited Oct. 27, 2006).

[255] News Release, Hawaii Fire Fighters Association, HFFA Adopts a Highway (Oct. 2, 2004), *available at* http://www.hawaiifirefighters.org/webnews.asp?ID=137.

[256] Making Waves staff, *2 School Clubs Offer Chance to Give Back*, HONOLULU STAR-BULL., Nov. 21, 2005, *available at* http://starbulletin.com/2005/11/21/features/story05.html.

A similar program, like "adopt-a-fishing-ground," could help the State promote awareness of the need for obeying fishing regulations. Instead of having community groups pick up litter, groups should be responsible for sponsoring educational activities directed at specific fishing grounds. An example of this type of program is Malama Maunalua, a newly formed community-based management group that is "dedicated to creating a more culturally and ecologically healthy Maunalua region."[257] In October 2005, Malama Maunalua supported a program that taught school children about "the Bay's health and threats (e.g. limu, fish, coral, water quality), invasive limu control, and navigation."[258]

Other community groups could take charge of fishing grounds in their community and lead a community-based system for that specific fishing ground. Groups such as Malama Kai,[259] Kai Makana,[260] and Malama Hawai'i[261] are already involved in promoting awareness of the importance of sustaining Hawai'i's marine life and environment. In addition to promoting general awareness of the importance of protecting marine resources in Hawai'i, these groups could be responsible for promoting awareness of the need for protecting marine resources for one specific fishing ground. Non-traditional groups, such as scuba and skin diving clubs, fishing organizations, and retail stores could also take part and support community groups by sponsoring educational activities for specific fishing grounds. Having a community group steward a specific fishing ground is a first step in creating an effective community-based management system.

Another community-based program is the neighborhood watch, where police departments in Hawai'i encourage and support community members to help fight crime.[262] Neighborhood watches prevent crimes "by teaching

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[257] Malama in Action, http://www.malamahawaii.org/maction.html (last visited Apr. 7, 2006).

[258] *Id.*

[259] Malama Kai Foundation, http://www.malama-kai.org/index.htm (last visited Oct. 27, 2006). Malama Kai "is a non-profit organization dedicated to ocean stewardship for current and future generations through community service and public education." *Id.*

[260] Kai Makana, Mission, Vision & Values, http://www.kaimakana.org/mission.htm (last visited Oct. 27, 2006). Kai Makana is a non-profit, volunteer based group that "takes an active role in educating and mobilizing the public to better understand and preserve marine life and the ocean environment." *Id.*

[261] Malama Hawai'i, http://www.malamahawaii.org/about_us.html (last visited Oct. 27, 2006). "Malama Hawai'i is a hui of over seventy organizations and hundreds of individuals committed to the vision that Hawai'i, our special island home, be a place where the people, land and sea are cared for, and communities are healthy and safe." *Id.*

[262] Honolulu Police Department, Neighborhood Security Watch, http://www.honolulupd.org/community/nsw.htm (last visited Oct. 26, 2006); County of Hawai'i, Neighborhood Watch—Working With Our Police, http://co.hawaii.hi.us/info/imua/nghbrhd_watch.html (last visited Oct. 26, 2006).

citizens to become aware of the daily activities that occur."[263] Increased awareness empowers citizens to "know when something out of the ordinary occurs and how to appropriately report the observation to the local [p]olice."[264] A similar program in Kailua-Kona, Hawai'i helps police patrol the community by having volunteers walk through a popular street on Friday and Saturday evenings.[265] In both programs, volunteers "do not intervene if trouble starts, but . . . serve as eyes and ears in telephone contact with the local [p]olice [d]epartment."[266]

A program similar to a neighborhood watch could be implemented to report violations to DLNR. With adequate training, ocean users could be trained to spot illegal fishing tactics, like fishing for certain species during a seasonal prohibition or using improper fishing nets, and properly report it to DLNR. The same community groups mentioned above could be in charge of educating the public of illegal fishing practices.

Community-based management would be successful because it seems to have support from those that are most likely to violate fishing regulations, fishermen. Certain local fishermen and fishermen advocates have indicated that fishermen may be willing to participate in community-based management programs if it would continue to allow them to fish. In an article in "Hawaii Fishing News" about the Northwest Hawaiian Island fishing ban, Bob Duerr, a staff writer responsible for reporting "fishing briefs and hunting news in the islands,"[267] stated that "[f]ishermen want conservation. Cut back, curtail, stop, limit, control and conserve fishing, but don't eliminate fishing with No Fishing Areas. No fishing forever is not the conservation tradition of the Hawaiian Islands."[268] Duerr continues to state that "[a]n ecosystem is a cooperation"[269] and that "[e]nvironmental cooperation . . . is the way of the *ahupua'a*,"[270] suggesting that fishermen are open to an *ahupua'a* type regulatory system or community-based management if it continues to allow them to exercise their fishing rights. "Hana Pa'a Hawaii," a prominent fishing store in Hawai'i, strongly opposes total fishing prohibitions as well and is urging DLNR to incorporate conservation techniques, such as "bag and size limits, non-ban gear restrictions, [and] closed seasons,"[271] and to "enforc[e] the rules already

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[263] County of Hawai'i, Neighborhood Watch, *supra* note 262.

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] Hawaii Fishing News, Writers, http://www.hawaiifishingnews.com/contact.cfm (last visited Oct. 27, 2006).

[268] Bob Duerr, *Lingle Ends NWHI Angling*, HAW. FISHING NEWS, Nov. 2005, at 11.

[269] *Id.*

[270] *Id.*

[271] Hana Pa'a Hawaii, Protect our Fishing Rights: NEW LEGISLATION, http://www.hanapaahawaii.net/articles.php?article_id=21 (last visited Oct. 26, 2006).

in place."[272] It also suggests that Hawai'i's regulatory scheme should incorporate "fishing community participation,"[273] thereby suggesting that a community-based system would be acceptable and that they may even participate in such programs.

DLNR should encourage and enable community groups to take charge of educational and enforcement activities for certain fishing grounds. By doing so, DLNR could delegate some of its responsibility in sustaining marine resources to groups that want to achieve the same conservation goals as DLNR. This type of system would also increase public compliance with fishing regulations because more members of the public are involved in the regulatory system and more attention would be focused on specific fishing grounds.

### *D. Taxes*

In both ancient Hawaiian and modern culture, members of the public are required to pay taxes.[274] In ancient Hawai'i, *maka'ainana*,[275] or commoners, paid taxes to their *ali'i*,[276] or chiefs, with offerings.[277] Offerings consisted of taro, mats, pigs, and performing laborious tasks, such as building roads and farming taro patches.[278] Today, the State has various taxes,[279] some of which help the State fulfill its duty to the public. The State should impose a fishing tax on fish sales to help fund conservation measures. Other tax schemes that fund public services serve as an example of how a fishing tax could be successful.

In Hawai'i, each county has a "highway fund" that receives disbursements from each county's fuel tax.[280] The highway fund is used to construct and maintain highways, streets, street lights, storm drains, and tunnels.[281] In fiscal years 2004 and 2005, Hawai'i County on the Big Island received $7,132,148 from the fuel tax for its highway fund.[282] Cumulatively, the State Department

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[272] *Id.*

[273] *Id.*

[274] DUNFORD, *supra* note 182, at 43; State of Hawai'i Department of Taxation, http://www.state.hi.us/tax/tax.html (last visited Oct. 26, 2005).

[275] DUNFORD, *supra* note 182, at 31.

[276] *Id.* at 29.

[277] *Id.* at 43.

[278] *Id.*

[279] *See* STATE OF HAWAI'I DEPARTMENT OF TAXATION, OUTLINE OF THE HAWAI'I TAX SYSTEM AS OF JULY 1, 2005 (2005), http://www.hawaii.gov/tax/pubs/05outline.pdf.

[280] HAW. REV. STAT. § 243-6 (1993).

[281] *Id.*

[282] COUNTY OF HAWAI'I, SUMMARY OF REVENUES AND APPROPRIATIONS BY FUNDS 1 (2005), http://www.hawaii-county.com/budget/FY04-05SummaryReports.pdf.

of Transportation received $42,256,999 and $42,670,381 in 2004 and 2005 respectively from the fuel tax.[283] Tax rates range from one cent to sixteen cents per gallon of fuel, depending on the type of fuel purchased and what the fuel is used for.[284]

The State of Washington has a commercial tax scheme in place for commercial fishermen. The commercial fish tax is applicable to "commercial 'deep sea' fishing outside the territorial waters of the state, and to commercial fishing within the three-mile limit."[285] Commercial fishermen catching fish in the open ocean must pay a 4.84% tax on the selling price of the fish.[286] Washington imposes a separate tax on anadromous fish, or fish that spawn in rivers, called the enhanced food fish tax on commercial fishermen.[287] The types of anadromous fish taxed are mainly various types of salmon caught in Washington's rivers and streams.[288] The tax rate ranges from 0.09% to 5.62% of the value of the fish when landed depending on the type of anadromous fish caught.[289] More popular salmons like the chinook and coho salmons have a 5.62% tax rate, whereas the less popular pink and sockeye salmons are subject to a 2.25% tax rate.[290] A portion of the proceeds from this tax are dedicated to special funds, such as Washington's wildlife fund, to help with conservation needs.[291] In fiscal years 2003 and 2004, Washington collected $1,850,000 and $1,698,000 respectively from the enhanced food fish tax.[292]

Hawai'i should impose a tax scheme on the commercial fishing industry to fund programs that seek to conserve and sustain Hawai'i's fish stocks. The State should either impose a tax scheme similar to Washington on commercial fishermen only, or impose an across the board tax on fish consumers, similar to the "highway fund." A four percent sales tax on commercial fish in Hawai'i, similar to Washington's 4.84% tax, could generate more than $1.75 million based upon the 2004 commercial fish value in Hawai'i of $44.6 million.[293] In addition to a regular fish tax, Hawai'i could impose a similar

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[283] STATE OF HAWAI'I DEPARTMENT OF TAXATION, STATE TAX COLLECTIONS AND DISTRIBUTION—SEPTEMBER 2005 1 (2005), http://hawaii.gov/tax/monthly/200509collec.pdf.

[284] HAW. REV. STAT. § 243-4 (1993 & Supp. 2005).

[285] WASHINGTON STATE DEPARTMENT OF REVENUE, INFORMATION ON WASHINGTON'S TAX STRUCTURE 1 (2002), http://dor.wa.gov/docs/pubs/industSpecific/FishTax.pdf.

[286] *Id.*

[287] *Id.*

[288] Washington State Department of Revenue, Other Taxes, http://dor.wa.gov/content/taxes/other/tax_enhancefish.aspx (last visited Oct. 26, 2006).

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] WASHINGTON STATE DEPARTMENT OF REVENUE, FOOD FISH/SHELLFISH TAX 119 (2005), http://dor.wa.gov/docs/reports/2005/Tax_Reference_2005/29fish.pdf.

[293] NATIONAL MARINE FISHERIES SERVICE OFFICE OF SCIENCE AND TECHNOLOGY, *supra* note 27, at 7.

enhanced food fish tax for certain fish species that are considered luxury or specialty items in the islands. Proceeds from the tax should be put into a special fund that supports conservation and sustainability management programs, or helps DLNR hire marine enforcement officers that patrol local harbors and inspect daily catches to ensure compliance with Hawai'i's fishing regulations.

## V. CONCLUSION

Fishing is an important part of the lifestyle and culture in Hawai'i. It provides recreational, subsistence, and economic benefits to both local residents and island visitors. Because of this, Hawai'i's fisheries are over-exploited and at risk of being depleted. To save local fishing culture and Hawai'i's fish stocks, the State must implement effective fishing regulations and enforcement methods.

DLNR should reevaluate its current regulatory system and expand fishing regulations to all commercially caught fish. It should also promulgate seasonal prohibitions for all regulated fish based on their spawning season and put into effect a minimum size limit to ensure that fishermen are not taking juvenile fish. As to enforcement and awareness issues, DLNR must encourage community groups to get involved. It should enable certain groups to take charge of specific fishing grounds by giving those groups the authority to implement educational and watch dog programs to increase the public's compliance with fishing regulations. In doing so, DLNR can greatly increase the sustainability of Hawai'i's fish stocks for future generations.

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# Physician Assisted Suicide: Expanding the Laboratory to the State of Hawai'i

## I. INTRODUCTION

Physician assisted suicide ("PAS") has long been an issue of vigorous moral, philosophical and legal debate. Opposition to PAS is multifaceted, with some arguing suicide itself to be morally wrong,[1] and others focusing on risks and concerns associated with the participation of physicians in acts designed to end the lives of patients.[2] Proponents, on the other hand, argue that competent individuals, facing terminal illnesses should have the right to decide whether to endure the intolerable pain, suffering, and loss of autonomy associated with the deterioration of their minds and bodies or whether to end their lives on their own terms in a dignified manner.[3] Such an intimate and personal decision, they argue, should not be restricted by the beliefs and mores of others.[4]

Although the Supreme Court of the United States has recognized that a competent person has a constitutionally protected right to refuse unwanted life-sustaining treatment,[5] the Court has expressly rejected the contention that individuals have a correlative constitutional right to hasten death with

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[1] *See, e.g.*, Brief Amicus Curiae of the Catholic Medical Ass'n in Support of Petitioners, Vacco v. Quill, 521 U.S. 793 (1997) (No. 95-1858), Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 656339; THE GOVERNOR'S BLUE RIBBON PANEL ON LIVING AND DYING WITH DIGNITY, FINAL REP. 35, Non-Concurring Opinion of Sister Roselani Enomoto, CSJ (Haw., May 1998) [hereinafter BRP FINAL REPORT]; Letter from Daniel P. McGivern, President, Pro-Family Hawai'i, to Haw. State House Judiciary Comm. (Mar. 2, 2004) (on file with author); Letter from "Traditional Roman Catholics" to Haw. State House Judiciary Comm. (Mar. 3, 2004) (on file with author).

[2] *See, e.g.*, Brief of the American Medical Ass'n, the American Nurses Ass'n, and the American Psychiatric Ass'n, et al. as Amici Curiae in Support of Petitioners, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 656263; BRP FINAL REPORT, *supra* note 1, app. M: Dissenting Opinion of Patricia Lee, MSN, RN, CS at 22; *see also* Yale Kamisar, *Physician Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121 (1998) [hereinafter Kamisar, *Heartwrenching Case*]; Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735 (1995) [hereinafter Kamisar, *Against Assisted Suicide*].

[3] For a general overview of the arguments advanced in support of a constitutional right to die, see Kathryn L. Tucker & David J. Berman, *Physician Aid in Dying: A Humane Option, a Constitutionally Protected Choice*, 18 SEATTLE U. L. REV. 495 (1995) [hereinafter Tucker, *A Humane Option*]. *See also* BRP FINAL REPORT, *supra* note 1, at 27-28.

[4] *See, e.g.*, Amici Curiae Brief of 52 Religious and Religious Freedom Organizations and Leaders in Support of Respondents, Gonzales v. Oregon, ___ U.S. ___, 126 S. Ct. 904 (2006) (No. 04-623), 2005 WL 1687166; *see also* BRP FINAL REPORT, *supra* note 1, at 28.

[5] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

physician assistance.[6] The Court, however, has indicated that the absence of a federal constitutional right does not preclude the protection of a right to PAS by the states.[7] Although a majority of Americans support the legalization of PAS, to date, Oregon is the only state to have successfully enacted legislation that authorizes its practice.[8] Despite numerous legal challenges brought by the federal government to invalidate Oregon's Death with Dignity Act ("DWDA"), Oregon's law remains intact.[9] Thus, in specific circumstances and with certain procedural safeguards, Oregon allows competent adults suffering from terminal illnesses to exercise the ultimate act of self-determination and choose how and when to end their own lives.[10]

The time is ripe for Hawai'i to join Oregon in providing its mentally competent, terminally ill citizens a safe and dignified way to end their suffering when that is their ultimate wish. Seven years of data from Oregon's Death with Dignity initiative demonstrates that tightly crafted legislation can appropriately safeguard against perceived risks and feared abuses of PAS.[11] In addition, the Supreme Court's recent decision in *Gonzales v. Oregon* affirms state authority to legalize and regulate PAS.[12] Moreover, Hawai'i's unique composition and cultural diversity, history of progressive reform, appreciation for individual rights, and general public support for PAS make it particularly suited to be the next state to legalize PAS. Accordingly, it is time to expand the laboratory of states engaging in critical experimentation with PAS to the State of Hawai'i.

This comment considers the current state of the law with respect to PAS and alternative routes to its legalization in the State of Hawai'i. Part II of this

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[6] *See* Washington v. Glucksberg, 521 U.S. 702, 728 (1997); Vacco v. Quill, 521 U.S. 793, 807-09 (1997).

[7] *See Glucksberg*, 521 U.S. at 735 ("Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."); *Id.* at 737 (O'Connor, J., concurring) ("States are presently undertaking extensive and serious evaluation of physician-assisted suicide . . . . In such circumstances, the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the laboratory of the States.").

[8] Oregon Death With Dignity Act, OR. REV. STAT. §§ 127.800-.995 (2001); Raphael Cohen-Almagor, *The Oregon Death with Dignity Act: Review and Proposals for Improvement*, 27 J. LEGIS. 269, 293 (2001).

[9] Cohen-Almagor, *supra* note 8, at 275-77, 293.

[10] *See* OR. REV. STAT. §§ 127.800–.995 (2001).

[11] *See* OFFICE OF DISEASE PREVENTION AND EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., SEVENTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT (2005), *available at* http://www.wrd.state.or.us/DHS/ph/pas/docs/year7.pdf [hereinafter SEVENTH ANNUAL REPORT]; *see also* Kathryn L. Tucker, *Federalism in the Context of Assisted Dying: Time for the Laboratory to Extend Beyond Oregon, to the Neighboring State of California*, 41 WILLAMETTE L. REV. 863, 864 (2005) [hereinafter Tucker, *Federalism*].

[12] Gonzales v. Oregon, ___ U.S. ___, ___, 126 S. Ct. 904, 925 (2006).

comment provides an overview of the current legal standard regarding PAS, reviewing the seminal federal cases, Oregon's Death with Dignity Act, and the federal government's unsuccessful challenges to this Act. Part III summarizes the reported data from Oregon's Death with Dignity Act, demonstrating the success of the program and the effectiveness of its procedural safeguards. Part IV of this comment discusses why the State of Hawai'i should be the next state to legalize PAS. This part explores the various factors that make Hawai'i a particularly compatible forum for PAS and also reviews the recent efforts that have been made by the Hawai'i legislature to legalize its practice. Part V attempts to explain why these legislative efforts have thus far been unsuccessful, identifying the primary bases of opposition to PAS in Hawai'i. This part also explains why these concerns should not continue to thwart efforts to legalize PAS in Hawai'i. This comment concludes by exploring alternative routes that the citizens of Hawai'i may pursue in their efforts to legalize PAS, including a state constitutional challenge based on Hawai'i's explicit right to privacy, and a public referendum.

