University of Hawai'i Law Review

Volume 32 / Number 1 / Winter 2009

ARTICLES

An Open Letter From Heaven to Barack Obama
F. Michael Higginbotham 1

Emerging Trends in International, Federal, and State and Local Government Procurement in an Era of Global Economic Stimulus Funding
Danielle M. Conway 29

Setting Aside Transfers of Property in Foreign Countries: How Long Is the Reach of the United States Bankruptcy Court?
Don Jeffrey Gelber 53

Tax Justice and Same-Sex Domestic Partner Health Benefits: An Analysis of the Tax Equity For Health Plan Beneficiaries Act
Michelle D. Layser 73

A Macabre Fixation: Is Plastination Copyrightable?
Kirill Ershov 125

NOTES

Electronic Discovery: A Call for a New Rules Regime for the Hawai'i Courts
Brandon M. Kimura and Eric K. Yamamoto 153

Method is Irrelevant: Allowing Native Hawaiian Traditional and Customary Subsistence Fishing to Thrive
Andrew R. Carl 203

Maka'ala Ke Kanaka Kahea Manu: Examining a Potential Adjustment of Kamehameha Schools' Tuition Policy
Lahela Hiapola'ela'e Farrington Hite 237

Refereeing the Recruiting Game: Applying Contract Law to Make the Intercollegiate Recruitment Process Fair
Jamie Y. Nomura 275

An Open Letter From Heaven to Barack Obama

F. Michael Higginbotham*

Since the passing of A. Leon Higginbotham, Jr. in 1998, many have wondered what the award-winning author, longest-serving black federal judge, first black to head a federal regulatory agency, recipient of the Spingarn Medal and the Congressional Medal of Freedom, and author of the famous "Open Letter to Clarence Thomas" would think of the state of race relations today. Appointed to the Federal Trade Commission in 1962, Higginbotham served in several powerful federal positions including Vice-Chairman of the National Commission on the Causes and Prevention of Violence, member of the first wiretap surveillance court, and chief judge of a United States Court of Appeals. Known as the conscience of the American judiciary on race issues, Higginbotham caused controversy in 1992, when he publicly reminded Justice Clarence Thomas of his predecessor's contributions to racial equality. In the 18 years since this public letter, much progress has been made, including Higginbotham's former student, Michelle Obama, becoming the first black first lady. This article presents what might have been Higginbotham's letter to President Obama after one year in office.

January 20, 2010[1]

Dear President Obama:

I rarely write letters that are published for the public to read. In fact, of the thousands of correspondences penned during my career, only one prior to this

---

* F. Michael Higginbotham, my nephew and protégé, is a professor of law at both the University of Baltimore and New York University. Although I have no brothers or sisters, I always refer to Mike as my nephew even though Mike's dad and I are cousins. In the Higginbotham family, it is customary to refer to children of cousins from the same generation as nephews or nieces, consistent with a tradition followed by some black families with Southern roots. Mike worked closely with me on my two books and on numerous law review articles spanning thirty years. He is the author of the forthcoming book *Getting to the Promised Land: How Blacks and Whites Can Create Racial Equality*, which provides an in-depth look at racism in America today. His earlier book, RACE LAW: CASES, COMMENTARY, AND QUESTIONS (3d ed. 2010), now in its third edition, is dedicated to me and includes my "open letter" to Associate Justice Clarence Thomas. The author would like to thank Alexis Martin, a 2009 graduate of the New York University School of Law, for research and editorial assistance, and Martha Kahlert and Barbara Coyle for secretarial support.

[1] This letter articulates what the author believes Judge A. Leon Higginbotham, Jr., deceased, would have written. *See infra* note 109.

has been published.[2] It was sent to Justice Clarence Thomas eighteen years ago, shortly after his contentious confirmation as the 106th Justice of the United States Supreme Court, and only the Court's second black nominee. My letter generated a good degree of controversy, even though it was not sent from Heaven.[3] Justice Thomas's nomination was hotly contested. The American Bar Association (ABA) rated him lower than his predecessors;[4] his lack of judicial experience (Thomas had never written a legal book or significant article and had only been a federal judge for one year) drew sharp criticism from detractors such as the National Association for the Advancement of Colored People (NAACP) and the National Organization for Women (NOW);[5] and he was confirmed (after overcoming rejection of his nomination by the Senate Judiciary Committee) by the smallest margin of votes (four) of any Supreme Court nominee since Lucius Lamar in 1888.[6]