## II. THE CURRENT LEGAL STANDARD

With the decision to end one's life being one of the most profoundly personal, intimate, and final decisions an individual can make, efforts have been made in recent years to ensure that the right to make this decision is legally protected. The Due Process Clause of the Fourteenth Amendment has been the basis of protecting certain fundamental rights, not specifically mentioned in the Constitution, but which are "implicit in the concept of ordered liberty"[13] or deeply rooted in American traditions.[14] The Supreme Court has found such protected liberty interests in a number of personal decisions determined to be essential to an individual's personal dignity and autonomy.[15] Although many believed that the right to PAS was therefore deserving of constitutional protection, the Supreme Court has declined to

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[13] Palko v. Connecticut, 302 U.S. 319, 324-25 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

[14] Duncan v. Louisiana, 391 U.S. 145, 180 (1968).

[15] *See* John A. Brennan, *A State Based Right to Physician Assisted Suicide*, 79 B.U. L. REV. 231, 235 n.20 (1999) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992))); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-685 (1977) ("While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" (quoting Roe v. Wade, 410 U.S. 113, 152-53 (1973))).

recognize a fundamental right to PAS.[16] This decision, however, has not foreclosed the potential for protection of this right by the states. To date, one state's efforts to protect and regulate the practice of PAS, together with unsuccessful attempts by the federal government to subvert these efforts, serve to affirm that states are in fact empowered to provide legal protection for this right.

### *A. The Supreme Court Declines to Recognize a Constitutionally Protected "Right to Die"*

The question of whether there is a constitutional "right to die" was first addressed in the context of whether there is a due process liberty interest in refusing unwanted life-sustaining treatment. In *Cruzan v. Director, Missouri Department of Health*,[17] the parents of a young woman in a persistent vegetative state sought authorization to terminate their daughter's life-sustaining artificial hydration and nutrition, challenging the constitutionality of a Missouri law that required clear and convincing evidence of an incompetent patient's desire not to be kept alive before such end-of-life decisions could be made by a third party.[18] In this case, the Court expressly recognized that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"[19] which can outweigh relevant state interests. However, in rejecting the Cruzans' constitutional challenge, the Court explained that when a patient is incompetent, the state has more particular interests at stake, which may justify the imposition of heightened evidentiary requirements for the removal of life-sustaining treatment by third-parties.[20]

Although leading proponents of PAS, such as Kathryn L. Tucker,[21] believed that *Cruzan* could be interpreted as recognizing a general constitutional "right

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[16] *See* Washington v. Glucksberg, 521 U.S. 702, 728 (1997); Vacco v. Quill, 521 U.S. 793, 807-09 (1997).

[17] 497 U.S. 261 (1990).

[18] *Id.* at 266-68.

[19] *Id.* at 278-79.

[20] *Id.* at 281-82, 284.

[21] Ms. Tucker, a graduate of Georgetown University Law Center, is presently the Director of Legal Affairs at Compassion & Choices, a national non-profit public interest organization dedicated to improving end-of-life care and expanding and protecting the rights of the terminally ill. *See* Kathryn L. Tucker Biography, http://www.compassionandchoices.org/pdfs/Bio_KT.pdf. Ms. Tucker is also an Adjunct Professor of Law, University of Washington School of Law and Of Counsel at Perkins Coie LLP, Seattle, Washington. *Id.* Ms. Tucker was lead counsel in a number of cases involving an individual's right to hasten their death with physician assistance, including *Vacco v. Quill*, *Washington v. Glucksberg*, and *Gonzales v. Oregon*. *Id.*

to die," incorporating a right to hasten death with assistance,[22] the Supreme Court expressly rejected this contention in two subsequent cases.[23] In *Washington v. Glucksberg*,[24] plaintiffs challenged a Washington statute banning PAS, arguing that pursuant to *Cruzan*, it violated a protected liberty interest in hastening one's own death.[25] The Court responded by asserting that *Cruzan* did not recognize a general "right to die," but rather, was limited to the right to refuse medical treatment, based on longstanding principles of informed consent and bodily integrity.[26] The Court contrasted this with the fact that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[27] Focusing on this consistent and almost universal tradition of rejecting suicide, the Court unanimously concluded that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[28] Consequently, Washington's statute was upheld under rational basis review.[29]

In the companion case of *Vacco v. Quill*,[30] plaintiffs alleged that a New York statute prohibiting PAS violated the Equal Protection Clause of the United States Constitution by allowing those on life support systems the opportunity to hasten their deaths by requesting removal of treatment, while denying the opportunity to hasten death by alternative means to those not on life support.[31] Reaffirming that there is no fundamental right to PAS and finding that no suspect class was implicated, the Court held that the statute

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[22] *See, e.g.*, Tucker, *A Humane Option*, *supra* note 3, at 504 (arguing that "the constitutional principle behind recognizing a right to refuse artificial life support applies equally to the choice to hasten inevitable death by other means"). *See generally* Note, *Physician-Assisted Suicide and the Right To Die with Assistance*, 105 HARV. L. REV. 2021, 2023-31 (1992) (arguing that the right to die with assistance exists in the current right-to-die doctrine).

[23] *See* Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill, 521 U.S. 793 (1997).

[24] *Glucksberg*, 521 U.S. 702.

[25] *Id.* at 708, 725; *see also* Brennan, *supra* note 15, at 236-37.

[26] *Glucksberg*, 521 U.S. at 725; *see also* Brennan, *supra* note 15, at 236.

[27] *Glucksberg*, 521 U.S at 711; *see also* Erwin Chemerinsky, *Privacy and the Alaska Constitution: Failing to Fulfill the Promise*, 20 ALASKA L. REV. 29, 34 (2003).

[28] *Glucksberg*, 521 U.S at 728; *see also* Chemerinsky, *supra* note 27, at 35.

[29] *Glucksberg*, 521 U.S at 727, 728-732 (concluding that the Washington ban on assisted suicide was rationally related to legitimate state interests, such as the preservation of human life, maintaining the integrity of ethics in the medical profession, protecting vulnerable groups from abuse, neglect and mistakes, and avoiding the slippery slope towards voluntary and possibly involuntary euthanasia); *see also* Chemerinsky, *supra* note 27, at 35; Brennan, *supra* note 15, at 236-37.

[30] 521 U.S. 793 (1997).

[31] *Id.* at 797.

need only pass rational basis review.[32] The Court consequently upheld the statute, finding that the law treated everyone equally[33] and that the distinction between assisting suicide and withdrawing life-support was rational, as it "comport[ed] with fundamental legal principles of causation and intent."[34] In so finding, the Court emphasized the difference between the natural death that results from underlying fatal causes when treatment is terminated and a death that is induced by the ingestion of a lethal medication.[35] The Court further explained that when a physician removes treatment, his intent is to respect the wishes of his patient, while his intent in assisting a suicide is to in fact cause death.[36] Based on these "widely accepted" distinctions, the Court found that the New York statute was rationally related to a legitimate state interest and therefore constitutional.[37] Thus, it is now well established that despite the personal and intimate nature of the decision to end one's own life, "there is no generalized right to 'commit suicide,'" or a right to assistance in doing so, protected by the federal Constitution.[38]

### *B. State Protection of Physician Assisted Suicide: An Experiment of the Laboratory of States*

Notwithstanding the Supreme Court's refusal to recognize a fundamental right to PAS, scholars generally agree that this does not preclude the protection of this right by the states.[39] In fact, some scholars have interpreted the

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[32] *Id.* at 799; *see also* Chemerinsky, *supra* note 27, at 35; Brennan, *supra* note 15, at 238.

[33] *Quill*, 521 U.S. at 808 (reasoning that the law treated everyone equally by "permitting everyone to refuse treatment while prohibiting anyone from assisting a suicide").

[34] *Id.* at 801; *see also* Chemerinsky, *supra* note 27, at 35; Brennan, *supra* note 15, at 238.

[35] *Quill*, 521 U.S. at 801; *see also* Chemerinsky, *supra* note 27, at 35-36; Brennan, *supra* note 15, at 238.

[36] *Quill*, 521 U.S. at 801-802; *see also* Chemerinsky, *supra* note 27, at 35-36; Brennan, *supra* note 15, at 238.

[37] *Quill*, 521 U.S. at 808; *see also* Chemerinsky, *supra* note 27, at 35.

[38] Washington v. Glucksberg, 521 U.S. 702, 736 (O'Connor, J. concurring), *cited in* Kathryn L. Tucker, *The Death with Dignity Movement: Protecting Rights and Expanding Options After Glucksberg and Quill*, 82 MINN. L. REV. 923, 926 (1998) [hereinafter Tucker, *Protecting Rights*].

[39] *See, e.g.*, Tucker, *Protecting Rights*, *supra* note 38, at 929 (noting that "[t]he [*Glucksberg* and *Quill*] opinions, both majority and concurring, invited legislative reform"); Chemerinsky, *supra* note 27, at 33("[A]lthough the [*Glucksberg* and *Quill*] decisions were rendered without a single dissent, they leave open the possibility of legal protection for such a right at the state level, either under state constitutions . . . or state statutes."); Melvin I. Urofsky, *Justifying Assisted Suicide: Comments on the Ongoing Debate*, 14 NOTRE DAME J.L. ETHICS & PUB POL'Y 893, 924-925 (2000) ("The Supreme Court, while denying that a constitutional right to assisted suicide exists, did not find a constitutional barrier to it either, and made clear that if individual states wanted to experiment in this area, they stood free to do so."); Yale Kamisar, *On the*

Supreme Court's majority and concurring opinions in *Glucksberg* and *Quill* as actively inviting the states to explore and decide this issue for themselves.[40] For example, in the closing sentences of his *Glucksberg* opinion, Chief Justice Rehnquist stated, "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."[41] Justice O'Connor echoed these sentiments, noting that "[s]tates are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. In such circumstances, 'the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . .'"[42]

To date, Oregon is the only state to have successfully passed legislation legalizing PAS.[43] In doing so, Oregon has not only provided its terminally ill citizens with the right to hasten death in a dignified manner with the help of a physician, but has affirmed that states are authorized to recognize and protect this right. Furthermore, Oregon's program has also provided a valuable model of success from which the rest of the Nation may better understand the risks and benefits of this controversial practice.[44]

### *1. Oregon exercises its right to regulate physician assisted suicide: the Oregon Death With Dignity Act*

In November 1994, Oregon became the first state to legalize PAS, adopting the Oregon Death with Dignity Act ("DWDA") by voter referendum by a margin of 51% in favor and 49% opposed.[45] Despite initial challenges to the implementation of this Act, including the imposition of a legal injunction in response to a constitutional challenge,[46] and efforts to force a repeal of the law

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*Meaning and Impact of the Physician-Assisted Suicide Cases*, 82 MINN. L. REV. 895, 896 (1998) (commenting that proponents of PAS have always had a "green light" to pursue state legislative authorization of PAS and that the assisted suicide cases did not address this particular issue).

[40] *See, e.g.*, Tucker, *Federalism*, *supra* note 11, at 863 (interpreting the language of the Court to have "invited state legislatures to address the contentious issue of physician assisted dying").

[41] *Glucksberg*, 521 U.S. at 735.

[42] *Id.* at 737 (O'Connor, J., concurring) (quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring)).

[43] *See* Oregon Death With Dignity Act, OR. REV. STAT. §§ 127.800-.995 (2001); SEVENTH ANNUAL REPORT, *supra* note 11, at 6.

[44] *See* Tucker, *Federalism*, *supra* note 11, at 879.

[45] *See* Oregon Department of Human Services, Death with Dignity Act, http://oregon.gov/DHS/ph/pas/about_us.shtml (last visited Oct. 27, 2006) [hereinafter DWDA website].

[46] Opponents brought a suit in federal court, challenging the Act on due process and equal protection grounds, asserting that it failed to protect vulnerable patients from resorting to

by subsequent referendum,[47] the Act prevailed. In November 1997, Oregon voters reaffirmed their support for the DWDA, voting to retain the Act by a margin of 60% to 40%.[48]

The Oregon DWDA provides that under certain limited circumstances and pursuant to an extensive list of safeguards, a terminally ill, competent individual may seek assistance from a physician to hasten death by means of obtaining a prescription for a lethal dose of self-administered medication.[49] In order to initiate the process, the patient must make an oral request, followed by a written request that is witnessed by at least two individuals who can confirm that the patient is capable, acting voluntarily, and is not being coerced, followed again by an oral request no less than fifteen days after the original request.[50] The Act requires that the attending physician determine whether the patient is both terminal and capable, and whether the patient has made the request voluntarily.[51] In order to ensure that the patient's decision is not only voluntary but informed, the physician is further required to engage in a

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suicide based on depression or coercion. *See* Lee v. Oregon, 869 F. Supp. 1491 (D. Or. 1994), *vacated*, 107 F.3d 1382 (9th Cir.), *cert. denied*, 522 U.S. 927 (1997). Although the federal district judge imposed an injunction and then struck down the Act on equal protection grounds, the Ninth Circuit subsequently lifted the injunction and dismissed the case on the basis that the plaintiffs lacked standing. *Id.* The Supreme Court denied certiorari. *Id.*

[47] In November 1997, Measure 51 (authorized by Oregon House Bill 2954) was placed on the general election ballot and asked Oregon voters to repeal the Death with Dignity Act. Voters chose to retain the Act by a margin of 60% to 40%. *See* DWDA website, *supra* note 45.

[48] *See id.*

[49] Oregon Death With Dignity Act, OR. REV. STAT. § 127.805(1) (2001). The Act specifically provides:

> [a]n adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with [this Act].

*Id.* The Act makes clear that euthanasia, the active administration of the lethal drug by the physician, is strictly prohibited. *Id.* § 127.880. Accordingly, although the physician may prescibe the lethal dose of medication, the patient, rather than the physician is responsible for administering the medication.

[50] *Id.* § 127.810, .840.

[51] *Id.* § 127.815(1)(a). "Terminal disease" is defined as an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months. *Id.* § 127.800(12). "Capable" means that in the opinion of a court or of the patient's attending or consulting physician, the patient has the ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the patient's manner of communication, if those persons are available. *Id.* § 127.800(3).

dialogue with the patient about his or her diagnosis, the risks associated with the medication and feasible alternatives to PAS.[52]

Before a patient may qualify, the findings of the attending physician must be confirmed by a consulting physician.[53] If either physician believes that the patient is suffering from "a psychiatric or psychological disorder, or depression causing impaired judgment," the patient must be referred for counseling.[54] Under these circumstances, the Act prohibits the prescription of any life-ending medication until it is confirmed that the patient is not suffering from any such cognitive impairment.[55]

The patient at all times retains the right to rescind his or her request and must be reminded of this right by the physician prior to obtaining the prescription.[56] Finally, the Act requires a waiting period between the time of the request and the issuing of the prescription,[57] again reinforcing the importance of a voluntary, well-informed decision.

### *2. Unsuccessful federal challenges to Oregon's Death With Dignity Act affirm the authority of states to protect and regulate physician assisted suicide*

With Oregon having successfully exercised its state-based authority to protect PAS, opponents of the DWDA and PAS have looked to federal law to subvert and undermine this authority. However, to date, all such efforts have been unsuccessful, reaffirming that states are in fact empowered to protect the right of their terminally ill citizens to hasten death with physician assistance.

Shortly following the implementation of the DWDA, a policy statement was issued by Thomas Constantine,[58] special administrator of the Drug Enforcement Administration ("DEA"), stating that because PAS was not a "legitimate medical purpose," physicians who prescribed medications under the DWDA would be in violation of the federal Controlled Substances Act[59]

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[52] *Id.* § 127.815(1).

[53] *Id.* § 127.820.

[54] *Id.* § 127.825.

[55] *Id.*

[56] *Id.* § 127.845.

[57] *Id.* § 127.850.

[58] *See* Joseph Cordaro, *Who Defers to Whom? The Attorney General Targets Oregon's Death with Dignity Act*, 70 FORDHAM L. REV. 2477, 2484 (2002) (citing Letter from Thomas A. Constantine, Adm'r, Drug Enforcement Admin., to Representative Henry J. Hyde, Chairman, Judiciary Comm., U.S. House of Representatives (Nov. 5, 1997)); *see also* Cohen-Almagor, *supra* note 8, at 275.

[59] Controlled Substances Act, 21 U.S.C. §§ 801-971 (2000). The Controlled Substances Act ("CSA") regulates the distribution of illicit drugs, placing substances into one of five schedules, based upon the drugs' medicinal value, harmful potential, and likelihood of abuse

("CSA"). However, United States Attorney General, Janet Reno, promptly overruled this statement, concluding that the CSA does not authorize the DEA to prosecute doctors who are acting in compliance with the Oregon law.[60] Opponents sought to overcome this hurdle by introducing two successive bills into Congress that would have effectively expanded the scope of the CSA.[61] However, both efforts failed due in large part to overwhelming concerns that these bills would hamper effective palliative care.[62]

With a change in the federal administration and the appointment of John D. Ashcroft as the new Attorney General in 2001, Oregon's DWDA again came under attack. On November 6, 2001, General Ashcroft issued a directive,[63] specifically rejecting the ruling by Janet Reno and reinstating the position taken by Thomas Constantine.[64] The directive stated that "assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 CFR § 1306.04

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or addiction. Drugs in Schedule I are deemed the most dangerous and considered not to have any medicinal value. The drugs commonly used in PAS have been placed in Schedule II, as they have an accepted medical use and can therefore be used for "legitimate medical purposes." *See* Brian Boyle, *The Oregon Death with Dignity Act: A Successful Model or a Legal Anomoly Vulnerable to Attack?*, 40 HOUS. L. REV. 1387, 1396-97 (2004); *see also* Cordaro, *supra* note 58, at 2487-89 (providing a brief overview of the CSA and the role of the Attorney General in administering and enforcing the Act).

[60] *See* Statement of Attorney General Reno on Oregon's Death with Dignity Act, U.S. Dept. of Justice (June 5, 1998), http://www.deathwithdignity.org/pdf/reno_letter.pdf. Reno concluded,

> adverse action against a physician who has assisted in a suicide in full compliance with the Oregon Act would not be authorized by the CSA. . . . There is no evidence that Congress, in the CSA, intended to displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice in the absence of a federal law prohibiting that practice.

*Id.*; *see also* Cordaro, *supra* note 58, at 2485; Cohen-Almagor, *supra* note 8, at 276; Tucker, *Federalism*, *supra* note 11, at 866.