As the longest-serving black federal judge at that time, I wrote that letter with the hope that reminding Justice Thomas of the great legacy of Justice Thurgood Marshall might encourage him to follow Justice Marshall's admirable path. As the first black to serve on the Supreme Court, Justice Marshall's defense of minorities, the poor, women, the disabled, and the powerless was unsurpassed. While I must confess to having had reservations about making that letter public because it could have been perceived as arrogant or inappropriate judicial conduct, I decided that the potential public good far outweighed any negative consequences that may have accrued to me personally. My apprehensions about Justice Thomas have proved to be well-founded and my words do not appear to have had much influence.[7] Yet, I have no regrets about writing or publishing the letter, for I believe it sparked valuable public discourse.

---

[2] A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).

[3] *See* David Margolick, *At the Bar; A Black Jurist, in an Open Letter, Says Justice Thomas Must Not Forget a Debt to the Past*, N.Y. TIMES, Feb. 14, 1992, at D20.

[4] *See* Bob Dart, *Thomas Ends Testimony; Bush Confident; But Lawyers Warn He Lacks Experience*, ATLANTA J. & CONST., Sept. 17, 1991, at E1.

[5] ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 282, 320, 357-58 (2001).

[6] United States Senate, Supreme Court Nominations, present-1798, http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Nov. 30, 2009).

[7] Frequently taking the point of view that the Fourteenth Amendment does not permit consideration of race, Justice Thomas has taken this country backwards in terms of providing equal opportunities for racial minorities. He voted with the majority in *Gratz v. Bollinger*, 539 U.S. 244 (2003), to limit the use of race as a factor for college admissions and again in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), with respect to elementary schools. Justice Thomas even showed his approval if the Court wishes to undo the judicial precedent, championed by Justice Thurgood Marshall, of *Brown v. Board of Education*, 347 U.S. 483 (1954), by joining Justice Scalia's dissent in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

This second "open letter" is spurred by similar and yet different motivations. I was inspired to write both because I recognize the responsibilities and peculiarities unique to a black man in a position of power, having been a black man appointed to many powerful positions in my time.[8] I am most invigorated when I see another poised to make a real impact on this country I love. I also recognize the need to make changes, not the least of which is eradicating racism that has hindered opportunities for millions of blacks and stunted America for far too long.

Rather than apprehension, however, I feel inspired by your platform and speeches. I regret that our paths did not cross during my lifetime, despite my teaching at your law school alma mater in the 1980s and 1990s. Your name comes up often these days in Heaven, particularly from persons like myself, who were active participants in the civil rights movement. Just yesterday, Rosa Parks[9] and I discussed how you can ignite monumental change. It is in this spirit that I now write.

---

[8] My full name is Aloyisus Leon Higginbotham, Jr. The unique spelling of my first name results from how my father's name is spelled on his birth certificate. I was born the only child of Aloyisus Leon Higginbotham, Sr., and Emma Douglas Higginbotham in Trenton, New Jersey. I graduated from Ewing Park High School in Trenton at the age of sixteen, began my college education at Purdue University, and transferred to Antioch College in Ohio, from which I graduated in 1949. I entered law school at Yale University at a time when there were only two other blacks in my class. Through tireless effort, I was able to graduate at the top of my class from Yale Law School in 1952 and was admitted to the Pennsylvania Bar in 1953. In the years following, I served as President of the Philadelphia branch of the NAACP, a commissioner of the Pennsylvania Human Relations Commission, and a special deputy attorney general. In 1962, after a successful private law practice, I was appointed by President John F. Kennedy to the Federal Trade Commission. In 1964, President Lyndon B. Johnson appointed me a federal district court judge, and in 1977, President Jimmy Carter appointed me to the United States Court of Appeals for the Third Circuit. I served as Chief Judge of that court from 1989 to 1991 and as a senior judge from 1991 until my retirement in 1993. During my judicial service, Supreme Court Chief Justices Warren, Burger, and Rehnquist appointed me to a variety of judicial conference committees and other related responsibilities. I taught at the law schools of Harvard University, University of Michigan, New York University, University of Pennsylvania, Stanford University, and Yale University. By appointment of President Johnson, I served as Vice-Chairman of the National Commission on the Causes and Prevention of Violence. In 1995, I was appointed by President William Jefferson Clinton to the United States Commission on Civil Rights. Also in 1995, I received the Presidential Medal of Freedom, the nation's highest civilian award.