[61] Lethal Drug Abuse Prevention Act of 1998, H.R. 4006, 105th Cong. (1998) (introduced the same day as the Reno ruling by Representative Henry J. Hyde); Pain Relief Promotion Act of 1999, H.R. 2260, 106th Cong. (1999) (introduced concurrently by Senator Don Nickles and Representative Henry J. Hyde); *see also* Cordaro, *supra* note 58, at 2485-86 (citing Joy Fallek, *The Pain Relief Promotion Act: Will it Spell Death to "Death with Dignity" or is it Unconstitutional?*, 27 FORDHAM URB. L.J. 1739, 1746-58 (2000) (describing the failed Lethal Drug Abuse and Prevention Act of 1998 and the Pain Relief Promotion Act of 1999); Tucker, *Federalism*, *supra* note 11, at 866; Cohen-Almagor, *supra* note 8, at 276-77.

[62] *See* Tucker, *Federalism*, *supra* note 11, at 866 (citing Marcia Angell, *Caring for the Dying—Congressional Mischief*, 341 NEW ENG. J. MED. 1923 (1999); David Orentlicher & Arthur Caplan, *The Pain Relief Promotion Act of 1999, A Serious Threat to Palliative Care*, 283 JAMA 255 (2000)).

[63] Dispensing of Controlled Substances to Assist Suicide, Att'y Gen. Order No. 2534-2001, 66 Fed. Reg. 56,607 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306) [hereinafter Ashcroft Directive].

[64] *See* Cordaro, *supra* note 58, at 2486-87.

(2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the CSA."[65] Consequently, according to Ashcroft, physicians who participated in PAS in conformance with the DWDA could have their licenses suspended or revoked.[66]

Unwilling to have the DWDA undermined by the Ashcroft Directive, the State of Oregon, together with a physician and pharmacist from Oregon, and a group of terminally ill Oregonians, engaged in a three-year legal battle that eventually made its way to the Supreme Court.[67] In 2006, in *Gonzales v. Oregon*,[68] the Supreme Court resolved the matter in favor of the plaintiffs, concluding that "the CSA's prescription requirement does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct."[69] In so ruling, the Court engaged in strict statutory interpretation, looking to the plain language, design, and legislative purpose of the CSA for guidance and concluded that Congress had no intent to regulate the practice of medicine beyond its prohibition on writing prescriptions for the purpose of engaging in illicit drug dealing and trafficking.[70] The Court further noted that "[t]he structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the *States' police powers*" and that "Oregon's regime is an example of the state regulation of medical practice that the CSA presupposes."[71]

In upholding the DWDA in *Gonzales*, the Supreme Court both affirmed the authority of the states to legalize and regulate PAS and confirmed that the current Act is not in violation of any federal law. While this case leaves open the possibility that Congress may in the future attempt to either expand the authority of the Attorney General under the CSA or pass additional legislation designed to prohibit PAS, whether Congress has the constitutional authority to do so remains a point of controversy.[72] Thus, under the current legal standard, the right to PAS can in fact be protected and regulated by the states.

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[65] Ashcroft Directive, *supra* note 63, at 56,608.

[66] *Id.* ("Such conduct by a physician registered to dispense controlled substances may 'render his registration . . . inconsistent with the public interest' and therefore subject to possible suspension or revocation under 21 U.S.C. § 824(a)(4).").

[67] Oregon v. Ashcroft, 192 F. Supp. 2d 1077 (D. Or. 2002), *aff'd*, 368 F.3d 1118 (9th Cir. 2004), *aff'd sub nom.*, Gonzales v. Oregon, ___ U.S. ___, 126 S. Ct. 904 (2006); *see also* Tucker, *Federalism*, *supra* note 11, at 867.

[68] Gonzales v. Oregon, ___ U.S. ___, 126 S. Ct. 904 (2006).

[69] *Id.* at ___, 126 S. Ct. at 925.

[70] *Id.* at ___, 126 S. Ct. at 923.

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

[72] For an overview of arguments regarding whether Congress has the authority to promulgate a prohibition on PAS, see generally, Boyle, *supra* note 59, at 1399-1412.

## III. OREGON'S LABORATORY PROVIDES PROMISING DATA

Many years ago, Justice Brandeis made the now famous declaration that "[i]t is one of the happy incidents of the federal system that a single courageous state, may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country."[73] Oregon's decision to serve as a "laboratory" in which physician assisted suicide can be experimented with embodies the benefits of federalism contemplated by Justice Brandeis.[74] Not only has Oregon's Death With Dignity initiative protected the rights of its citizens to make end-of-life choices, but it has also served as a model for the nation to observe and study in its ongoing efforts to better understand the risks and benefits associated with PAS.[75]

Seven years of data compiled and analyzed by the Oregon Department of Human Services Office of Disease Prevention and Epidemiology provide support for the contention that abuses thought to be associated with PAS can be avoided with appropriate safeguards.[76] Contrary to the suggestion of PAS opponents, the reports demonstrate that PAS has not been forced upon

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[73] New State Ice Co. v. Liebermann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Tucker, *Federalism*, *supra* note 11, at 879; Brian H. Bix, *Physician Assisted Suicide and Federalism*, 17 NOTRE DAME J. L. ETHICS & PUB POL'Y 53, 54-55 (2003); Urofsky, *supra* note, 39, at 924.

[74] *See* Tucker, *Federalism*, *supra* note 11, at 879-80 (noting that "it has been widely recognized that the states' ability to experiment with local solutions to public health problems is especially critical to the development of wise public policy").

[75] *See id.* at 879 ("The experience of Oregon permits a more concrete and informed public discussion of the realities some patients confront at the end stage of terminal illness, the role for assisted dying as an option, and the risks and benefits of legalizing assisted dying. This enables informed debate which is necessary to the democratic process and to the careful empirical investigation that ought to accompany efforts to grapple with this complex subject.").

[76] Oregon Department of Human Services, Death With Dignity Annual Reports, http://www.oregon.gov/DHS/ph/pas/ar-index.shtml (provides online access to all of Oregon's Death With Dignity Reports) (last visited Oct. 27, 2006); *see* SEVENTH ANNUAL REPORT, *supra* note 11; OFFICE OF DISEASE PREVENTION AND EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., SIXTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT (2004); OFFICE OF DISEASE PREVENTION AND EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., FIFTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT (2003) [hereinafter FIFTH ANNUAL REPORT]; OFFICE OF DISEASE PREVENTION AND EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., FOURTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT (2002); OFFICE OF DISEASE PREVENTION AND EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., OREGON'S DEATH WITH DIGNITY ACT: THREE YEARS OF LEGALIZED PHYSICIAN-ASSISTED SUICIDE (2001); AMY D. SULLIVAN ET AL., OR. DEP'T OF HUMAN SERVS., OREGON'S DEATH WITH DIGNITY ACT: THE SECOND YEAR'S EXPERIENCE (2000); ARTHUR E. CHIN ET AL., OR. DEP'T OF HUMAN RESOURCES, OREGON'S DEATH WITH DIGNITY ACT: THE FIRST YEAR'S EXPERIENCE (1999) [hereinafter FIRST ANNUAL REPORT].

vulnerable patients, such as the poor, uneducated and uninsured.[77] Rather, use of PAS is strongly associated with higher education, with individuals graduating from university being 8.3 times more likely to use PAS than those without a high school diploma.[78] In addition, of the patients utilizing PAS, 86% were enrolled in hospice care and 99% had health insurance.[79] Although there has been a general trend upward in the number of prescriptions written each year, the overall number of patients utilizing this option remains low, with only 208 deaths by PAS over the course of seven years.[80] Thus, PAS accounts for less than one-eighth of one percent of Oregonian deaths,[81] showing no sign of a "slippery slope" or "floodgate" effect.

The Oregon reports also reveal that the decision to utilize PAS is generally the result of multiple concerns, with the most frequently cited being loss of autonomy (87%), decreased ability to engage in activities that make life enjoyable (84%), and loss of dignity (80%).[82] Inadequate pain management or concerns about it was cited only 22% of the time.[83] Thus, although enhancing palliative care is clearly of great importance, it must be recognized that advancements in this area will not necessarily remove the impetus for PAS.[84] The reports also demonstrate a strong relationship between the type of terminal disease and the likelihood of utilizing PAS, with those suffering from

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[77] *See, e.g.*, FIRST ANNUAL REPORT, *supra* note 76, at 7 ("Patients who chose physician-assisted suicide were *not* disproportionately poor (as measured by Medicaid status), less educated, lacking in insurance coverage, or lacking in access to hospice care."); SEVENTH ANNUAL REPORT, *supra* note 11, at 13-14 ("A higher level of education was strongly associated with the use of PAS . . . . All individuals had some form of health insurance."); *see also* Tucker, *Federalism*, *supra* note 11, at 869; Cohen-Almagor, *supra* note 8, at 292-93.

[78] SEVENTH ANNUAL REPORT, *supra* note 11, at 13; *see also* Tucker, *Federalism*, *supra* note 11, at 869.

[79] SEVENTH ANNUAL REPORT, *supra* note 11, at 24, tbl.4; *see also* Tucker, *Federalism*, *supra* note 11, at 869.

[80] SEVENTH ANNUAL REPORT, *supra* note 11, at 5, 16; *see also* Tucker, *Federalism*, *supra* note 11, at 869.

[81] SEVENTH ANNUAL REPORT, *supra* note 11, at 5, 16; *see also* James H. Pietsch, *Health Care Decision Making and Physician-Aid-In-Dying in Hawai'i*, 25 J. OF LEGAL MED. 303, 317 (2004).

[82] SEVENTH ANNUAL REPORT, *supra* note 11, at 24, tbl.4; *see also* Tucker, *Federalism*, *supra* note 11, at 870.

[83] SEVENTH ANNUAL REPORT, *supra* note 11, at 24, tbl.4.

[84] For a discussion on why pain control and good palliative care do not obviate the necessity for physician assisted dying, see Norman L. Cantor, *On Kamisar, Killing, and the Future of Physician-Assisted Death*, 102 MICH. L. REV. 1793, 1831-33 (2004).

amyotrophic lateral sclerosis ("ALS"),[85] HIV/AIDS, and cancer being significantly more likely to turn to PAS.[86]

Although many opponents suggest that PAS will undermine efforts to provide better end-of-life care, the Oregon reports suggest that "[t]he availability of PAS may have led to efforts to improve end-of-life care through other modalities."[87] The reports suggest that requests for PAS create opportunities for discussions between patients and physicians regarding end-of-life care.[88] A study conducted in Oregon showed that physicians have made greater efforts since the enactment of the DWDA to enhance the quality of end-of-life care by improving "their knowledge of the use of pain medications in the terminally ill, . . . their recognition of psychiatric disorders such as depression, and [referring] patients more frequently to hospice [programs]."[89]

## IV. EXPANDING THE LABORATORY OF STATES: PHYSICIAN ASSISTED SUICIDE IN HAWAI'I

Based on the data from Oregon, it is clear that rather than harming Oregon's citizenry, the DWDA has not only respected the rights of individuals to determine their own fate, but has enhanced the medical treatment available for those who would prefer to let fate take its course. Furthermore, Oregon's Death With Dignity initiative has also demonstrated that the risks and abuses thought to be associated with the legalization of PAS can be successfully

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[85] Amyotrophic lateral sclerosis ("ALS"), also known as Lou Gehrig's disease, is a progressive, invariably fatal motor neurone disease in which both the upper motor neurons and the lower motor neurons degenerate or die, ceasing to send messages to muscles. *See* ESSENTIALS OF PHYSICAL MEDICINE AND REHABILITATION ch. 114 (Walter R. Frontera & Julie K. Silver eds., 2002).

> ALS rapidly produces skeletal muscle weakness, eventually leading to the requirement for ventilatory support or death from respiratory failure. . . . Mean survival without tracheostomy is 3 years from symptom onset . . . . The mean age of onset is in the mid 50s, but adults of any age may develop ALS. The cause of the disease is unknown . . . .
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> As the disease progresses, patients develop impaired mobility and difficulties with performing even the most basic activities of daily living, such as feeding themselves. . . . [E]ventually, some patients become . . . unable to swallow even their own saliva. Reactive depression, generalized fatigue, and musculoskeletal pain may further limit function.

*Id.*

[86] SEVENTH ANNUAL REPORT, *supra* note 11, at 13.

[87] FIFTH ANNUAL REPORT, *supra* note 76, at 15; *see also* SEVENTH ANNUAL REPORT, *supra* note 11, at 17; Tucker, *Federalism*, *supra* note 11, at 870-71.

[88] SEVENTH ANNUAL REPORT, *supra* note 11, at 17.

[89] *Id.* (citing L. Ganzini et al., *Oregon Physicians Attitudes About and Experiences with End-of-Life Care Since the Passage of the Oregon Death With Dignity Act*, 285 JAMA 2363-69 (2001)).

addressed through procedural safeguards.[90] Accordingly, it is time for other states to step forward to protect the rights of their terminally ill citizens to a humane and dignified death. Hawai'i's unique compatibility with PAS and recent efforts to grapple with the issues surrounding the legalization of PAS make it the appropriate place to begin this expansion of the laboratory of states.

### *A. Hawai'i: A Compatible Forum for Physician Assisted Suicide*

Hawai'i's unique diversity, history of progressive reform and support for individual self-determination and autonomy make it an appropriate forum for the legalization of PAS.[91] As a melting pot of ethnicities and cultures,[92] tolerance and acceptance of differences is of great importance to the State of Hawai'i. Studies have shown that support for PAS varies by ethnicity and have suggested that this may be associated with cultural values and socio-economic experiences.[93] Studies of ethnic groups in Hawai'i demonstrate that although a majority of those sampled tend to support the legalization of PAS, in general, there is less support among Filipinos (45%) and Hawaiians (54%) and more support among Caucasians (70%), Chinese (71%) and Japanese (75%).[94] While it is important to respect and promote the celebration of culture, it is equally important to ensure that cultural beliefs and preferences of one group do not restrict the rights or practices of another. Because PAS does not impose an obligation on anyone, but rather gives individuals the opportunity to make the decision that best conforms to their individual wishes and beliefs, its legalization is especially relevant to Hawai'i's diverse citizens.

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[90] *See* Tucker, *Federalism*, *supra* note 11, at 864, 869-70.

[91] *See* Pietsch, *supra* note 81, at 303-04 (suggesting that factors that make Hawai'i a "special place" support the legalization of physician-aid-in-dying in that State).

[92] *See* United States Census 2000, Census 2000 Data for the State of Hawaii, *available at* http://www.census.gov/census2000/states/hi.html (follow "General Demographics Characteristics" hyperlink) (last visited October 31, 2006). According to the 2000 Census, 6.6% of Hawai'i's population identified themselves as Native Hawaiian, 24.3% were White or Caucasian, and 41.6% were Asian, including 0.1% Asian Indian, 4.7% Chinese, 14.1% Filipino, 16.7% Japanese, 1.9% Korean and 0.6% Vietnamese; 1.3% were other Pacific Islander, and 21.4% described themselves as mixed (two or more races/ethnic groups); 1.8% were Black or African American and 0.3% were Native American and Alaska Native. *Id.*

[93] *See* Kathryn L. Braun et al., *Support for Physician-Assisted Suicide: Exploring the Impact of Ethnicity and Attitudes Toward Planning for Death*, 41 GERONTOLOGIST 51 (2001) [hereinafter Braun, *Impact of Ethnicity*].

[94] Kathryn L. Braun et al., *Advance Directive Completion Rates and End-of-Life Preferences in Hawai'i*, 49 J. AM. GERIATRIC SOC'Y 1708, 1710 (2001); *see also* Kathryn L. Braun, *Do Hawai'i Residents Support Physician-Assisted Suicide? A Comparison of Five Ethnic Groups*, 57 HAW. MED. J. 529, 531 (1998); Braun, *Impact of Ethnicity*, *supra* note 93, at 56-59.

Legalization of PAS is also consistent with Hawai'i's history of progressive laws designed to protect and respect its citizens' autonomy, privacy and right to self-determination.[95] For example, unlike the United States Constitution, the Hawai'i State Constitution explicitly recognizes a right of privacy.[96] The Hawai'i Supreme Court has recognized that pursuant to this provision it is "free to give broader privacy protection than that given by the federal constitution."[97] This right has been interpreted as protecting highly personal and intimate matters, implicit in the concept of ordered liberty, especially those concerning "intimate personal relationships."[98] It has also been the basis for affirming the right to refuse unwanted medical treatment.[99] Hawai'i has also been a pioneer in privacy legislation, becoming the first state to legalize abortion,[100] three years prior to the landmark Supreme Court decision of *Roe v. Wade*.[101] Hawai'i was also the first state to enact employer-mandated health insurance legislation in 1974.[102] Most recently, in the wake of uncertainty over the future of *Roe v. Wade* and the federal constitutional right to abortion, Hawai'i has approved additional legislation designed to amend outdated statutory language and affirm Hawai'i's commitment to protecting a woman's right to reproductive choice.[103] While these are just a few examples, they serve to illustrate Hawai'i's general propensity to support progressive movements in the areas of health care and personal decision making, both of which are implicated in the right to hasten death.[104]

Recognizing the potential compatibility of PAS with Hawai'i, Governor Benjamin Cayetano[105] established the Blue Ribbon Panel on Living and Dying

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[95] *See* Pietsch, *supra* note 81, at 304-06 (discussing Hawai'i's history of laws promoting individual rights).

[96] HAW. CONST. art. I, § 6; *see also* State v. Mallan, 86 Hawai'i 440, 448, 950 P.2d 178, 186 (1998) ("[U]nlike the federal constitution, [the Hawai'i] state constitution contains a specific provision expressly establishing the right to privacy as a constitutional right.").

[97] *Mallan*, 86 Hawai'i at 448, 950 P.2d at 186 (quoting State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988)).

[98] *Id.* at 444, 950 P.2d at 182.

[99] Pietsch, *supra* note 81, at 305 (citing *In re* Guardianship of Crabtree, Cause No. 86-0031 (Haw. Fam. Ct., 1st Cir. Apr. 26, 1990)).

[100] *Id.* (citing HAW. REV. STAT. § 453-16 (1970)).

[101] 410 U.S. 113 (1973); *see* Pietsch, *supra* note 81, at 305.

[102] Pietsch, *supra* note 81, at 305 (citing HAW. REV. STAT. § 393-7 (1993)).

[103] Act of Apr. 24, 2006, No. 35, 23d Leg., Reg. Sess. (2006), *reprinted in* 2006 Haw. Sess. Laws 38. The Bill prohibits the State from denying or interfering with a female's right to choose or obtain an abortion of a nonviable fetus or an abortion necessary to protect the female's life or health; it also repeals the residency requirement for abortions, and permits abortions to be performed in clinics and physician's offices. *Id.* § 2.

[104] *See* Pietsch, *supra* note 81, at 306.

[105] Benjamin Cayetano served as Governor of the State of Hawai'i for two terms, from 1994 to 2002. *See* Benjamin Cayetano, http://bencayetano.com/?page_id=3 (information about

with Dignity in 1997 to further investigate this option.[106] Comprised of eighteen prominent members of Hawai'i's medical, legal, and religious communities, the Panel was charged with exploring various issues relating to living and dying with dignity.[107] The Panel, while unanimous on recommendations regarding, spiritual counseling, health care education, advance directives, hospice care, pain management programs and involuntary euthanasia,[108] was unable to come to a unanimous agreement on the issue of PAS. However, a majority of the eighteen members did vote to recommend the legalization of PAS.[109] The Panel recognized the struggle between an individual's right to control the manner and timing of his or her death and the government's responsibility to protect its citizens.[110] However, the Panel's majority ultimately concluded that the benefits of legalizing PAS outweighed the risks, noting that decriminalizing its practice would allow for its regulation and emphasizing the importance of preventing any one perspective from imposing their beliefs on another.[111]

Recent studies further demonstrate that a significant majority of Hawai'i's citizens support the position of the Blue Ribbon Panel, believing that a competent, terminally ill individual should have the right to choose to hasten death in a dignified manner with the assistance of a physician. In a statewide poll conducted by Qmark Research and Polling in 2004, 75% of those surveyed agreed that "when a person is dying from a terminal disease, they [sic] should be allowed by law to request and receive help from their [sic] doctor to end their [sic] life."[112] This study also shows the public's increasing belief that "how a terminally ill person chooses to end their [sic] life should be an individual decision and not a government decision" (86% in 2004 compared to 79% in 2002).[113] Thus, with Hawai'i's particular need for tolerance and acceptance, its strong respect for individual rights generally and support for PAS specifically, Hawai`i is well suited to be the next state to legalize PAS.

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Benjamin Cayetano, including awards received and his biography).

[106] *See* BRP FINAL REPORT, *supra* note 1.

[107] *Id.* at iii-iv.

[108] *Id.* at 5.

[109] *Id.* at 29.

[110] *Id.* at 28.

[111] *Id.* at 27-28.

[112] QMark Research & Polling, *Hawai'i Residents' Attitudes Concerning Death With Dignity* (2004), *available at* http://www.dwd.org/documents/HI2004topline.doc.

[113] *Id.*

### B. Hawai'i's Legislature Grapples with the Legalization of Physician Assisted Suicide

Since 2002, supporters of PAS in Hawai'i have taken their cause to the state legislature, engaging in an ongoing effort to have the right to end one's life in a dignified manner legally recognized. In 2002, Hawai'i came within two votes of passing a bill that would have authorized PAS.[114] Despite this failure, the vigorous debate has continued in Hawai'i, with the introduction of similar bills in each of the successive legislative sessions.[115] Although supporters of PAS have yet to triumph, with each passing year has come additional data from Oregon, lending support to their cause and undermining many of the claims of their opponents. With this guidance from Oregon, PAS supporters in Hawai'i have made continued efforts to refine their proposed legislation, so as to best safeguard the interests of Hawai'i's citizens.

In 2002, Hawai'i made its first effort to legalize PAS with the introduction of House Bill 2487.[116] This bill provided for the administration of "death with dignity" to terminally ill patients,[117] which unlike Oregon's Act, allowed for the "painless *inducement* of death."[118] This bill permitted both physicians and registered nurses to *actively* administer drugs to render a patient continuously unconscious in the event that pain could not be adequately relieved.[119]

Upon review by the Committee on Judiciary and Hawaiian Affairs, the bill was amended to more closely mirror Oregon's DWDA and better protect patients from potential abuses.[120] In recommending that the amended bill pass Second Reading, the Committee made reference to the highly personal nature of PAS, the recommendations of the Blue Ribbon Panel, and that the need to provide a humane solution to situations which cause such anguish and turmoil.[121] The Committee acknowledged concerns voiced by opponents,[122]

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[114] H.R. 2487, 21st Leg, Reg. Sess. (Haw. 2002); *see also* Hawai'i State Legislature, 2002 Legislative Session, HB2487 HD1, Status Report, http://www.capitol.hawaii.gov/session2002/status/HB2487.asp (last visited Oct. 27, 2006).

[115] *See* H.R. 862, 22d Leg., Reg. Sess. (Haw. 2003); H.R. 862, 22d Leg., Reg. Sess. (Haw. 2004); H.R. 1454, 23d Leg., Reg. Sess. (Haw. 2005); S. 2448, 23d Leg., Reg. Sess. (Haw. 2006).

[116] H.R. 2487, 21st Leg., Reg. Sess. (Haw. 2002).

[117] *Id.* § 2.

[118] *Id.* § 3 (emphasis added).

[119] *Id.* §§ 8, 12.

[120] *See id.* (as reported by H.R. Comm. on the Judiciary & Hawaiian Aff., Mar. 1, 2002); H.R. STAND. COMM. REP. NO. 539-02, 21st Leg., Reg. Sess. (Haw. 2002) [hereinafter 2002 COMMITTEE REPORT].

[121] *Id.*

[122] *Id.*

Opponents to this measure warn that patients may feel obligated to end their lives to avoid burdening their families with costly medical care, and that health care providers

but asserted that support for the bill "is in no way intended to detract from improvements in health care, hospice care . . . [and] pain management" and that safeguards included in the legislation are sufficient to guard against risks to the vulnerable.[123] Although the measure was passed by the House of Representatives by a vote of 30-20, it ultimately failed after lengthy and heated debates on the Senate floor on May 2, 2002 by a vote of 11-14.[124]

In 2003, House Bill 862, closely patterned after the Oregon DWDA, was introduced in the legislature.[125] After passing First Reading, the measure was carried over to the 2004 Regular Session, where it was reviewed by the House Judiciary Committee.[126] The Committee received extensive testimony on the matter, demonstrating the continued controversy over PAS. Strong support was voiced by organizations such as the Hawai'i State Commission on the Status of Women, ACLU of Hawai'i, Compassion in Dying of Hawai'i, Death With Dignity Hawai'i Coalition, National Association of Social Workers, Hawai'i Physicians for Assisted Dying, and Planned Parenthood.[127] Opposition was voiced by the American Cancer Society, Hawai'i Family Forum, Hawai'i Medical Association, Hospice Hawai'i, and various religious organizations.[128] The Committee found that "in keeping with Hawai'i's reputation for kindness, caring, and compassion, this measure creates options that may, depending on unforeseen events, provide precious relief in our loved ones' final hours."[129] Thus, because the measure contained "significant safeguards to prevent abuse," the Committee approved the bill, with minor amendments, by a vote of 10-5 and recommended it pass Second Reading. The bill, however, ultimately failed, ostensibly due to general discomfort with addressing the issue during an election year.[130]

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may be tempted to assist with death rather than providing expensive treatment or hospice care. Opponents wonder whether this measure is but the first step in a "slippery slope" toward involuntary euthanasia. Opponents are also concerned that this measure could impede progress toward expanding availability of hospice services and increasing physician knowledge of pain management techniques. Finally, they suggest that undiagnosed depression may cloud patients' reasoning at this critical phase of life.

*Id.*

[123] *Id.*

[124] *See* Hawai'i State Legislature, 2002 Legislative Session, HB2487 HD1, Status Report, http://www.capitol.hawaii.gov/session2002/status/HB2487.asp (last visited Oct. 27, 2006).

[125] H.R. 862, 22d Leg., Reg. Sess. (Haw. 2003).

[126] *See* Hawai'i State Legislature, 2004 Legislative Session, HB862 HD1, Status Report, *available at* http://www.capitol.Hawai'i.gov/session2004/status/HB862.asp (last visited Mar. 3, 2006).

[127] H.R. STAND. COMM. REP. NO. 677-04, 22d Leg., Reg. Sess. (Haw. 2004).

[128] *Id.*

[129] *Id.*

[130] *See* Gordon Y.K. Pang & Lynda Arakawa, *'Death with Dignity' Bill Shelved*, HONOLULU ADVERTISER, Mar. 10, 2005, *available at* http://the.honoluluadvertiser.com/article/2004/Mar/

Accordingly, the legislation was reintroduced in 2005 as House Bill 1454.[131] The bill passed its First Reading and was referred to the House Health and Judiciary Committees.[132] However, the bill was subsequently deferred to the 2006 session where it ultimately stalled in committee and failed to reach the floor for Second Reading.[133] It is expected that a similar bill will again be introduced in the 2007 legislative session.

## V. EXPLAINING LEGISLATIVE RESISTANCE AND GETTING OVER THE LEGISLATIVE HURDLE

With legislation in Hawai'i again at a cross-road, it is important to take a moment to examine why efforts to legalize PAS have thus far been unsuccessful. A review of the legislative testimony relating to the various "Death With Dignity" bills that have come before the Hawai'i State Legislature indicates that there are four prevailing grounds for PAS opposition in Hawai'i, which closely parallel those voiced at the national level. First, opponents argue that the appeal of assisted suicide stems from the medical profession's failure to provide adequate pain management and end-of-life care.[134] Accordingly, these opponents argue that the State's focus should be on training and health care reform, rather than on the legalization of PAS.[135] Second, opponents vehemently argue that PAS creates risks of abuse and coercion for vulnerable patients and that its legalization is the first step in a slippery slope toward voluntary and perhaps even involuntary euthanasia.[136] Third, opponents argue that allowing individuals to hasten death

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10/ln/ln08a.html (quoting House Judiciary Vice Chairman Blake Oshiro, D-33d (Halawa, 'Aiea, Pearlridge)).

[131] H.R. 1454, 23d Leg., Reg. Sess. (Haw. 2005).

[132] *See* Hawai'i State Legislature, 2005 Legislative Session, HB1454, Status Report, http://www.capitol.hawaii.gov/session2005/status/HB1454.asp (last visited Oct. 27, 2006).

[133] *Id.*

[134] *See, e.g.*, Letter from Reverend Frank Chong, Chair of the Gov't Relations Comm., Am. Cancer Soc'y, to House Comm. on Judiciary (Mar. 4, 2004) (on file with author); Letter from Dr. Inam Rahman, President, Haw. Med. Ass'n, to Representative Blake Oshiro (Feb. 15, 2005) (on file with author); Letter from Kenneth Zeri, President & CPO, Hospice Haw., to House Judiciary Comm. (Mar. 4, 2004) (on file with author).

[135] *See* sources cited *supra* note 134.

[136] *See, e.g.*, Letter from Sandra G.Y. Young, Attorney at Law, to House Judiciary Comm. (Mar. 3, 2004) (on file with author); Letter from Nancy Pace, M.D., HFF Bd., Haw. Family Forum, to House Judiciary Comm. (Mar. 2, 2003) (on file with author); Letter from Patricia Lee, MSN, APRN, Gerontological Nurse Practitioner, Former Appointee of Governor's Blue Ribbon Panel of Living and Dying with Dignity, to House Judiciary Comm. (Mar. 4, 2004) (on file with author); 2002 COMMITTEE REPORT, *supra* note 120 (discussing arguments of PAS opponents).

impermissibly violates the sanctity of life.[137] Finally, opponents argue that legalizing PAS would undermine the role of the physician as a healer and consequently the integrity of the medical profession.[138] A careful analysis, however, reveals that these concerns are unfounded, can be appropriately safeguarded against, or are based on moral or religious judgments that should not be imposed upon others. Accordingly, the legislature cannot justifiably continue to ignore Hawai'i's general support for the legalization of assisted suicide.

### *A. Better Palliative Care Will Not Likely Eliminate the Need for Physician Assisted Suicide*

Many opponents of PAS argue that the call for assisted death is the result of inadequate pain management and end-of-life care and that such inadequacies are not appropriately addressed by "legalized killing."[139] It has been suggested that ninety-five percent of pain experienced by patients can be avoided through the use of effective palliative care but that a vast majority of manageable pain goes either undetected or untreated.[140] Commentators suggest that various factors contribute to this failure of our medical system, including a lack of clinical knowledge and experience necessary for the proper identification and treatment of pain, as well as misplaced concerns about addiction to pain medications.[141] Thus, opponents argue that "medicine in fact

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[137] *See, e.g.*, Letter from Daniel P. McGivern, President, Pro-Family Haw., to House Judiciary Comm. (Mar. 2, 2004) (on file with author); Letter from "Traditional Roman Catholics" to House Judiciary Comm. (Mar. 3, 2004) (on file with author).

[138] *See, e.g.*, Letter from Reverend Frank Chong, Chair of the Gov't Relations Comm., Am. Cancer Soc'y, to House Comm. on Judiciary (Mar. 4, 2004) (on file with author); Letter from Haw. Med. Ass'n to House Judiciary Comm. (Mar. 3, 2004) (on file with author).

[139] BRP FINAL REPORT, *supra* note 1, at 37, Non-Concurring Opinion of Brian F. Issell, MD; *see also* Seth Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey and the Right to Die*, 44 AM. U. L. REV. 803, 827 (1995) ("[C]urrent medical practice radically undertreats pain, making suicide a more attractive option than is technically necessary."), *cited in* Kamisar, *Heartwrenching Case*, *supra* note 2, at 1132.

[140] *See* Patrick M. Curran, Jr., Note, *Regulating Death: Oregon's Death with Dignity Act and the Legalization of Physician Assisted Suicide*, 86 GEO. L.J. 725, 738 (1998) (citing Don Colburn, *Assisted Suicide: Doctors, Ethicists Examine the Issues of Pain Control, Comfort Care and Ending Life*, WASH. POST, Sept. 14, 1993, at Z7; Ira R. Byock, *Kevorkian: Right Problem, Wrong Solution*, WASH. POST, Jan. 17, 1994, at A23 (quoting ethics chairman of the Academy of Hospice Physicians stating that the physical pain accompanying dying can always be controlled)).

[141] *See* Curran, *supra* note 140, at 738; *see also* Ada Jacox et al., *New Clinical-Practice Guidelines for the Management of Pain in Patients with Cancer*, 330 NEW ENG. J. MED. 651, 651 (1994).

Patients with cancer often have pain from more than one source, but in up to 90 percent

has a great deal to offer, right up to the end, and failure to do so demands reform, not physician-assisted suicide."[142]

While enhancing palliative care is certainly of utmost importance and should continue to be a priority for health care professionals, improvements in this area are not likely to completely eliminate the need for PAS. As the data from Oregon, discussed in Part III, suggests, pain was cited as a reason for turning to PAS only 22% of the time.[143] Of greater concern to Oregon's terminally ill patients were the decreased ability to participate in enjoyable activities and the loss of autonomy and dignity.[144] While advancements in modern medicine may help to alleviate some of these concerns, the fact remains that an integral part of autonomy and dignity is the ability to make personal decisions for one's self. Thus, regardless of the quality of care available, many who are faced with a terminal illness will continue to cry out for the right to be able to choose to end their lives on their own terms and to be able to do so in a humane and dignified way, with the help of a physician.[145]

Opponents of PAS who focus on palliative care as the appropriate solution to end-of-life concerns also argue that the legalization of PAS will reduce the incentive to improve end-of-life care.[146] Opponents suggest that:

> the recognition of killing as a valid medical response to patient discomfort might create disincentives not just to the development of new palliative treatments, but also to the full dissemination of nursing and hospice care as well as existing and readily available pain suppressants that can prevent suffering and the perceived need for assistance in dying.[147]

However, these opponents fail to acknowledge the positive impact of Oregon's DWDA on end-of-life care. As discussed in Part III, legalization of PAS in Oregon has created greater opportunities and a stronger impetus for physicians

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> of patients the pain can be controlled by relatively simple means. Nevertheless, undertreatment of cancer pain is common because of clinicians' inadequate knowledge of effective assessment and management practices, negative attitudes of patients and clinicians toward the use of drugs for the relief of pain, and a variety of problems related to reimbursement for effective pain management.

*Id.*

[142] Cantor, *supra* note 84, at 1832 (citing Felicia Cohn & Joanne Lynn, *Vulnerable People: Practical Rejoinders to Claims in Favor of Assisted Suicide*, *in* THE CASE AGAINST ASSISTED SUICIDE 238, 244 (Kathleen Foley & Herbert Hendin eds., 2002)).

[143] SEVENTH ANNUAL REPORT, *supra* note 11, at 24, tbl.4.

[144] *Id.*

[145] *See supra* note 84 and accompanying text.

[146] *See, e.g.*, BRP FINAL REPORT, *supra* note 1, at 42, Non-Concurring Opinion of James H. Pietsch, Attorney.

[147] Neil M. Gorusch, *The Legalization of Assisted Suicide and the Law of Unintended Consequences: A Review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change*, 2004 WIS. L. REV. 1347, 1388.

to engage in dialog with their patients about their diseases, their pain, and possible alternative means of treatment.[148] The legalization of PAS has served to raise awareness of end-of-life concerns and led to greater efforts by members of the medical community to improve their knowledge in this area.[149] Accordingly, Hawai'i's legislature should understand that rather than undermining efforts to improve patient care, the legalization of PAS may in fact serve to complement these efforts.

### *B. Oregon's Data Demonstrates the Slippery Slope and Abuse of the Vulnerable Can Be Safeguarded Against*

Opponents of PAS in Hawai'i and across the nation strongly argue that the legalizing of this practice will create risks of coercion and undue influence in end-of-life decision making, particularly for vulnerable groups such as the poor, uneducated, and disabled.[150] The New York Task Force on Life and the Law articulated this concern when it recommended against the legalization of PAS in New York, stating:

> The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group. The risk of legalizing assisted suicide and euthanasia for these individuals, in a health care system and society that cannot effectively protect against the impact of inadequate resources and ingrained social disadvantages, would be extraordinary.[151]

Professor Yale Kamisar,[152] one of the most prominent and influential opponents of PAS, has also warned that PAS will be practiced "through the prism of social inequality and prejudice that characterize the delivery of services in all segments of society, including health care. Those who will be most vulnerable to abuse, error, or indifference are the poor, minorities, and

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[148] *See supra* notes 87-88 and accompanying text.

[149] *See supra* note 89 and accompanying text.

[150] *See, e.g.*, BRP FINAL REPORT, *supra* note 1, app. M: Dissenting Opinion of Patricia Lee, MSN, RN, CS at 22.

[151] The New York Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* 120 (1994), *available at* http://www.health.state.ny.us/nysdoh/provider/death.htm, *cited in* Sylvia A. Law, *Physician-Assisted Death: An Essay on Constitutional Rights and Remedies,* 55 MD. L. REV. 292, 307 (1996).