[9] *See* ROSA PARKS & JIM HASKINS, ROSA PARKS: MY STORY 1, 80-81 (1992) (Rosa Parks was a Civil Rights activist and former Secretary of the Montgomery chapter of the NAACP. She is most recognized for sparking the Montgomery, Alabama Bus Boycott in 1955.).

I. INTRODUCTION

Congratulations on winning the highest office in America and completing one year of service! Your job as President is of vital importance in these tumultuous times. The unemployment rate is the highest it has been in over twenty-five years;[10] the nation is involved in two military conflicts, one against the Taliban in Afghanistan and another against al Qaeda in Iraq, as we attempt to help stabilize those countries and win a "war on terrorism;"[11] the incarceration rate is the highest in the world;[12] and the American people are divided on how to address these problems. The country desperately needs a wise and unifying leader. And while these problems are monumental, and could be catastrophic without proper attention on your part, there is another monumental problem—this one of longstanding stature—that also must be addressed. This problem is racial inequality.[13]

Because you were recently awarded the 2009 Nobel Peace Prize for your "extraordinary efforts to strengthen international diplomacy and cooperation between peoples,"[14] you may be thinking to yourself: "Is this man crazy? I have won both the United States presidency and the most prestigious internationally-recognized award for my ability to bring entire populations together across ethnic, class, gender, and age lines to unite for the common goals of world peace and a better future for all. How can he write about

---

[10] Bureau of Labor Statistics Data, United States Dep't of Labor, Labor Force Statistics from the current population survey, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000 (charting the national unemployment rate from 1948 to present) (last visited Nov. 30, 2009).

[11] This phrase was coined by President George W. Bush in response to the al Qaeda attacks on the United States on September 11, 2001. The "war" continued throughout President Bush's two terms, and, while targeting mainly Islamic militants, also had the effect of catching other criminals unrelated to the September 11th attacks because of an increasing web of anti-terror laws in the United States. *See generally* CNN.com, War Against Terror, http://www.cnn.com/SPECIALS/2001/trade.center/ (last visited Nov. 30, 2009).

[12] Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, at A1.

[13] The focus of this letter will be the racial divide between whites and blacks. Other racial minorities will not be covered in the same detail as blacks. There has been much criticism concerning a failure to focus on other minority groups when explaining current disparities. To that charge I plead guilty with an explanation. It is not that the story of Latino Americans, Asian Americans, Native Americans, Native Alaskans, Native Hawaiians, and others are unimportant. On the contrary, these stories are uniquely valuable and certainly as rich and complex. Their stories deserve the same detailed treatment elsewhere that blacks receive in this letter. It is worth noting that many of the issues discussed in this letter are also relevant to the history and current situation of other racial and ethnic minorities.

[14] The Nobel Foundation, The Nobel Peace Prize 2009, http://nobelprize.org/nobel_prizes/peace/laureates/2009/ (last visited Nov. 30, 2009).

inequality among races?" Your skepticism is well-placed. I am, after all, writing you from Heaven. Nonetheless, in my years of experience in the flesh I have learned that it takes much more than tremendous accolades to impact racial inequality that has persisted for centuries in our country and abroad.[15]

I have been studying you intently since 2006 when you rose from the unknown to become the fifth black senator to serve in the United States Congress.[16] Similar to you, I transferred in the midst of my college career to better serve my dreams of using the law to create social change. I too was the leader of a prestigious law student organization.[17] I was also a fervent civil rights advocate in a working class town and the first black in a number of revered positions: partner at the first black law firm in Pennsylvania, the first black trustee of Yale University, and the first black to be appointed commissioner of a federal regulatory agency. I know all too well the constant feeling that everyone is closely scrutinizing your every move, eager to point out missteps. Believe me, this feeling will not leave you anytime soon. Your courage, dedication to the American people, and commitment to the pursuit of equality and justice, however, will sustain and energize you as you continue on this remarkable journey.

Your inauguration has ended an era in American history. When I arrived at Yale Law School as a student in 1949, a black janitor hugged me, and with tears in his eyes, exclaimed that he was so happy to see a black face in the student body.[18] Now, some sixty years later, Yale Law School has had an Asian-American dean,[19] and you, a black man of multiracial descent, have risen to this nation's highest political office. The America that I knew prior to my

---

[15] In 1950, as a second-year law student, I won more oral advocacy awards than any other student in the history of Yale Law School. At the argument for the prestigious Honors Moot Court Prize, John W. Davis, the head of one of the premier law firms in the country, Davis, Polk & Wardwell, was a judge in the competition. I was given an award as the best oral advocate. After the ceremony, Davis congratulated the three other finalists and asked each to interview at his firm. I received neither a congratulatory handshake nor an invitation to interview.

[16] Other black senators include: Hiram Rhodes Revels (R-MS, 1870-1871), Blanche Kelso Bruce (R-MS, 1875-1881), Edward Williams Brooke, III (R-MA, 1967-1979), and Carol Moseley Braun (D-IL, 1993-1999). After you were elected, you were succeeded by America's sixth black senator, Roland Wallace Burris (D-IL, 2009-). United States Senate, Breaking New Ground—African American Senators, http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/Photo_Exhibit_African_American_Senators.htm (last visited Nov. 30, 2009).

[17] I was a member of the Yale Law Student Moot Court Board.

[18] Yale Law School admitted its first African American student in 1880, but even in 1949, I was one of only three blacks in my class.

[19] Yale Law School Faculty Biography, Harold Hongju Koh, http://www.law.yale.edu/faculty/HKoh.htm (last visited Nov. 30, 2009). A first-generation Korean-American, Harold Hongju Koh became Yale Law School's fifteenth dean in 1998 before you tapped him to join your administration as Legal Advisor to the United States Department of State.

death in 1998, where minorities were rarely seen in the corridors of political power, is no more.

Yet, neither your swift rise to the Presidency nor the presence of any minority in a position of power marks the end of racism. Overt racism expressly sanctioned by our nation's laws has given way to covert racism, tacitly approved through color-blind policies and "race neutral" programs.

As I watched your meteoric rise to the Presidency, I was impressed by the groundswell of support you received from people in all walks of life, poor and rich, both domestically and internationally. Your Nobel Peace Prize confirms this ongoing and widespread support. Equally striking was the way in which race implicitly and sometimes explicitly affected your campaign. You have endured attacks on your name, patriotism, nationality, religion, experience, affiliations, friendships, and judgment, all unique to your status as a black man in America. So fierce were some of the attacks on your ethnicity and allegiances that you addressed the matter in a nationally televised speech from my former hometown of Philadelphia, Pennsylvania, on March 18, 2008.[20]

In that speech at Independence Mall, where the Liberty Bell is housed, where the Constitution was forged, where the Founders first grappled with the meaning of "life and liberty," and where I often looked from my chambers as a federal judge from 1964 to 1993, you acknowledged pride of heritage while applying the same yardstick to whites and blacks to hold both groups responsible for ongoing problems of racial inequality. What impressed me most about this speech was your recognition of our country's marred past while focusing on solutions for the future. It is this type of forward-thinking coupled with a firm grasp of the realities of racism that will allow you to continue a path forged by those in my generation.

I do not speak lightly when I say that you evoke memories of my friend and fellow civil rights leader, Dr. Martin Luther King, Jr.[21] The night before he was murdered, your fellow Nobel Peace Prize winner delivered a speech predicting the nation's future and his own demise.[22] Dr. King prophesied that, while he likely would not live to see the day, he had no doubts that all Americans, including blacks, would some day "get to the promised land" of racial equality.[23] Four decades later you have become president and gained the same international recognition as Dr. King. This achievement stirs powerful

---

[20] Senator Barack Obama, Remarks at the Constitution Center in Philadelphia, Pennsylvania: A More Perfect Union (Mar. 18, 2008) [hereinafter Speech on Race].

[21] I had the pleasure of being very dear friends with Dr. King's wife, Coretta. Coretta and I were the only black students admitted to Antioch College in 1945.

[22] Martin Luther King, Jr., "I See the Promised Land" (Apr. 3, 1968), *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 279 (James Melvin Washington ed., 1986).

[23] *Id.*

emotions. In a country with a long history of slavery and segregation, this is truly a monumental event in the American story.

Yet, incredible barriers still exist for racial minorities in such areas as education, housing and urban development, economic power, and politics. It is difficult to imagine how those barriers can be leveled without directly tackling racism. As President, you have an opportunity to shape this country's future. Americans are counting on you to help solve the country's racial inequities and lead them to "the promised land,"[24] to those "self-evident" truths of equality identified by the Founders some two hundred years ago.[25]

II. YOUR IMPACT ON RACE RELATIONS

A. Changing Perceptions

The image of a black man as the symbol of the country has already had widespread impact. People who have had little contact with blacks and could never conceive of a black man in a position of power are now faced with the reality of not only a black president, but also a black major international leader. Children who limited their goals because of their race now have a role model who can expand their possibilities. I was particularly moved by a story of the black child who asked to touch your hair to confirm its similarity to his own curly hair.[26]