[152] Clarence Darrow Distinguished University Professor, University of Michigan Law School, http://www.sandiego.edu/usdlaw/faculty/facprofiles/kamisary.php.

those who are least educated and least empowered."[153] Professor Kamisar has also articulated the concern of many opponents that the legalization of PAS will inevitably lead to "unsavory" extensions and "far more objectionable practices" such as voluntary and perhaps even involuntary euthanasia.[154]

Although the risks of coercion and abuse of the vulnerable are real, Oregon's experience demonstrates that such harms have not materialized. Contrary to the suggestion of opponents, the use of PAS remains limited and controlled,[155] with no sign of being disproportionately chosen by or forced upon the vulnerable.[156] Oregon's data demonstrates that rather than the socially or economically disadvantaged, those turning to PAS are generally well-educated, insured, and have access to end-of-life hospice care.[157] These individuals have explained that their decision to utilize PAS stems from their value of autonomy and self-determination rather than societal or financial pressures.[158] Oregon's experience shows that the compassionate goals of PAS can in fact be realized without also giving rise to the abuses feared by opponents. In response to Oregon's success, the Director of the Center for Bioethics at the University of Pennsylvania, School of Medicine stated: "I was worried about people being pressured to do this. But this data confirms, for the seventh year, that the policy in Oregon is working. There is no evidence of abuse or coercion or misuse of the policy."[159]

Similarly, while slippery slope arguments are generally a legitimate law-making concern,[160] the slide toward voluntary and involuntary euthanasia can in fact be safeguarded against. Oregon's Act and Hawai'i's parallel legislation both explicitly prohibit euthanasia and are specifically structured to ensure that

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[153] Kamisar, *Against Assisted Suicide*, *supra* note 2, at 738, *cited in* Sahil Godiwala, *Killing the Scapegoat: How the Poor Are Manipulated in the Right to Die Debate*, 9 GEO. J. POVERTY LAW & POL'Y 453, 457 (2002).

[154] Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy Killing" Legislation*, 42 MINN. L. REV. 969, 1029, 1042 (1958); *see also* Kamisar, *Against Assisted Suicide*, *supra* note 2, at 745-47. For a review, discussion and analysis of Professor Yale Kamisar's arguments against PAS, see Cantor, *supra* note 84.

[155] SEVENTH ANNUAL REPORT, *supra* note 11, at 5, 16.

[156] *See* Tucker, *Federalism*, *supra* note 11, at 869.

[157] *See supra* notes 78-79 and accompanying text.

[158] *See supra* note 82 and accompanying text.

[159] William McCall, *Assisted Suicide Declines in 2004, According to Report*, ALBANY DEMOCRAT-HERALD, Mar. 11, 2005, *available at* http://www.dhonline.com/articles/2005/03/11/news/oregon/state06.txt (quoting Arthur Caplan, Director of the Center for Bioethics at the University of Pennsylvania, School of Medicine), *cited in* Tucker, *Federalism*, *supra* note 11, at 870.

[160] *See* Cantor, *supra* note 84, at 1817 ("Slippery slopes are genuine law-making concerns. A court or legislature asked to recognize a new right understandably worries about the ultimate boundaries of the prerogative being sought. . . . Yet not every slippery slope argument is convincing. Each feared slide warrants examination.").

decisions are completely voluntary.[161] Requests for PAS cannot be made by anyone other than the patient, and physicians must engage in a substantial evaluation of the patient's diagnosis and competence as well as ensure that the patient's decision is independent and informed.[162] The inclusion of these procedural safeguards in PAS legislation reflect a commitment to actively guard against the slippery slope and to date, these safeguards have proven to be effective.[163]

### *C. Calls to Protect the Sanctity of Life and the Integrity of the Medical Profession Unjustifiably Impose Restrictions Based on Moral Judgments*

Given that Oregon's data undermines opponents' concerns over the practical applications of PAS, continued legislative reluctance must in large part be based on moral judgments regarding the sanctity of life.[164] As it is unjust to limit the legal rights of others on the basis of subjective moral judgments, the continued prohibition of PAS is not justified.[165] The sanctity of life is always at the forefront of the PAS issue. While the state may have a general interest in preserving and protecting life, this interest is not absolute and must certainly diminish as natural death becomes more imminent.[166] At the point in which an individual faces a terminal illness, likely to be associated with unbearable deterioration in quality of life, no one should have the right to force another human being to suffer.[167] A state's philosophic or religious preference should

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[161] *See supra* notes 49-57 and accompanying text; H.R. 1454, 23d Leg., Reg. Sess. (Haw. 2005).

[162] *See supra* notes 50-57 and accompanying text; H.R. 1454, 23d Leg., Reg. Sess. (Haw. 2005).

[163] *See supra* notes 77-81 and accompanying text; H.R. 1454, 23d Leg., Reg. Sess. (Haw. 2005).

[164] Boyle, *supra* note 59, at 1416.

[165] *See* Tucker, *A Humane Option*, *supra* note 3, at 501 (acknowledging that PAS unquestionably raises religious implications, but arguing that these implications are similar to those raised by the right to abortion, which the *Casey* court determined "cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."); Law, *supra* note 151, at 315 (arguing that *Casey* stands for the proposition that "the state may not justify a denial of an individual liberty by adopting one view of a contested moral issue").

[166] *See* Washington v. Glucksberg, 521 U.S. 702, 745 (1997) (Stevens J., concurring) (discussing his belief that those who are facing imminent death have a unique liberty interest, that non-terminally ill individuals do not have, in hastening death that may outweigh a state's interests, and noting that "[i]t is an interest in deciding how, rather than whether, a critical threshold shall be crossed."); *see also* Paul S. Kawai, Comment, *Should the Right to Die Be Protected? Physician Assisted Suicide And Its Potential Effect on Hawai`i*, 19 U. HAW. L. REV. 783, 794 (1997).

[167] *See* BRP FINAL REPORT, *supra* note 1, at 41 (Individual Opinion of Stephanie Monet, J.D., R.N.).

not outweigh the intimately personal end-of-life choices of terminally-ill, competent individuals.[168] Unlike the prohibition of PAS, which clearly restricts the rights of individuals by imposing the beliefs of certain groups on others, the legalization of PAS allows all individuals to "follow the dictates of their conscience and choose to die in a manner consistent with their beliefs."[169]

Whether PAS would undermine the integrity of the medical profession is also an issue of moral debate.[170] Many opponents argue that hastening a patient's death is counter to a physician's role as a healer,[171] and that the legalizing of PAS would undermine the doctor-patient relationship.[172] Doctors in support of this position have suggested that "[i]f physicians become killers or are even merely licensed to kill, the profession—and, therefore, each individual physician—will never again be worthy of trust and respect as healer and comforter and protector of life in all its frailty."[173]

Many, however, take the contrary view, arguing that physician assistance in hastening death in response to a voluntary request by a terminally ill patient does not constitute a "harm" that is inconsistent with the role of the physician.[174] Rather, in cases where death is inevitable and pain and loss of autonomy and dignity are likely, many argue that refusing to "ease . . . suffering and make [a patient's] death tolerable and dignified . . . would be inconsistent with the healing role."[175] These proponents of PAS, many of whom are physicians, suggest that the proper role of the physician is to do

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[168] *See* Tucker, *A Humane Option*, *supra* note 3, at 501.

[169] *See* BRP FINAL REPORT, *supra* note 1, at 30.

[170] *See* Boyle, *supra* note 59, at 1416-18.

[171] *See, e.g.*, American Medical Association, Code of Ethics Rule 2.211 (1994), *available at* http://www.ama-assn.org/ama/pub/category/8459.html ("Physician assisted suicide is fundamentally incompatible with the physician's role as a healer.").

[172] *See* Urofsky, *supra* note 39, at 918. Some opponents go so far to suggest that if PAS were legalized, decisions regarding whether a patient should hasten death or explore other treatments would principally be managed by the physician, not the patient. *See, e.g.*, Kamisar, *Heartwrenching Case*, *supra* note 2 (arguing that if PAS was accepted as "therapy," physicians would make judgments regarding which patients make "good candidates" and inevitably make recommendations for PAS, when considered appropriate as part of their medical practice); Gorusch, *supra* note 147, at 1389 (suggesting that legalization of PAS might cause physicians to feel freer to disregard patient wishes for what the physician may consider futile or unduly expensive care and questioning whether physicians may respond to incentives by healthcare companies to promote PAS over more expensive treatments).

[173] Urofsky, *supra* note 39, at 918 (citing W. Gaylin et al., *Doctors Must Not Kill*, 259 JAMA 21, 39-40 (1988)).

[174] *See* Boyle, *supra* note 59, at 1417 (discussing the bioethical issues surrounding PAS, including whether physician assistance in hastening death would violate the physician's oath to "do no harm," arguing that the determination of "harm" in this context is an issue of moral debate that can only be truly answered by each individual physician).

[175] Washington v. Glucksberg, 521 U.S. 702, 748-49 (1997) (Stevens, J., concurring), *cited in* Boyle, *supra* note 59, at 1417.

what is in the best interest of the patient, which includes respecting their wish to control their final days.[176] As this is an issue of moral debate that can only be resolved on a personal level, the decision to participate in the practice of PAS should ultimately be left up to the individual physician.[177] PAS legislation does not compel a physician to assist in the death of a patient.[178] Thus, no physician is required to act contrary to their moral and ethical beliefs. PAS legislation would, however, allow those who do find PAS to be consistent with their role as a physician to engage in such assistance. Because both the value of a terminal life and the role of a physician in treating terminally ill patients are subject to moral judgments, the legalization of PAS, which allows individuals to exercise their own morals without imposing them on others, should prevail.

## VI. ALTERNATIVE AVENUES FOR THE LEGALIZATION OF PHYSICIAN ASSISTED SUICIDE: TURNING TO THE HAWAI'I CONSTITUTION AND THE PUBLIC THEMSELVES

Should the Hawai'i legislature continue to resist efforts to legalize assisted suicide, the citizens of Hawai'i may instead look to the Hawai'i state courts to recognize and protect a right to PAS under the State Constitution. Pursuant to efforts by the 1978 Constitutional Convention of Hawai'i, the Hawai'i State Constitution was amended that year to include "a separate and distinct privacy right" designed to "insure that privacy is treated as a fundamental right. . . ."[179]

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[176] *See* Law, *supra* note 151, at 312-13 (citing Jonathan S. Cohen et al., *Attitudes Toward Assisted Suicide and Euthanasia Among Physicians in Washington State*, 331 NEW ENG. J. MED. 89 (1994); Timothy E. Quill et al., *Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-Assisted Suicide*, 327 NEW ENG. J. MED. 1380, 1381-82 (1992)); *see also* Urofsky, *supra* note 39, at 919.

[177] *See* Boyle, *supra* note 59, at 1417.

[178] Oregon Death With Dignity Act, OR. REV. STAT. § 127.885(4) (2001) ("No health care provider shall be under any duty, whether by contract, by statute or by any other legal requirement to participate in the provision to a qualified patient of medication to end his or her life in a humane and dignified manner."); H.R. 1454, 23d Leg., Reg. Sess. (Haw. 2005).

[179] COMM. WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978 at 1024 (1980). For a brief review of the Committee discussions of this right, see State v. Mueller, 66 Haw. 616, 624-26, 671 P.2d 1351, 1357–58 (1983); State v. Kam, 69 Haw. 483, 492-93, 748 P.2d 372, 378 (1988).

The call for this privacy provision was in large part due to confusion and ambiguity over whether the existing privacy provision in the state counterpart to the Fourth Amendment of the United States Constitution, as amended by the 1968 Constitutional Convention, extended beyond the criminal setting. The Report of the Committee on Bill of Rights, Suffrage and Elections stated:

> In 1968 the Constitution was amended to include the prohibition against unreasonable invasions of privacy, but its inclusion within a section patterned after the Fourth

Article I, section 6 of the Hawai'i Constitution provides for this explicit right to privacy, stating, "[t]he right of people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."[180] Because the Hawai'i Supreme Court has acknowledged that this provision authorizes it to provide greater protection than that afforded under the federal Constitution,[181] the United States Supreme Court's refusal to recognize a constitutional right to PAS, does not foreclose recognition and protection of this right under Hawai'i's Constitution.

In drafting and adopting Hawai'i's privacy provision, the delegates of the 1978 Constitutional Convention concluded that "this privacy concept encompasses the notion that in certain *highly personal and intimate matters*, the individual should be afforded freedom of choice absent a compelling state interest."[182] The framers, however, did not provide specific guidance as to what behaviors are in fact protected by this provision.[183] The Hawai'i Supreme Court has responded by taking two distinct approaches in determining whether matters are protected by Hawai'i's right to privacy: the *Mueller/Baehr* approach and the *Stanley/Kam* approach.[184]

Under the *Mueller/Baehr* approach, the Hawai'i Supreme Court has stated that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal

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> Amendment right against unreasonable searches and seizures and the debate during the 1968 constitutional convention have engendered some confusion as to the extent and scope of the right . . . . Thus it may be unclear whether the present privacy provision extends beyond the criminal area. Therefore, your Committee believes that it would be appropriate to retain the privacy provision in Article I, Section 5 [now Article I, Section 7], but limit its application to criminal cases, and create a new section as it relates to privacy in the information and personal autonomy sense.

STAND. COMM. REP. NO. 69, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978 at 674 (1980); *see also* Julia B.L. Worsham, Casenote, *Privacy Outside of the Penumbra: A Discussion of Hawai'i's Right to Privacy After* State v. Mallan, 21 U. HAW. L. REV. 273, 281 n.61 (1999).

[180] HAW. CONST. art. I, § 6.

[181] *See* State v. Mallan, 86 Hawai'i 440, 447-48, 950 P.2d 178, 185-86 (1998) ("We are not limited to the federal interpretation of constitutional rights and have often extended the protections of the Hawai'i Constitution beyond those of the United States Constitution."); *Kam*, 69 Haw. at 491, 748 P.2d at 377 ("The Hawai'i Constitution article I, section 6, though, affords much greater privacy rights than the federal right to privacy, so we are not bound by the United States Supreme Court precedents.").

[182] *Mueller*, 66 Haw. at 625, 671 P.2d at 1357 (citing COMM. WHOLE REP. NO. 15, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978, at 1024) (emphasis added); *see also Kam*, 69 Haw. at 493, 748 P.2d at 378.

[183] *See* Worsham, *supra* note 179, at 282; *see also Mueller*, 66 Haw. at 624, 671 P.2d at 1357 (acknowledging that "the provision itself gives no clue of its intended breadth").

[184] *See Mallan*, 86 Hawai'i at 443-44, 950 P.2d at 181-82 ("[O]ur case law interpreting article I, section 6 has apparently established two distinct approaches to the right to privacy.").

liberty."[185] This approach has emphasized the protection of intimate personal decisions and relationships.[186] Thus, under this approach, proponents of PAS must argue that the right to hasten one's death with the assistance of prescription medication is "fundamental," given its highly personal and intimate nature. As Chief Justice Kogan of the Florida Supreme Court has noted, "the right of privacy attaches with unusual force at the death bed."[187] Although the right to terminate one's life may not have been widely accepted throughout history, the fact remains that this issue strikes at the heart of the right of self-determination and should be recognized even in the face of majoritarian disapproval.[188] Accordingly, the Hawai'i Supreme Court should find that the right to PAS is fundamental and therefore protected under Hawai'i's privacy provision.

The second approach to the right to privacy in Hawai'i was first articulated in *State v. Kam*,[189] and was based in large part on the United States Supreme Court case of *Stanley v. Georgia*.[190] In *State v. Kam* the Hawai'i Supreme Court held that because there is a constitutionally protected right to read or view pornographic material in the privacy of one's home, there exists a correlative right to purchase such material.[191] In so holding, the Court focused on two primary factors: 1) the home as the situs of privacy and 2) the implications on First Amendment rights.[192]

Although the Court subsequently expressed its disinclination to extend the *Stanley/Kam* approach beyond the home and pornography,[193] a strong argument for PAS can still be made under this approach. While PAS does not implicate the First Amendment, given the profoundly personal nature of PAS, the fact that the ingestion of the lethal medication generally takes places within the privacy of an individual's home, and that the right to self-determination is certainly implicated, the Hawai'i Supreme Court may be willing to extend the *Stanley/Kam* approach under these factual circumstances.

However, in the event that PAS legislation continues to fail and a state constitutional right is denied, proponents of PAS may have one last alternative. Proponents may lobby the government for the right to emulate Oregon's

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[185] *Id.* at 443, 950 P.2d at 181 (citing *Mueller*, 66 Haw. at 628, 671 P.2d. at 1355).

[186] *Id.* at 444, 950 P.2d at 182.

[187] *See* Krischer v. McIver, 697 So. 2d 97, 111 (Fla. 1997) (Kogan, C.J., dissenting).

[188] *Id.*

[189] 69 Haw. 483, 748 P.2d 372 (1988).

[190] 394 U.S. 557, 565 (1969) (holding that the right to read or view pornographic material in the privacy of one's home is protected by the First Amendment because "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in the privacy of his own house, what books he may read or what films he may watch").

[191] *See Kam*, 69 Haw. at 495, 748 P.2d at 380.

[192] *See* State v. Mallan, 86 Hawai'i 440, 444-45, 950 P.2d 178, 182-83 (1998).

[193] *See id.* at 447, 950 P.2d at 185.

citizen initiative approach[194] and put the issue of PAS before Hawai'i's electorate in a public referendum.[195]

Some scholars have argued that "legislation by referendum on a public matter that concerns the lives of all citizens is preferable to a decision-making process in a room, where a small group decides for the people what they should do in an area that is intimate and personal . . . ."[196] Other scholars, however, argue that the lack of flexibility and the financial costs of the initiative process make it a less desirable means to address the sensitive and complex issues surrounding PAS.[197] Notwithstanding the arguments for and against the use of a public referendum, what remains clear is that in the event that other mechanisms prove futile, a public referendum would provide a means to ensure that if Hawai'i's majority truly supports the legalization of PAS, their voices do not go unheard.

## VII. CONCLUSION

Hawai'i's unique diversity, long-standing respect and protection of intimate, personal decisions, and general support for the right of an individual to exercise control over end-of-life decisions make it an appropriate forum for the legalization of PAS. With the recent affirmation of the states' authority to legalize and regulate PAS, and seven years of data from Oregon's initiative demonstrating that the risks and concerns espoused by opponents of PAS are either unfounded or can be appropriately safeguarded against, it is time for the State of Hawai'i to step forward and afford its terminally ill citizens a right to a humane and dignified death. Whether it is through legislation, state

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[194] Although Hawai'i law does not presently allow its citizens to initiate and enact legislation through public referendum, this does not foreclose the future consideration and adoption of this mechanism.

[195] *See* Pietsch, *supra* note 81, at 332.

[196] Cohen-Almagor, *supra* note 8, at 275 (arguing that legislation by referendum does not reduce complex public policy issues to mere media "sound-bites" but rather involve extensive discussions on the issues and provide ample opportunity for the media and public to explore all relevant points of view).

[197] *See* Tucker, *Protecting Rights*, *supra* note 38, at 931 (citing Judith F. Daar, *Direct Democracy and Bioethical Choices: Voting Life and Death at the Ballot Box*, 28 U. MICH. J.L. REFORM 799, 835 (1995); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 18 (1995)). Tucker explains that "[i]n this complex area, a legislative process that allows for extensive factfinding and continual refinement of proposed provisions throughout the process of development of the legislation would be preferable to the passage of a law by the inflexible procedure necessary with initiative measures." *Id.*

constitutional protection, or public referendum, the voices of Hawai'i's citizens must be heard and their right to PAS protected.