Your election has forced many to realize that a candidate's race is not as important as his policies and beliefs. An anecdote from your campaign trail is illustrative. In the 2008 Pennsylvania Democratic presidential primary, one of your campaign canvassers knocked on the door of a house in Washington, Pennsylvania and asked the white woman resident about her choice for president. After consulting with her husband, the woman responded: "We're voting for the Nigger!"[27]

What is the meaning of this story? Some suggest that even bigots have priorities, and in the 2008 election the failing economy was more important than your race. Others suggest that you can put a black man in the White House, but at the end of the day—in the eyes of some—he is still inferior because he is black. Either explanation displays the complicated nature of today's racial divide. The response of the white voter from Pennsylvania reflects both the progress that has been made and one of the problems that

---

[24] *See id.*

[25] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[26] *See Ebony on the Scene*, EBONY, Sept. 2009, at 24.

[27] James Hannaham, *Racists for Obama*, SALON.COM, Nov. 3, 2008, http://www.salon.com/opinion/feature/2008/11/03/racists_for_obama/.

remains. The substantial number of whites[28] willing to vote for a black candidate for the highest political office in the United States suggests that white racism in the political arena has decreased. Yet, the characterization of you as "the Nigger" indicates that some of your own supporters continue to view blacks negatively.

Your election will force many non-blacks to confront a duality in their own thinking: on one hand that blacks are inferior to whites, and on the other that the best person for the most prestigious job in this country is a black man. Many blacks will have to confront an analogous duality; one that leads many to believe that American structural racism prevents black success, but at the same time allows for blacks to occupy this nation's highest political office.

During the campaign, with the exception of your Pennsylvania speech,[29] you generally avoided racially-charged issues, not wanting to be viewed as "the black candidate" as past minority presidential candidates had been, including Jesse Jackson.[30] When controversy arose surrounding your relationship with Reverend Jeremiah Wright,[31] bringing race issues to the forefront, you felt you had to address the issue directly. Such a discussion carried great risk, threatening to polarize the electorate along racial lines and jeopardize your chance to win the presidency. With much at stake, you gave an incredible speech that was ultimately considered a dramatic turning point in the election.[32] You spoke directly to blacks and whites. You made whites feel that you understood their concerns about crime, education, and economic security.[33] Yet, you encouraged them to acknowledge past racism and understand its

---

[28] David Paul Kuhn, *Exit Polls: How Obama Won*, POLITICO.COM, Nov. 5, 2008, http://www.politico.com/news/stories/1108/15297.html (describing your win of the largest share of the white vote of any Democratic presidential candidate since Jimmy Carter in 1976). Exit polls showed you at four percentage points below Carter, an incredible feat in these trying economic times. *Id.*

[29] *See* Speech on Race, *supra* note 20.

[30] Jesse Jackson, a civil rights advocate, ran for the Democratic Party's nomination for president in 1984 and 1988, receiving 1200 delegates during the second campaign and finishing second in the balloting. MARSHALL FRADY, JESSE: THE LIFE AND PILGRIMAGE OF JESSE JACKSON 15 (Simon & Schuster 2006) (1996). Shirley Chisholm, a Congressperson from New York City, was the first black candidate to mount a significant campaign for president receiving 151 of the over 2,000 ballots cast in the first roll call for president in the 1972 Democratic Convention. NICHOLA D. GUTGOLD, PAVING THE WAY FOR MADAM PRESIDENT 65 (2006).

[31] Jeremiah Wright is the former pastor of Trinity United Church of Christ, a Chicago church with over 8,000 members. *The New Mega Churches*, EBONY, Dec. 2001, at 157. Reverend Wright had delivered several provocative sermons while you were a member of his church and when this information surfaced during the presidential campaign, some began to question your relationship. Campbell Robertson, *Between the Pulpit and the Pews, a Gulf on Obama's Ex-Pastor*, N.Y. TIMES, May 2, 2008, at A1.

[32] *See* Speech on Race, *supra* note 20.

[33] *See* Speech on Race, *supra* note 20.

present effects.[34] You spoke about changing the way that whites view blacks while criticizing blacks so that whites would not feel unduly burdened.[35] You urged blacks to take more personal responsibility.[36]

In all modesty, people used to say that I could deliver a pretty good speech on race,[37] but yours was truly one of the best I have heard. You dismissed the old racially-charged laments of the past as unproductive and divisive, but instead of saying, "Let's just drop the race issue altogether," you said, "Race is an issue that I believe this nation cannot afford to ignore right now."[38] You urged people to start talking about race in productive ways, including how it affects education, healthcare, and economic opportunities.[39] You told the American populace not to dwell on the anger of past discrimination or resentment about current programs (such as affirmative action), but instead to find solutions to real problems that have racial dimensions.[40] Through this speech and other speeches by your administration,[41] you bolstered your credibility with the American people (and with many of us up here in Heaven).

Many blacks, particularly those of us who lived through the Civil Rights era, never thought we would see a black president. We never believed a sufficient number of whites would vote for a black candidate. Remembering the political fates of black candidates like Harold Washington,[42] Harold Ford, Jr. of Tennessee (my former student at the University of Pennsylvania),[43] and Tom Bradley of California,[44] many of my former colleagues and friends thought your

---

[34] *See* Speech on Race, *supra* note 20.

[35] *See* Speech on Race, *supra* note 20.

[36] *See* Speech on Race, *supra* note 20.

[37] *See* Michael A. Fitts, In Memoriam, *A. Leon Higginbotham, Jr.: The Complicated Ingredients of Wisdom and Leadership*, 16 HARV. BLACKLETTER L.J. 17, 25-26 (2000).

[38] *See* Speech on Race, *supra* note 20.

[39] *See* Speech on Race, *supra* note 20.

[40] *See* Speech on Race, *supra* note 20.

[41] *See, e.g.*, Eric Holder, United States Att'y Gen., Remarks at the Dep't of Justice African American History Month Program (Feb. 18, 2009) [hereinafter Holder Speech].

[42] MANNING MARABLE, SPEAKING TRUTH TO POWER: ESSAYS ON RACE, RESISTANCE, AND RADICALISM 51 (1996). Although immensely popular, Harold Washington won the Chicago mayoral seat by only a very slim margin when members of his own Democratic party used overt racial scare-tactics that culminated in some influential politicians switching political parties to avoid supporting him as a black candidate.

[43] Robin Toner, *In Tight Senate Race, Attack Ad on Black Candidate Stirs Furor*, N.Y. TIMES, Oct. 26, 2006, at A1. On the eve of Harold Ford, Jr.'s campaign, his Republican challenger openly race-baited the voting populace by airing a widely-viewed, extremely controversial commercial featuring Ford Jr. and an attractive white female "supporter" whom, the commercial explained, Ford Jr. had met at a "playboy party."

[44] Tom Bradley was a five-time mayor of Los Angeles whose unsuccessful run for governor coined the term "the Bradley effect," describing the phenomenon where fewer whites vote for a black candidate on Election Day than polling data indicated. *See* Jeffrey M. Chemerinsky &

political career would similarly fail to attract a critical mass of white voters on Election Day. I am so glad that we were wrong.

B. A New Conversation on Race

This is not the first time that an American president has urged a "national conversation on race."[45] President Bill Clinton did so in 1997, when he created the race initiative of "One America in the 21st Century,"[46] but the notion fizzled.[47] As both you and Attorney General Eric Holder have noted, the same fate cannot meet your renewed call for a national conversation on race.[48] It is time that America confronts its past and openly and collaboratively forges its future.

There are several dimensions to a new cross-racial understanding. One significant change could be that whites will increasingly view the conversation on race as one that is as important to them as it is to minorities. In the past, many whites viewed racial issues such as segregation, housing, and employment discrimination as solely minority concerns, something that blacks or minority immigrants—but not whites—need deal with. Now whites have begun to understand the importance of the conversation to their own well-being.

As the upcoming 2010 census will show, whites will soon become a minority—albeit a majority-minority, but a minority nonetheless.[49] Sheer population numbers may permit many whites to change their perspectives on what have been traditionally called minority issues. But despite demographic

---

Kimberly C. Kisabeth, *Tracing the Steps in a Historic Election*, 86 DENV. U. L. REV. 615, 623 & n.43 (2009).

[45] *'A Nation of Cowards'?; The Attorney General's Speech on Race*, WASH. POST, Feb. 21, 2009, at A12.