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# Playing by the Rules of Intellectual Property: Fantasy Baseball's Fight to Use Major League Baseball Players' Names and Statistics

## I. INTRODUCTION

Baseball as an analogy for the law is ripe with possibility. At his confirmation hearing before the Senate Judiciary Committee, Chief Justice John Roberts likened the role of judges to baseball umpires.[1] Both judge and umpire play a critical role, Roberts said, but it is a limited one, since "[n]obody ever went to a ball game to see the umpire."[2] They are simply there to ensure "everybody plays by the rules."[3]

Alan Schwarz, a senior writer for *Baseball America* magazine, suggested that there is an elegant symmetry to baseball.[4] It is, after all, composed of three strikes and three outs, and nine innings and nine players to a side.[5] Its symmetry "offers an uncommon balance of order ruling over bedlam" that Schwarz imagined would "surely appeal[] to attorneys, for whom the law provides the harmony of logic and procedure."[6]

Baseball's relationship with the law, however, runs much deeper than mere metaphor, especially in the arena of intellectual property law. In 1953, baseball cards were at the center of a legal dispute in *Haelan Laboratories v. Topps Chewing Gum, Inc.*,[7] which recognized for the first time the right of publicity as an independent and distinct property right.[8] In 2001, Major League Baseball successfully fended off right of publicity claims by former professional players who objected to the League's use of their identities on promotional materials during an All-Star game in *Gionfriddo v. Major League Baseball*.[9]

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[1] *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States: Hearing Before the S. Judiciary Comm.*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.).

[2] *Id.*

[3] *Id.*

[4] Alan Schwarz, Argument, *Claiming It Owns the Rights to Players' Names, Baseball Tells Fantasy Leagues to Pay Up*, LEGAL AFF., Nov.-Dec. 2005, at 22 (2005) [hereinafter Schwarz, *Baseball Tells Leagues*].

[5] *Id.*

[6] *Id.*

[7] 202 F.2d 866 (2d Cir. 1953), *cert denied*, 346 U.S. 816 (1953).

[8] *Id.* at 868.

[9] 114 Cal. Rptr. 2d 307 (Ct. App. 2001).

In 2005, fantasy sports took aim at Major League Baseball's ownership claims over the statistics from baseball games.[10] On August 8, 2006, the United States District Court for the Eastern District of Missouri ruled that player names and statistics are not the intellectual property of Major League Baseball.[11] As such, fantasy baseball operators may use the statistics without entering into licensing agreements with Major League Baseball.[12]

Fantasy sports is a predominantly online game, where "participants assemble teams from real players and compete based on those players' real-world performances."[13] At issue was whether C.B.C. Distribution and Marketing ("CBC"), a fantasy sports gaming company, must pay to use athletes' names and statistics.[14] Central to the legal issue was whether the "statistics generated at [ballgames] are public domain or the intellectual property of Major League Baseball."[15] The outcome of the dispute has implications for the millions of fans who play fantasy sports and the profits made from its growing online presence.[16]

Part I of this paper traces the rise of fantasy baseball leagues, from humble beginnings into a multi-million dollar industry. Part II reviews CBC's dispute with Major League Baseball over the use of players' names and statistics in fantasy leagues. Part III examines the case law and legal doctrines that shaped the resolution of CBC's dispute with Major League Baseball in CBC's favor, and in particular, Major League Baseball's copyright and right of publicity claims. Part IV weighs the implications that fantasy sports' growing popularity and profitability on the Internet will have in the larger context of intellectual property law. This paper concludes that the federal district court's ruling was correct. Fantasy sports should be allowed to use player names and statistics. Doing so does not infringe upon copyright law or rights of publicity held by Major League Baseball.

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[10] Jim Salter, *Reality Intrudes on Fantasy*, WICHITA EAGLE, Jan. 13, 2006, at C7. Major League Baseball's ownership claims stems from its January 2005 agreement with the players association, in which the League bought the "exclusive rights to license [player] statistics" for $50 million. *Id.*

[11] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006).

[12] *Id.*

[13] Jim Hu, *Sites See Big Season For Fantasy Sports*, CNET NEWS.COM, Aug. 8, 2003, http://news.com.com/2100-1026-5061351.html (last visited March 4, 2006).

[14] *C.B.C. Distribution*, 443 F. Supp. 2d at 1081; *see* Salter, *supra* note 10.

[15] Salter, *supra* note 10. CBC's complaint "alleges that [Major League Baseball] has maintained that it has exclusive ownership of statistics associated with players' names and that it can, therefore, preclude all fantasy sports league providers from using this statistical information." *C.B.C. Distribution*, 443 F. Supp. 2d at 1081.

[16] Greg Johnson, *Suing Over Statistics*, L.A. TIMES, Jan. 2, 2006, at D1.

## II. FANTASY SPORTS' RISE FROM SMALL TIME TO BIG TIME

### *A. Fantasy Baseball's Humble Beginnings*

Fantasy sports started more than twenty-five years ago as a grass-roots hobby among a handful of devoted fans,[17] and is just what the name implies—pure fantasy. It epitomizes the dream job of sports fans everywhere. Fantasy sports is built on the notion that fans often think they can run their favorite professional sports team better than the actual owners or coaches can, or as one fan puts it: "[We] could do a better job than George Steinbrenner, but we [don't] have $50 million."[18]

First and foremost, however, fantasy sports is a game. Participants, known as fantasy owners, build an imaginary team that competes against other fantasy owners using the statistics generated by players or teams from a professional sport.[19] The starting point of every fantasy sports season is the fantasy draft, where fantasy owners gather before the actual season begins to select the real-life players that will comprise their fantasy rosters.[20]

The oldest and one of the most popular forms of fantasy sports is fantasy baseball.[21] The earliest version of fantasy baseball appeared in the 1960s, and fittingly, involved baseball cards.[22] The game, called Strat-O-Matic Baseball, used customized baseball cards printed with statistics from players' previous seasons.[23] Participants would then re-create those seasons, putting together

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[17] *Id.*

[18] Matthew Purdy, *Who's on First? Wonder No More*, N.Y. TIMES, June 7, 2001, at G1. George Steinbrenner is the owner of the New York Yankees, who in part, is known for his sometimes heavy-handed involvement in the day-to-day running of his professional baseball club. *George Steinbrenner*, BASEBALLLIBRARY.COM, http://www.baseballlibrary.com/baseballlibrary/ballplayers/S/Steinbrenner_George.stm (last visited Oct. 6, 2006).

[19] Purdy, *supra* note 18, at G1; Adam Caplan, *It's Not Just a Fantasy Anymore*, FANTASY SPORTS TRADE ASSOCIATION, http://www.fsta.org/press/casino.shtml (last visited Mar. 4, 2006).

[20] *How to Play Fantasy Baseball*, FANTASY SPORTS TRADE ASSOCIATION, http://www.fsta.org/faq/howtoplay/baseball.php (last visited Sept. 17, 2006) [hereinafter *How to Play*]. A typical fantasy baseball roster may be comprised of twenty-three players from the National League and American League from among the following positions: starting pitchers, relief pitchers, catcher, first baseman, second baseman, shortstop, third baseman, outfielders, utility player, middle infielder (second or short), or corner infielder (first or third). *Id.*

[21] Chris Isidore, *The Ultimate Fantasy—Profits*, CNNMONEY.COM, Sept. 2, 2003, http://money.cnn.com/2003/08/29/commentary/column_sportsbiz/sportsbiz/index.htm (last visited Oct. 6, 2006) ("Fantasy sports started with a baseball league in 1980, with fantasy owners compiling weekly stats with various sports newspapers, such as *Sporting News*.").

[22] SAM WALKER, FANTASYLAND: A SEASON ON BASEBALL'S LUNATIC FRINGE 61 (2006); Brian Ettkin, *Strat-O-Magic: Players Across the Country Celebrate the 40th Anniversary of the Classic Baseball Game*, Sarasota Herald-Trib., July 27, 2002, at E1.

[23] WALKER, *supra* note 22, at 61; Ettkin, *supra* note 22, at E1.

fantasy teams from the cards to play against each other.[24] During its time, Strat-O-Matic was a popular parlor game,[25] though its popularity came nowhere close to today's levels.

Sports writer Daniel Okrent first created the game that has morphed into today's high-tech form.[26] In 1980, Okrent brought the idea for Rotisserie League Baseball to some friends, the name being a spin off the New York City restaurant, La Rotisserie Francaise, where they often met to talk about baseball.[27] Okrent offered a new approach to fantasy baseball. Fantasy owners in a Rotisserie League would draft teams from the list of currently active Major League Baseball players and follow their statistics during the upcoming season.[28] In this way, fantasy sports took one of its first important leaps forward: The game moved from relying on statistics from seasons whose outcomes were already known to forcing fantasy owners to consider what the outcomes might be.[29] Fans would now have to make the same kind of predictions about players' health, playing time, and potential performance that real-life general managers make.[30] Like managers, fantasy owners would decide "who to draft, who to trade or who to play on a given day."[31]

Okrent is hard-pressed to remember the exact moment that the idea for fantasy baseball came to him, but most likely, the game originated from his college experiences.[32] While a student at the University of Michigan in the late 1960s, Okrent recalled how his professors, who were devout baseball fans, formed betting pools on which players would lead the league in various statistical categories.[33] This notion "of a betting game among friends based on real baseball players' performances over the course of a season" became the genesis of Okrent's vision for fantasy baseball.[34] In fact, it is an aspect of the game that is still alive today. While many fans join fantasy leagues purely for fun among friends, some enter a competitive world where leagues award cash

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[24] WALKER, *supra* note 22, at 61.

[25] Evelyn Nieves, *Baseball Game for Those Who Love Player Stats*, N.Y. TIMES, Jan. 25, 1994, at B5.

[26] Chris Colston, *Revisiting Roto's Roots*, USA TODAY BASEBALL WEEKLY, Dec. 8, 1999, http://www.usatoday.com/sports/bbw/2001-04-04/2001-04-04-archive-roto.htm (last visited Oct. 6, 2006).

[27] WALKER, *supra* note 22, at 66; Colston, *supra* note 26; Purdy, *supra* note 18, at G1.

[28] WALKER, *supra* note 22, at 4.

[29] *Id.* at 65.

[30] *Id.* at 5, 65.

[31] Salter, *supra* note 10.

[32] Colston, *supra* note 26.

[33] *Id.*

[34] *Id.*

prizes,[35] some valued at up to a staggering $100,000.[36] For Okrent's small group of friends though, the game "grabbed" hold of them from the very first pitch.[37] And it would soon take hold of baseball fans across the nation.

Ironically, fantasy baseball's first growth spurt occurred at a time when Major League Baseball came to a screeching halt. With unresolved issues over free agency, ballplayers went on strike in the summer of 1981.[38] It was the fifth stoppage[39] of play since the League formed in 1903.[40] It lasted seven weeks in the middle of the season.[41] Eventually, a compromise was reached and play resumed, but not before 713 games (nearly forty percent of the season) were cancelled, and collectively, players and owners lost an estimated $98 million in salaries, ticket and concession sales, and broadcast revenues.[42]

It was around this time that Okrent began writing about his fantasy baseball league for a publication called *Inside Sports*.[43] Among the first to latch on to his idea were other sports writers.[44] In practical terms, this made a lot of sense, since reporters had easier access to player statistics. Early on, newspapers did not regularly publish a box score of statistics from games.[45] Yet despite this, fantasy baseball exploded. With little to write about during the baseball strike, many sports writers, like Okrent, also began writing about their fantasy leagues,[46] thus introducing a nation of baseball-deprived fans to a new pastime.

Rotisserie Leagues began springing up "in every corner of North America,"[47] and by 1988, an estimated "five hundred thousand people were playing."[48] By 1994, fantasy baseball's following surpassed three million.[49] From 2004 to 2005, about sixteen million people played fantasy sports,[50] and of that number, more than six million played fantasy baseball.[51] Today,

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[35] Salter, *supra* note 10.

[36] Johnson, *supra* note 16.

[37] Colston, *supra* note 26.

[38] DAVID S. NEFT ET AL., THE SPORTS ENCYCLOPEDIA: BASEBALL 2006, at 485 (26th ed. 2006).

[39] *1981: Baseball Strikes Out*, CBC NEWS, July 22, 1981, http://archives.cbc.ca/IDC-1-41-1430-9212/sports/sports_disputes/clip1 (last visited Oct. 6, 2006).

[40] NEFT, *supra* note 38, at 20, 485.

[41] *Id.* at 485.

[42] *Id.*

[43] Colston, *supra* note 26; WALKER, *supra* note 22, at 69.

[44] *Id.*

[45] Colston, *supra* note 26; Caplan, *supra* note 19.

[46] Colston, *supra* note 26; WALKER, *supra* note 22, at 69.

[47] WALKER, *supra* note 22, at 70-71.

[48] *Id.* at 71.

[49] *Id.* at 72.

[50] Johnson, *supra* note 16.

[51] Maury Brown, *Fantasy Stats and the Intellectual Property Debate*, THE HARDBALL TIMES, Jan. 30, 2006, http://www.hardballtimes.com/main/article/fantasy-stats-and-the-

fantasy sports is played by people all over the world,[52] and it is by no means exclusive to baseball. There are fantasy leagues for football, basketball, hockey, auto racing, even cricket and sumo wrestling.[53] What started as a hobby among a handful of friends has turned into a national obsession.

Fantasy sports has grown into an industry of itself, one in which fans spent about $200 million in league registration fees in 2004.[54] Fantasy baseball hauled in approximately $20 million of that.[55] However, the total value of the fantasy sports industry may be worth a whole lot more. Taking into account "ancillary spending on things like league dues, Internet upgrades, and premium sports packages . . . there's little doubt that total fantasy expenditures are well north of one billion dollars."[56] Sam Walker, in his book *Fantasyland: A Season on Baseball's Lunatic Fringe*, goes so far as to boldly predict that "[s]omeday, these derivative games may be just as profitable as the real ones."[57]

### *B. Computers and the Internet Take Fantasy to a New Level*

Much of the change in the landscape of fantasy sports has been made possible by the development of better and more accessible technology.[58] What has not changed is the basic statistics-driven element of the game. As Okrent explained: "Statistics are the DNA of baseball."[59] The gathering of those statistics is where computers and the Internet have allowed fantasy sports to flourish.

In the early days, full statistics and accurate reporting were often hard to come by. An appointed league commissioner, usually one of the fantasy owners, would collect and manually calculate the statistics that would earn points for each fantasy team.[60] Undoubtedly, it was a time-consuming process. The traditional statistics used in early Rotisserie Leagues—home runs ("HR"), runs batted in ("RBI"), stolen bases ("SB"), earned run average ("ERA"), wins, and saves—were often chosen because they were easy to extract from game results published in newspapers.[61]

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intellectual-property-debate/ (last visited Oct. 6, 2006).

[52] WALKER, *supra* note 22, at 6.

[53] *Id.*; Isidore, *supra* note 21.

[54] Johnson, *supra* note 16.

[55] Brown, *supra* note 51. Although fantasy sports began with baseball, football has since surpassed it, bringing in $100 million in sales in 2004. *Id.*

[56] WALKER, *supra* note 22, at 73.

[57] *Id.*

[58] Johnson, *supra* note 16; Hu, *supra* note 13.

[59] Purdy, *supra* note 18, at G1.

[60] WALKER, *supra* note 22, at 68; Hu, *supra* note 13.

[61] WALKER, *supra* note 22, at 5, 68; Colston, *supra* note 26; Caplan, *supra* note 19.

Those days are long gone. The rise of the Internet and digital technology has revolutionized fantasy sports.[62] Computers now perform all the numbers-crunching,[63] and the Internet brings all that raw data to the fingertips of fantasy players at lightning quick speeds.[64] Computers and the Internet have also "geometrically expanded the availability and variations of statistics that have captivated fans ever since bubble gum met baseball cards."[65] In forming fantasy leagues, players now have greater flexibility to choose the statistics that will shape their scoring system.[66] Additionally, the Internet's ability to bring people all over the world closer together has been a significant factor in fantasy sports' growth. Greg Johnson, a reporter for *The Los Angeles Times*, observed that: "Fantasy games became easier to play because fans no longer had to seek out like-minded fans. E-mail and high-tech software also ended the cumbersome dependence on faxes and regular mail to exchange information."[67]

A profile of the average fantasy sports fan has begun to emerge. A sociology study conducted at the University of Connecticut found fantasy players to be ninety-eight percent male, ninety-four percent white, sixty-three percent married, and mostly college educated.[68] Studies also show that fantasy players tend to be extremely loyal fans, who spend more time watching and tracking sports than the typical sports fan.[69] A University of Mississippi demographic research study revealed that fantasy players spend approximately three hours each week "managing" their teams, while fifty-five percent of them admitted to watching more sports on television since joining a fantasy league.[70] In this way, the fantasy sports fan demographic has become exceedingly attractive to advertisers.[71]

In part, this profile of the average fantasy participant may have something to do with the very nature of fantasy sports, particularly how professional athletes are drafted for fantasy teams. Through the fantasy draft, participants

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[62] Johnson, *supra* note 16; Isidore, *supra* note 21.

[63] Hu, *supra* note 13.

[64] Caplan, *supra* note 19.

[65] Purdy, *supra* note 18, at G1.

[66] *Id.* at G1. As "[s]tatistics became more readily accessible, . . . [Web] sites began allowing players to analyze statistics that skirted around analytical software and manual calculations." Hu, *supra* note 13.

[67] Johnson, *supra* note 16.

[68] WALKER, *supra* note 22, at 50.

[69] *Fantasy Sports Industry Demographics and 1st Annual Fan Choice Awards Announced*, FANTASY SPORTS TRADE ASSOCIATION, Mar. 24, 2006, http://www.fsta.org/news/pressreleases/FSTA_2006_Post-Conference_PressRelease.doc (last visited Oct. 6, 2006) [hereinafter *Fantasy Sports Demographics*].

[70] *Id.*

[71] *Id.*

may become invested in the productivity of actual ballplayers that they would never otherwise follow. The fantasy owners themselves may very well be die-hard fans of a single team, say the New York Yankees, but in a fantasy league, the owners will have to draft players across a number of different teams, including perhaps the Yankees' arch division rival, the Boston Red Sox. In this way, fantasy owners are compelled to follow not just the progress of the Yankees, but also the Red Sox and any other teams whose players comprise fantasy owners' rosters.[72] Tracking the daily playing status of various players and teams has created a "thirst" for information that is largely responsible for the industry that has sprung up around fantasy sports.[73] And the Internet has become the primary source for fantasy players to quench that thirst.