[46] President Clinton's One America in the 21st Century, About the Initiative, http://clinton4.nara.gov/textonly/Initiatives/OneAmerica/about.html (last visited Nov. 30, 2009). President Clinton's Race Initiative for One America was designed to "strengthen our shared foundation as Americans so that we can live in an atmosphere of trust and mutual respect." President Clinton's One America in the 21st Century, Overview, http://clinton4.nara.gov/textonly/Initiatives/OneAmerica/overview.html (last visited Nov. 30, 2009). By inviting critics of America's racial practices and policies including John Hope Franklin to chair committees, the initiative aimed to create an understanding about racial frustrations. By focusing on specific national issues, Clinton hoped to learn more about America's racial problems and reach targeted solutions. Established in 1997, the project produced a number of reports but was largely dissolved by 1998.

[47] *Nation of Cowards*, *supra* note 45.

[48] *See* Holder Speech, *supra* note 41.

[49] *See* Press Release, U.S. Census Bureau, An Older and More Diverse Population by Midcentury 1 (Aug. 14, 2009), http://www.census.gov/Press-Release/www/releases/archives/cb08-123broadcast.pdf.

changes, whites still comprise a controlling voting block and are overrepresented in national and state congresses. As such, you must be careful not to alienate this group as a whole. If white political and economic dominance are perceived to be "unfairly" threatened, there could be conflict fueled by white resentment. So you must be very careful to formulate issues in ways that will not make whites feel unduly challenged politically, economically, or socially. This will require careful balancing on your part. Issues perceived as impacting white dominance, such as affirmative action, must be couched in non-threatening terms. Poverty-based efforts, in conjunction with racially-based ones, may reduce such feelings of anxiety. This is imperative because racial polarization would undermine your coalition significantly.

Another potential response to the renewed racial dialogue is one that we have seen already: the blank stare of incredulity. Some will think, "What conversation on race?"; or "Racism is over; we have a black president." Your election symbolizes the start of a "post-racial" America for many, one in which race as a salient factor ceases to exist.[50] But you know better. It will take a concerted effort to undermine this sentiment. No domestic or international acclaim will bring an end to racial hatred or inequality. Your domestic policies should be made with a focused understanding of their racial effects as appropriate. You must continue to counter the idea that your election had the magic[51] effect of ameliorating centuries of racism and segregation. As you receive praise worldwide, you must remember that covert racism unfettered by government action could prevent many youngsters from seizing the same opportunities that allowed you to stand before 1.8 million Americans, the largest crowd ever assembled on the Washington National Mall,[52] and take the oath of office on January 20, 2009.

---

[50] *See, e.g.*, Jonah Goldberg, *Why Obama also Gives Hope to Conservatives*, CHI. TRIB., Jan. 22, 2009, at C31; John O'Sullivan, Comment, *Obama the Enigma Must Point the Way to the Future; The Arrival of a New President Has United Americans in a Mood of Optimism—Despite the Economic Crisis. Will His Inaugural Speech This Week Justify Their Faith in Him?*, SUNDAY TELEGRAPH (London), Jan. 18, 2009, at 22; Jonetta Rose Barras, *The Man of Tomorrow: He Leapt the Tallest Barrier. What does it Mean for Black America?*, WASH. POST, Nov. 9, 2008, at B01 (Md. regional ed.).

[51] *See* David Ehrenstein, *"Magic Negro" Returns*, L.A. TIMES, Mar. 19, 2007, at A13 (noting that during the 2008 election you were referred to as the "magic Negro" for your ability to help whites rid themselves of the guilt many associate with slavery). So popular was the moniker that the Republican Party named a song after you at their national convention and talk show host Rush Limbaugh played it on his show. *See* Posting of John Aravosis to Americablog, http://www.americablog.com/2007/04/barack-magic-negro-new-song-played-on_30.html (Apr. 30, 2007, 09:34:00 EST).

[52] Michael E. Ruane & Aaron C. Davis, *D.C.'s Inauguration Head Count: 1.8 Million*, WASH. POST, Jan. 22, 2009, at B1. That crowd included my 84-year-old cousin, Robert

III. THE UNIQUE OPPORTUNITY FOR THE FIRST BLACK PRESIDENT TO SUCCESSFULLY CONFRONT RACIAL ISSUES STILL FACING AMERICA

As President, you must create and support programs that encourage black personal responsibility and prevent white isolationism. Whites cannot opt out of the collective responsibility to create equality. Blacks must opt into a system that they believe has repeatedly diminished their opportunities. You can create a more fair system that accounts for racial discrepancies, but is not seen as giving "free handouts" to undeserving individuals.