While computers and the Internet have made things vastly simple for the fantasy player, bringing the statistics to the fantasy player is still quite an involved process. A variety of Web portals, like *ESPN, Yahoo!, America Online* and *SportingNews.com*, serve as hosts, where fantasy players can set up their leagues online.[74] Almost all have some form of "pay-for-play" feature.[75] For instance, *Sportsline.com* charges $140 to set up a league.[76] *Yahoo!* lets fans in for free, but also offers a variety of premium features, like live scoring or wireless access, which fantasy players can take advantage of for a fee.[77] The Web sites, however, do not crunch their own numbers.[78] Instead, they turn to interactive software companies that collect and process the statistics that are then fed to the Web sites, and eventually to each fantasy player.[79] One such company is Texas-based Stats, which has a network of nearly 500 reporters throughout the country attending games and updating player statistics.[80]

At the center of all this innovation has been the baseball statistic. One online publication that tracks new developments in interactive technology commented that "[a]lthough Web-based communities have played a role in the success of online fantasy leagues, the star is data, served in real time, which keeps players returning to the game Web sites" for constant updates, often

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[72] Purdy reported that "[t]he [fantasy] leagues have made baseball interactive, giving desk-chair managers a personal stake in how Ben Grieve of Tampa Bay hits when the count is 2-1 as opposed to 1-2." Purdy, *supra* note 18, at G1.

[73] Hu, *supra* note 13; Isidore, *supra* note 21.

[74] Hu, *supra* note 13; WALKER, *supra* note 22, at 72.

[75] Hu, *supra* note 13.

[76] *Id.*

[77] *Id.*; Isidore, *supra* note 21.

[78] Hu, *supra* note 13.

[79] *Id.*; *In Comedy of Errors, MLB's "Intellectual Property" Right Put to Test*, SAN ANTONIO EXPRESS-NEWS, Jan. 17, 2006, at 2D [hereinafter *Comedy of Errors*].

[80] Hu, *supra* note 13.

"several times a day."[81] Ultimately, the role that computers and the Internet have played is simply to bring that data to the fantasy sports fan more quickly and efficiently. Matthew Purdy of *The New York Times* went a step further, suggesting perhaps that fantasy sports has become another way in which "[t]he Great American Pastime has intersected with the great American way of passing time [in that] surfing the World Wide Web has given every fan a ticket to sit in the digital dugout."[82]

## III. FANTASY SPORTS TAKES ON MAJOR LEAGUE BASEBALL

C.B.C. Distribution and Marketing Inc. ("CBC") is a St. Louis, Missouri-based company that runs and operates a host of fantasy sports games, including fantasy baseball.[83] Since 1992, the company, through its online brand name CDM Fantasy Sports, has served the many facets of fantasy sports, collecting and processing players' statistics and operating Web sites that host fantasy sports leagues.[84] In the past, CBC has worked with affiliates, like *USA Today, Sports Weekly, The Hockey News,* and *The Golf Channel,* to develop their own fantasy games.[85]

In addition to statistics, CBC provides its fantasy customers with profiles of athletes and teams so that they can make "informed decisions" in building and managing their fantasy teams.[86] This information is presented on its Web site and provided to its customers "without player photographs (which are controlled by players in nonjournalistic commerce) or team logos (which are trademarks owned by the major league clubs)."[87]

CBC had been paying the Major League Baseball Players Association ("Players Association") nine percent of its fantasy baseball revenue for a license to use player names and statistics.[88] At the end of 2004, that license ran

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[81] *Id.*; *see also* Purdy, *supra* note 18 ("Pitch-by-pitch text updates are available on ESPN.com and elsewhere.").

[82] Purdy, *supra* note 18.

[83] Complaint paras. 1, 4, 14, C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (No. 4:05CV00252MLM), 2005 WL 453742 [hereinafter Complaint]; *Comedy of Errors, supra* note 79; *Future of Fantasy Sports May Be Decided in St. Louis Court,* BELLEVILLE NEWS DEMOCRAT, Jan. 13, 2006, at D7 [hereinafter *Future of Fantasy Sports*].

[84] *Comedy of Errors, supra* note 79; *Future of Fantasy Sports, supra* note 83.

[85] Complaint, *supra* note 83, at para. 13.

[86] *Id.* at para. 14.

[87] Alan Schwarz, *Baseball is a Game of Numbers, but Whose Numbers Are They?,* N.Y. TIMES, May 16, 2006, at A1 [hereinafter Schwarz, *Game of Numbers*].

[88] Salter, *supra* note 10.

out.[89] In January 2005, the Players Association sold the rights to use players' names and likenesses to Major League Baseball Advanced Media ("MLBAM"),[90] the interactive media and Internet arm of Major League Baseball, which was launched in 2001.[91] The five-year, $50 million deal gave MLBAM an exclusive license to use and sublicense Major League players' rights in the development of all online content and interactive games, including fantasy baseball games.[92] When CBC applied to MLBAM for a new license, however, it was denied.[93] In its place, MLBAM offered CBC a less than ideal alternative—to instead promote the League's fantasy baseball games to the company's customers, essentially requiring CBC to discontinue its own already established fantasy services.[94]

On February 7, 2005, CBC filed suit in the United States District Court for the Eastern District of Missouri claiming that its use of baseball statistics does not require a license from Major League Baseball or the Players Association.[95] Despite being turned down for the license, CBC was unfazed; it continued to run its fantasy baseball operations using player statistics.[96] Kevin D. Caton, an attorney whose law firm, Folger, Levin & Kahn LLP, monitors and tracks developments in intellectual property law on its blog, *IP Law Observer*,[97] commented that the outcome of CBC's case "could have major business ramifications for sports leagues, fantasy sports game companies, and any web site that charges a fee for a product incorporating athletes' names and playing statistics."[98]

In its complaint, CBC argued that its use of baseball players' names and statistics does not infringe on any intellectual property rights controlled by MLBAM.[99] Specifically, CBC asked the court for a declaratory ruling that

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[89] Complaint, *supra* note 83, at para. 15; *see also* Posting of Kevin D. Caton to IP Law Observer, http://www.iplawobserver.com/2005/09/pending-lawsuit-may-decide-whether.html (Sept. 13, 2005, 11:04:00 PST) [hereinafter Caton to IP Law Observer].

[90] Johnson, *supra* note 16; Salter, *supra* note 10.

[91] Ryan Naraine, *MLBAM Goes Beyond Baseball Diamond*, INTERNETNEWS.COM, May 5, 2004, http://www.internetnews.com/bus-news/article.php/3349891 (last visited Oct. 6, 2006).

[92] Complaint, *supra* note 83, at para. 16; Brown, *supra* note 51.

[93] Johnson, *supra* note 16; Salter, *supra* note 10.

[94] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1081 (E.D. Mo. 2006).

[95] *Id.* at 1081-82; Brown, *supra* note 51; Complaint, *supra* note 83, at para. 1.

[96] *Future of Fantasy Sports*, *supra* note 83, at D7; *Baseball Statistics: History or Property?*, CNN.COM, http://www.cnn.com/2006/US/01/15/baseball.stats.ap/index.html (last visited Oct. 6, 2006).

[97] IP Law Observer, http://www.iplawobserver.com/ (last visited Oct. 6, 2006).

[98] Caton to IP Law Observer, *supra* note 89.

[99] Complaint, *supra* note 83, at para. 2.

CBC is not in violation of any copyright or right of publicity that is owned or controlled by Major League Baseball.[100]

In response, Major League Baseball maintained that its actions are defensible under intellectual property law.[101] Publicly, Major League Baseball has said that intellectual property law "makes it illegal for fantasy league operators to commercially exploit the identities and statistical profiles" of its players.[102] Major League Baseball's position has been that it does not object to the use of the statistics; rather, it objects to the commercial exploitation of players' names.[103] If fantasy providers insist on using players' names with statistics, Major League Baseball's argument goes, then they must be willing to pay for a license to use that information.[104] A motion by the Players Association to intervene as a defendant was granted by the district court,[105] and the association asserted counterclaims against CBC that mirrored the right of publicity arguments raised by Major League Baseball.[106]

The result of Major League Baseball's argument is a distinction without a difference. The message that fantasy providers can use all the player statistics they want without using player names renders the statistics useless. Statistics "without the ability to associate them to a player is nothing more than a collection of numbers that serves no purpose in a fantasy league format."[107]

Understandably, Major League Baseball simply appeared to be after its share of the pie, especially as fantasy sports became ever more profitable. The fact that fantasy sports has been profitable is a relatively new phenomenon.[108] It has been argued by some legal analysts that, in the beginning, Major League Baseball was simply too slow to act on the fantasy sports trend through the licensing of player names and statistics.[109] More than 300 entities currently run fantasy baseball leagues, and the vast majority has done so without obtaining licenses from the Players Association or from Major League Baseball.[110] The numbers from the Fantasy Sports Trade Association support

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[100] *Id.* at paras. 23-28.

[101] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1082 (E.D. Mo. 2006).

[102] Salter, *supra* note 10 (internal quotation marks omitted).

[103] *C.B.C. Distribution*, 443 F. Supp. 2d at 1082; Neil deMause, *When IP Meets WHIP*, Feb. 16, 2005, BASEBALL PROSPECTUS, http://www.baseballprospectus.com/article.php?articleid=3763 (last visited Oct. 6, 2006).

[104] Caton to IP Law Observer, *supra* note 89.

[105] *C.B.C. Distribution*, 443 F. Supp. 2d at 1082.

[106] *Id.*; Caton to IP Law Observer, *supra* note 89; joegratz.net, http://www.joegratz.net/archives/2006/01/16/baseball-stats-public-domain/ (Jan. 16, 2006).

[107] Brown, *supra* note 51.

[108] Isidore, *supra* note 21.

[109] Brown, *supra* note 51.

[110] Salter, *supra* note 10.

this. It estimated that among its 182 members, only twelve have actually been licensed by the Players Association in the past.[111] For the most part, Major League Baseball largely ignored fantasy sports until the emergence of the Internet propelled its growth and made it profitable.[112]

As more fans became hooked on fantasy sports, fantasy Web sites and statistics-provider services began to charge fantasy players.[113] Over time, the fees were met with little resistance.[114] Fans, it seems, were willing to pay if the services were worth it.[115] In the 1990s, fantasy Web sites offering free services littered the Internet landscape.[116] Now, few of those services remain.[117] *Yahoo!* is one of the only major free fantasy Web sites still available, but even it has begun to charge customers who are willing to pay for premium services.[118]

Thus, two aspects linger in the background of the dispute between fantasy sports and Major League Baseball: money and the Internet. Johnson observed that CBC's case "highlights the new types of disputes arising as sports . . . tries to wring more revenue from intellectual property in a digital world where information flows ever more freely."[119] The fight over players' names and statistics is just such a new digital world dispute. Ultimately, the federal district court sided with CBC.[120] The court found that the players (and Major League Baseball) "do not have a right of publicity in their names and playing records as used in CBC's fantasy games," and that use of such names and statistics "are not copyrightable" in a fantasy sports context.[121]

## IV. THE FIGHT OVER PLAYER STATISTICS AND NAMES IN THE ARENA OF INTELLECTUAL PROPERTY LAW

The fight between CBC and Major League Baseball was essentially a fight over use of players' statistics and names. Jack Williams, a Georgia State University law professor and also a longtime fantasy baseball player, characterized the significance of the issues at stake in CBC's lawsuit as such: "The question of whether performance statistics are some form of protected

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[111] deMause, *supra* note 103.

[112] Johnson, *supra* note 16; Walker, *supra* note 22, at 73.

[113] Isidore, *supra* note 21.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Johnson, *supra* note 16.

[120] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006).

[121] *Id.*

intellectual property becomes vital. . . . Moreover, who owns the property becomes vital."[122] The issues raised in CBC's suit were addressed in two important cases—*National Basketball Ass'n v. Motorola, Inc.*[123] with respect to the copyright issue and *Gionfriddo v. Major League Baseball*[124] regarding the right of publicity issue.

### *A. Fantasy Sports' Fair Use of Facts in a Public Domain: Statistics as Un-copyrightable Facts*

One of the bedrock principles in intellectual property law is that facts may not be copyrighted; rather, copyrights are "limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality."[125] Federal copyright law extends protection to "original work[s] of authorship," but not to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[126] The district court in Missouri explained that "facts do not owe their origin to an act of authorship. . . . The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence."[127] Thus, fantasy sports' use of player statistics hinged in large part on whether the players, and by extension, Major League Baseball, hold a copyright in those statistics. The Second Circuit Court of Appeals' 1997 decision in *Motorola* suggested that the players do not.

The *Motorola* case involved copyright infringement claims by the National Basketball Association ("NBA") in its attempts to prevent Motorola from transmitting real-time scores and statistics from in-progress NBA games over handheld paging devices.[128] Notably, Major League Baseball and other professional sports leagues filed amicus briefs in support of the NBA.[129] Motorola manufactured and marketed its pager, called SportsTrax, in January 1996 at a retail price of about $200.[130] In holding that Motorola's device did

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[122] Johnson, *supra* note 16.

[123] 105 F.3d 841 (2d Cir. 1997).

[124] 114 Cal. Rptr. 2d 307 (Ct. App. 2001).

[125] *Motorola*, 105 F.3d at 847 (quoting Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991)).

[126] 17 U.S.C. § 102(b) (2005) (emphasis added).

[127] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006) (quoting *Feist*, 499 U.S. at 347-48).

[128] *Motorola*, 105 F.3d at 844.

[129] Schwarz, *Baseball Tells Leagues*, *supra* note 4, at 22.

[130] *Motorola*, 105 F.3d at 844.

not engage in unlawful misappropriation,[131] the court reasoned that the underlying games, like facts, were not copyrightable.[132] The court distinguished the underlying athletic events from the broadcasts of the games, which it held were entitled to copyright protection.[133] Motorola's pager was simply transmitting facts from the games, and not the copyrightable expression of the games' broadcasts.[134] Under this reasoning, the court held that Motorola did not infringe upon the intellectual property rights of the NBA.[135] Motorola had successfully argued that while broadcasts of games were indeed protected under copyright law, the game scores and statistics that Motorola reproduced were merely "facts from the broadcasts, not the expression or description of the game that constitutes the broadcast."[136] In this way, video and radio transmissions of the Yankees' "16-5 rout of the Baltimore Orioles" could be copyrighted, but the fact that five different Yankees hit home runs in the win could not.[137]

The court in *Motorola* also referenced the Supreme Court's 1918 decision in *International News Service v. Associated Press*,[138] which considered whether there is a property right in the news.[139] *International News* involved a dispute between two competing news wire services.[140] The Associated Press accused International News Service ("INS") of lifting facts and information directly from Associated Press news bulletins on the East Coast for dissemination in INS' own newspapers on the West Coast.[141] The Court affirmed the Associated Press' injunction against INS' actions.[142] It reasoned that while the news was the "history of the day"[143] and thus un-copyrightable, the Associated Press had a protected copyright interest in its authorship of its news articles.[144] INS, as a direct competitor with the Associated Press, did not

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[131] Misappropriation is the "application of another's property or money dishonestly to one's own use." BLACK'S LAW DICTIONARY 1013 (7th ed. 1999).

[132] *Motorola*, 105 F.3d at 847, 853.

[133] *Id.* at 847.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] Yahoo! Sports, http://sports.yahoo.com/mlb/recap;_ylt=AmpZRt_i5SbbfXNNISKeA3wS0bYF?gid=260927110 (last visited Oct. 12, 2006). In the September 28, 2006 game, the Yankees got home runs from Jason Giambi, Bobby Abreu, Jorge Posada, Johnny Damon, and Robinson Cano. *Id.*

[138] 248 U.S. 215 (1918).

[139] *Id.* at 232.

[140] *Id.* at 231.

[141] *Id.* at 232, 238.

[142] *Id.* at 246.

[143] *Id.* at 234.

[144] *Id.* at 241.

have the right to reap the fruits of the Associated Press' labor.[145] In this way, the facts belong to the public, but the arrangement and compilation of those facts may receive copyright protection.

As such, the *Motorola*[146] court's test for whether copyrighted works have been misappropriated called for the following conditions to occur:

> (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) the defendant's use of the information constitutes free-riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.[147]

Against this backdrop, the district court in Missouri found that players' names and statistics cannot be copyrighted.[148] Certainly the information at issue (player statistics) is time sensitive, since fantasy leagues are updated daily, sometimes even in real-time, as the games happen.[149] Significantly however, CBC's actions do not free-ride upon the efforts of Major League Baseball, since "CBC's website provides up-to-date"[150] and "purely factual information which any patron of [a baseball] game could acquire."[151] The data is not simply copied from something put out or generated by Major League Baseball, but is gathered daily as each game is played and as each player racks up statistics by hitting a home run, stealing a base, or striking out a batter.[152] In fact, the district court found CBC simply provided player names and statistics that are available in "newspaper box scores[, which] include players' hits, runs, doubles, triples, etc." [153]

Thus, the Missouri district court correctly decided the copyright issue in *C.B.C. Distribution*. The court recognized that CBC's fantasy leagues used "players' names and records from baseball games" and did not "utilize the broadcasts of games themselves."[154] It reasoned that "while the players' names

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[145] *Id.*

[146] Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).

[147] *Id.* at 845.

[148] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1107 (E.D. Mo. 2006).

[149] Hu, *supra* note 13; Purdy, *supra* note 18, at G1.

[150] *C.B.C. Distribution*, 443 F. Supp. 2d at 1080.

[151] *Id.* at 1102.

[152] The Missouri District Court noted that CBC "hires journalists to write stories relevant to fantasy owners, such as the latest injury reports, player profiles, and player reports." *Id.* at 1080. Additionally, "[o]ne does not have to be a customer of CBC or a game participant to obtain the statistics which CBC provides on its website." *Id.* at 1080 n.4.

[153] *Id.*

[154] *Id.* at 1103.

and playing records in the context of CBC's fantasy games are arguably within the subject matter of copyright," they are un-copyrightable, because they lack even the basic, essential element of copyright, which is originality.[155] Instead, player names and statistics "are akin to the names, towns and telephone numbers in a phone book, to census data, and to news of the day."[156] The Missouri district court further recognized that "CBC's use of Major League baseball players' names and playing records does not give CBC something free for which it would otherwise be required to pay[, since] players' records are readily available in the public domain."[157]

In *Motorola*, the Second Circuit "wrest[ed] control of real-time news and player statistics from the sports leagues and release[ed] them into the public domain."[158] A decision favoring Major League Baseball in *C.B.C. Distribution* would have wrested it back.

### *B. Fantasy Sports' Use of Players' Names Does Not Violate Major League Baseball's Right of Publicity*

While the copyright issue favored fantasy sports, legal experts and observers believed that the resolution to the right of publicity issue would greatly determine the outcome of CBC's lawsuit.[159] The right of publicity, both at common law and under state-enacted statutes, is the right of every person to control and profit from the commercial use of his or her name, likeness, or persona.[160]

Originally, the right of publicity existed only as a right based in privacy.[161] Simply put, the right of publicity was enmeshed in the right to be left alone.[162] It was not until the 1953 decision in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[163] that courts recognized a right of publicity that was

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[155] *Id.*; 17 U.S.C. § 102(b) (2005).

[156] *C.B.C. Distribution*, 443 F. Supp. 2d at 1103.

[157] *Id.* at 1091.

[158] Schwarz, *Baseball Tells Leagues*, *supra* note 4, at 22.

[159] Caton to IP Law Observer, *supra* note 89; joegratz.net, *supra* note 106; deMause, *supra* note 103.

[160] Caton to IP Law Observer, *supra* note 89; Baila H. Celedonia, UPDATED BY Jason D. Sanders, *Recent Developments in the Right of Publicity in the United States*, COWAN, LIEBOWITZ & LATMAN, P.C., ARTICLES & NEWS, Sept. 1, 2003, http://www.cll.com/articles/article.cfm?articleid=10 (last visited Oct. 6, 2006); Lloyd L. Rich, *Right of Publicity*, PUBLISHING LAW CENTER (2000), http://www.publaw.com/rightpriv.html (last visited Mar. 4, 2006).

[161] Celedonia, *supra* note 160.

[162] *Id.*

[163] 202 F.2d 866 (2d Cir. 1953).

separate and distinct from the right of privacy.[164] The *Haelan* case was a dispute between two chewing-gum manufacturing companies.[165] The first gum company obtained an exclusive contract with a professional baseball player to use his photograph on trading cards to advertise its gum.[166] The second gum manufacturer, fully aware of the first company's exclusive agreement, managed to induce the same ballplayer to also grant it rights to use his name and likeness.[167] The Second Circuit Court of Appeals ultimately ruled in favor of the first gum company, expressly adopting the right of publicity doctrine.[168]

In separating the right of privacy from the right of publicity, the court distinguished between a personal right to be left alone and an economic right to exploit one's own fame.[169] The *Haelan* court looked specifically at the issue of transferability of rights, noting that a personal right of privacy would not be transferable, but that a right of publicity, as a property right, would be.[170] Although, the *Haelan* court analogized a right of publicity to property rights, it also noted that "[w]hether it be labeled a 'property' right is immaterial . . . [since] the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."[171] Indeed, the court explained that "many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."[172] Out of this, the right of publicity was born.[173] The *Haelan* court recognized that celebrities' desire to safeguard the commercial interests in their personas factored greatly in making the right of publicity independent of the right of privacy.[174]

For many celebrities and professional athletes, the right of publicity has served as an important line of protection.[175] The doctrine preserves their right

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[164] *Id.* at 868.

[165] *Id.* at 867.

[166] *Id.*; *see also* Russell J. Frackman & Tammy C. Bloomfield, *The Right of Publicity: Going to the Dogs?*, UCLA ONLINE INST. FOR CYBERSPACE LAW AND POL'Y (Sept. 1996), http://www.gseis.ucla.edu/iclp/rftb.html (last visited Oct. 12, 2006).

[167] *Haelan Laboratories*, 202 F.2d at 867.

[168] *Id.* at 868; Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204 (1954).

[169] *Haelan Laboratories*, 202 F.2d at 868.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 868-69.

[175] Pamela Edwards, *What's the Score?: Does the Right of Publicity Protect Professional Sports Leagues?*, 62 ALB. L. REV. 579, 581 (1998).

to control and profit from the use of their personas, and in turn, shields their "marketable identities" from being commercially misappropriated.[176] Baila Celedonia, in her article *Recent Developments in the Right of Publicity in the United States*,[177] suggested that "the [greater the] ability and the extent to which a celebrity can control the use of his or her 'persona' in a commercial context, the greater is the potential economic reward of his or her fame."[178]

For Major League Baseball, invoking the right of publicity as a defense in CBC's lawsuit was crucial. The fact that it obtained the exclusive rights to license the players' names from the Players Association is an important fact, allowing them to rely on the right of publicity doctrine. Here again, the *Haelan* case is instructive. In *Haelan*, the party who actually brought the lawsuit was not the baseball player who would normally invoke the right of publicity doctrine to protect the use of his identity; instead, it was a chewing gum company, as holder of the exclusive right to use the player's celebrity to sell its gum.[179]

However, the decision in *Gionfriddo*[180] presents a major hurdle for Major League Baseball to overcome. In 1996, a handful of former Major League ballplayers, including Al Gionfriddo, a former Brooklyn Dodger and 1947 World Series hero,[181] sued Major League Baseball, claiming that their rights of publicity were violated when the League used their names, statistics and photos in All-Star game media guides without the players' permission and without compensating them.[182] The court disagreed and sided with the League.[183] It held that the former players' names, images and statistics were historical facts that Major League Baseball made available to the public, and that the recitation of those facts concerning the past athletic accomplishments of the ballplayers was a form of expression protected by the First Amendment of the Constitution.[184]

It is significant to note that the players' right of publicity arguments that the League successfully fended off in *Gionfriddo* were then used by the League against CBC.[185] In this way, Major League Baseball has come full circle—

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[176] *Id.*

[177] Celedonia, *supra* note 160.

[178] *Id.*

[179] *Haelan Laboratories*, 202 F.2d at 867.

[180] Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307 (Ct. App. 2001).

[181] Schwarz, *Baseball Tells Leagues*, *supra* note 4, at 22. The four former professional players who sued Major League Baseball were Al Gionfriddo, Pete Coscarart, Dolph Camilli, and Frank Crosetti. Brown, *supra* note 51.

[182] *Gionfriddo*, 114 Cal. Rptr. 2d at 311.

[183] *Id.* at 309.

[184] *Id.* at 314-15.

[185] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1082 (E.D. Mo. 2006) (noting MLBAM's contention that CBC used players'

rejecting the right of publicity in one case, while using it to its advantage in another, all in an effort to protect its commercial interests. That Major League Baseball appeared to have "flip-flopped" on the right of publicity issue in the face of CBC's lawsuit was not lost on legal observers and followers of the case.[186]

CBC possesses a similar argument to Major League Baseball in *Gionfriddo*[187]—that fantasy sports is helping to promote the sport in much the same way that the League's inclusion of former players' personas in All-Star materials did. The *Gionfriddo* court explained that the former players "understood the important role this media publicity held in promoting interest in professional baseball."[188] Likewise, it would seem that fantasy baseball and Major League Baseball are "natural allies" rather than "enemies."[189] The demographic survey conducted by the University of Mississippi found that sixty percent of fantasy sports fans attended at least one Major League game every year, compared to only twelve percent of most other Americans.[190] Perhaps fantasy baseball is even helping the League to weather the storm of the steroids scandals that have plagued it in recent seasons.[191] The start of the 2006 Major League Baseball season was again shadowed by allegations of steroid use by franchise players.[192]

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names in the company's fantasy games "in violation of the players' right of publicity").

[186] Schwarz, *Baseball Tells Leagues*, *supra* note 4, at 23.

[187] *Gionfriddo*, 114 Cal. Rptr. 2d at 311.

[188] *Id.*

[189] Editorial, *Property Rights Claim Not in the Ballpark*, ALBUQUERQUE J., Jan. 19, 2006, at A10.

[190] *Fantasy Sports Demographics*, *supra* note 69.

[191] Opinion, *Spare the Geeks: Pro Baseball Shouldn't Charge for Using Stats*, SAN DIEGO UNION-TRIBUNE, Jan. 7, 2006, at B.8.7.

[192] Ron Kroichick, *Book Traces Bonds' Steroids use to McGwire-Sosa HR Race*, S.F. CHRON., Mar. 7, 2006, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/03/07/MNG90HJF4N22.DTL (last visited Oct. 12, 2006). The release of a book written by *San Francisco Chronicle* reporters outlined how Barry Bonds "knowingly and meticulously" used performance-enhancing drugs as far back as 1998, including the 2001 season in which he shattered the single-season home run record previously held by another steroids scandal-plagued former major leaguer, Mark McGwire. *Id.* During the 2001 season, Bonds hit 73 home runs to become the single-season home run leader, breaking the record set just three years earlier by McGwire's 70 home runs. NEFT, *supra* note 38, at 678.

For the Missouri district court, the right of publicity issue came down simply to money.[193] Fantasy sports had become profitable.[194] The court said that in order to show a right of publicity had been violated, a plaintiff "must establish that the defendant commercially exploited the plaintiff's identity without the plaintiff's consent to obtain a commercial advantage."[195] While the court found that the players had not consented to CBC's use of their names and statistics, it found no intent on the part of CBC to gain a commercial advantage.[196] The court reasoned that there was no evidence to indicate that CBC's use of players' names and statistics was meant to suggest in any way that the players were associated with or somehow endorsed the company's fantasy games.[197] In addition, CBC's use of the names and statistics was not seen by the court as interfering or pulling customers away from other fantasy providers because all providers rely on the same names and statistics.[198]

Ultimately, the statistics used by fantasy sports are not part of a player's identity in a right of publicity sense.[199] Fantasy baseball operators' use of the statistics do not infringe upon the marketable identities of the players.[200] Instead, statistics are facts that have been given up to the public domain.[201] Like in *International News*, statistics are contemporary news that become the "history of the day."[202] Like in *Gionfriddo*, they constitute a recitation of historical facts that are constitutionally protected.[203]

## V. *C.B.C. DISTRIBUTION V. MAJOR LEAGUE BASEBALL*: IMPLICATIONS FOR INTELLECTUAL PROPERTY LAW, THE INTERNET, AND THE FUTURE

Fantasy sports is now big business and its medium of choice is the Internet, but like the real thing, its "DNA"[204] remains the player statistic. At the outset, CBC's lawsuit against Major League Baseball may simply appear to be a fight

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[193] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1085 (E.D. Mo. 2006) ("[T]he court must consider whether CBC's use of players' names in conjunction with their playing records in its fantasy baseball games utilizes the players' names as a symbol of their identities to obtain a *commercial advantage* and, if so, whether there is resulting injury.") (emphasis added).

[194] Brown, *supra* note 51; WALKER, *supra* note 22, at 73; Isidore, *supra* note 21.

[195] *C.B.C. Distribution*, 443 F. Supp. 2d at 1085.

[196] *Id.* at 1086.

[197] *Id.*

[198] *Id.*

[199] *Id.* at 1107.

[200] *Id.* at 1091.

[201] *Id.* at 1103.

[202] *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

[203] Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 314-15 (Ct. App. 2001).

[204] Purdy, *supra* note 18.

over batting averages and earned runs, but it is more than that. It is also about the "nature of celebrity" in an increasingly technological world.[205]

The policy behind the right of publicity doctrine is steeped in compelling commercial and ideological reasons. Clearly, athletes and celebrities should have the right to control the commercial use of their images and likenesses.[206] An unauthorized use of their identities may damage the time and talent that they have invested in making their personas valuable.[207] The right of publicity also "prevent[s] harmful or excessive commercial use that may dilute the value of [a person's] identity."[208] For celebrities, choosing to endorse products or brands can be the "most lucrative reward" for reaching their celebrity status.[209] Fundamentally though, the right of publicity also inheres to the philosophy that every person "should have autonomy over what he or she endorses, be it an idea, a political candidate or a product."[210]

The decision in *C.B.C. Distribution* may not produce a bright line test for separating out issues of right of publicity, copyright law, and the First Amendment. For reasons of complexity and perhaps even futility, the courts have shied away from laying down bright line tests in the past.[211] Significantly, the Missouri district court confined the language of its decision to narrowly find that player names and statistics are not intellectual property as used in the fantasy sports context of CBC's operations.[212] The explosion in popularity and profitability of fantasy sports on the Internet and the subsequent dispute over the use of players' statistics have shown that the Internet media landscape is constantly changing, making "the distinction between news and commercial property [] less clear than ever."[213] For the moment, the *C.B.C. Distribution* decision cleared up some of the haze between the commercial and media reporting aspects of the use of player statistics, especially in light of the Internet. Statistics are facts that are not copyrightable, and cannot be claimed as protected property in a right of publicity action.[214] The federal district court in Missouri, however, may not have the final say should Major League Baseball appeal the case further.

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[205] Schwarz, *Baseball Tells Leagues*, *supra* note 4, at 22.

[206] Celedonia, *supra* note 160.

[207] Frackman & Bloomfield, *supra* note 166.

[208] C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1090 (E.D. Mo. 2006).

[209] Frackman & Bloomfield, *supra* note 166.

[210] *Id.*

[211] John McMillen & Rebecca Atkinson, *Artists and Athletes: Balancing the First Amendment and the Right of Publicity in Sport Celebrity Portraits*, 14 J. LEGAL ASPECTS SPORTS 117, 136 (Summer 2004); Frackman & Bloomfield, *supra* note 166.

[212] *C.B.C. Distribution*, 443 F. Supp. 2d at 1107.

[213] Schwarz, *Baseball Tells Leagues*, *supra* note 4, at 23.

[214] *C.B.C. Distribution*, 443 F. Supp. 2d at 1107.

Nevertheless, the result of *C.B.C. Distribution* has significant implications for the Internet and intellectual property law. A decision in CBC's favor reinforced the *Motorola* standard.[215] It solidified the recognition that statistics are historical facts that have been given up to the public domain. Had the decision gone the other way in Major League Baseball's favor, it would have confused the settled issue of statistics as historical facts. To include statistics under the umbrella of a professional athlete's right of publicity would be stretching the meaning of identity too far. Russell J. Frackman and Tammy C. Bloomfield, in *The Right of Publicity: Going to the Dogs?*," have said that "[l]iberal interpretation of what constitutes appropriation of identity is a natural reaction to protect against the creative evocation of those who try to capitalize on the fame of another, rather than generate their own attention-getting identity (or pay for the right to use another's identity)."[216]

The *C.B.C. Distribution* case, however, does not interfere with the marketable identities that athletes and celebrities have worked diligently to create. The Missouri district court reasoned that CBC's use of players' names and statistics "does not go to the heart of the players' ability to earn a living as baseball players; the baseball players earn a living playing baseball and endorsing products; they do not earn a living by the publication of their playing records."[217] The district court even suggested that CBC's use of athletes' names and statistics may "actually enhance[] the marketability of the players" by generating increased fan interest in the players and in the sport as a whole.[218] The court in *Gionfriddo* explained that Major League Baseball was not using the former players' identities to advertise a product,[219] and likewise, CBC's use of player statistics in fantasy sports is not advertising.[220] CBC derives its profits from the fantasy game that it provides, not from misappropriating players' marketable identities in order to endorse a product or service. Player statistics cannot be separated from player names, but fantasy sports' use of statistics does not automatically mean that a player's autonomy has been surrendered. Players have lost nothing more than what has already been given up to the public domain for use by anyone, whether they be the media or an online fantasy sports provider like CBC.

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[215] *Id.* at 1102.

[216] Frackman & Bloomfield, *supra* note 166.

[217] *C.B.C. Distribution*, 443 F. Supp. 2d at 1091.

[218] *Id.*

[219] Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 314-15 (Ct. App. 2001).

[220] *C.B.C. Distribution*, 443 F. Supp. 2d at 1086; Schwarz, *Baseball Tells Leagues*, *supra* note 4, at 23.

## VI. CONCLUSION

Understandably, Major League Baseball wants a share of what has become a multi-million dollar industry. But they do not want just a piece; it seems they want the whole pie.

CBC's attorneys have suggested that Major League Baseball's motive in denying licenses to use players' names and statistics was to reduce the more than 300 fantasy providers to just a handful of companies.[221] Major League Baseball has reportedly resorted to using aggressive, but shrewd, tactics by imposing severe terms on many of the smaller operators, not just requiring licenses, but forcing them to limit their business to 5,000 customers or to turn over their customer lists to the League.[222] In CBC's case, Major League baseball gave the company little choice, offering CBC a license agreement that would effectively end the company's fantasy operations and force it to instead endorse the League's own budding fantasy games.[223]

Major League Baseball was perfectly within its right to use the copyright and right of publicity arguments that it has used in the past to protect what it sees as its legitimate interests. It did work in Major League Baseball's favor that fantasy sports providers gain commercially from the use of the player names and statistics. Complicating matters was that fantasy sports has now become so profitable. However, the commercial aspects of fantasy sports' use of player names and statistics do not mean that it is any less protected. In *Gionfriddo*, the court rejected the former players' argument that Major League Baseball was commercially exploiting their identities. [224] The court reasoned that "[p]rofit, alone, does not render expression 'commercial,'" and that "[an expressive activity] does not lose its constitutional protection because it is undertaken for profit."[225]

In the end, statistics and player names are inextricably linked. The statistics simply have no value without the names. Fantasy sports' use of them is supported by case law and it is a fair use of facts that are part of the public domain. In *Gionfriddo*, the court pointed out that "it is manifest that as news occurs, or as a baseball season unfolds, the First Amendment will protect mere recitations of the players' accomplishments."[226] The function of fantasy operators like CBC is merely to provide fantasy leagues with player statistics

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[221] Salter, *supra* note 10.

[222] *Id.*; deMause, *supra* note 103.

[223] *C.B.C. Distribution*, 443 F. Supp. 2d at 1081.

[224] *Gionfriddo*, 114 Cal. Rptr. 2d at 318.

[225] *Id.* at 315 (*quoting* Comedy III Prod., Inc. v. Gary Sederup, Inc., 21 P.3d 797, 802 (Cal. 2001)).

[226] *Id.* at 314.

as they are compiled. CBC does so by gathering the statistics on its own and without free-riding on the efforts of Major League Baseball.

When Okrent first invented fantasy baseball, he likely never envisioned that it would have the kind of success that it enjoys today. Okrent never received a financial boon from his creation.[227] Others are now profiting from his original idea. But Okrent is perfectly fine with this.[228] The fight over statistics is really a fight over profits. It is a fight that will continue until the courts firmly resolve the issue of the Internet's impact on the realm of intellectual property. Maury Brown, in *The Hardball Times*, suggested that "the CBC case will not be the end of the story on the use of statistics and intellectual property rights. The issues surrounding the case will continue to be a hot topic, especially as the financial rewards continue to climb."[229]

The fantasy experience has now spread well beyond the arena of sports. Today, there are fantasy games that allow people to manage their very own "movie studios, record labels, or stock funds."[230] In addition, Walker estimated that in 2006, "roughly nine hundred legal buffs . . . [played] a game called Fantasy Supreme Court, in which the goal [was] to predict the outcome of every case on the High Court's docket before the term begins."[231] Even the law, it seems, has inevitably become part of the fantasy experience.

Gary P. Quiming[232]

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[227] Colston, *supra* note 26.

[228] *Id.*

[229] Brown, *supra* note 51.

[230] WALKER, *supra* note 22, at 72-73.

[231] *Id.*

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