Racial inequality today is much more complex than it was when Dr. King led protests. Forty years ago, our nation's laws enshrined discrimination and violence was used to maintain the divide. Today such inequality results from inadequate anti-discrimination laws, inequitable school funding, housing isolation, economic exploitation, criminal justice stereotyping, and political underrepresentation. If true racial equality is ever to be achieved, the "hearts and minds" of the American people must change first.

A. Helping Blacks Examine Race-Based Ideologies

Your 2008 Father's Day speech encouraging black male familial responsibility was inspiring.[53] As many people in black elite, older generations, and academia have noted, as a community, blacks need to foster a culture of responsibility for their actions.[54] More recently, dispatching Attorney General Eric Holder and Secretary of Education Arne Duncan to Chicago, to address issues of gang violence in urban schools, continues to convey the proper messages of personal responsibility, the value of education, and deploring violence. Without a serious change in how blacks view their own destinies (as being at least to some extent out of their control due to white racism), it will be impossible to have a constructive conversation on race or to improve racial equality in this country.

Without stifling the creativity of musicians, it is time to hold them accountable for self-hating messages and demonization of our rich culture and

---

Higginbotham, and several dozen of his fellow Tuskegee Airmen, who you commendably invited to the ceremony in recognition of their outstanding combat record and civil rights commitments during World War II.

[53] President Barack Obama, Remarks on Father's Day 2008 at the Apostolic Church of God in Chicago, Illinois (June 15, 2008).

[54] Indeed, the "grandfather" of the movement for black familial responsibility, Bill Cosby, my friend and fellow Philadelphian, made a similar speech in 2004 at the NAACP's commemoration of the *Brown v. Board of Education*, 347 U.S. 483 (1954), decision. Bill Cosby, Address at the NAACP on the 50th Anniversary of *Brown v. Board of Education* (May 17, 2004).

traditions. Many hip hop artists produced songs and commercials to support you. This is a step in the right direction. Perhaps you can use your influence to encourage musicians, including T.I. (who appeared with you on the campaign trail), to produce more positive music and be positive role models. At the same time, you should not ignore the profound nihilistic messages espoused by many of the hip hop generation. While I personally preferred the jazz greats such as my relative J.C. Higginbotham, Miles Davis, Ella Fitzgerald, and Duke Ellington, I realize that, among others, T.I., Jay-Z, Mos Def, Beyonce, and Erykah Badu bear witness for a new generation. The themes of many of their songs provide a voice for the unseen, ignored, and marginalized "invisible" men and women of the Twenty-First Century. In the same way that they could learn from your example and continued encouragement of black personal responsibility, you would do well to listen to their messages and keep them in mind as you forge policies affecting their admirers and yours. You must continue to encourage black personal responsibility through your words of wisdom and by example.

Your presence on the international stage and the image you project will continue to have a tremendous impact in combating stereotypes. Due to negative media presentations and prejudice, perceptions of blacks include broken families, excessive criminality, and widespread drug abuse. High visibility of you and your family, who defy those racially stereotypical images, undermines negative perceptions of blacks. Whether you like it or not, perceptions carry great weight, and to that end you must remain above reproach in your display of family values. A Clinton-era-type misstep on the homefront could prove disastrous. The tendency of Americans to generalize your family experiences as those of blacks throughout the country is too great to put into jeopardy. Without a doubt, this standard is unfair, but the American racial paradigm cannot be ignored. As you are aware, that entails blacks being considered an "exception" while portraying excellence, but "the rule" while portraying something negative. Merely by your example, you have already begun to move the baseline for "the rule." It will be up to your sound decision-making and groundbreaking policies to ensure that your legacy is not viewed as an "exception."

B. Helping Whites Change Problematic Racially-Based Behavior

White privilege must be stopped by whites themselves. A failure to acknowledge structural racism, white isolationism and overvaluation, and black marginalization ignores the reality of current American race relations. Cross-racial dialogue is made difficult by the suggestion that racism is no longer a factor in determining opportunities, even though it is admittedly much less of one today than in the past.

The debate over affirmative action provides an excellent example. Some states, such as California, have forbidden race from being used as a factor in admissions to public colleges or universities.[55] Yet, these same states allow a preference for children of alumni even when blacks were excluded from those schools in the past or did not attend in large numbers. Under such circumstances, prohibiting a preference for under-represented blacks while permitting a preference for children of mostly-white alumni embraces the notion of white superiority and maintains inequality, even though on its face it appears race-neutral. This is especially problematic because statistics indicate that black students admitted under affirmative action programs perform well in terms of grade-point-averages and graduation rates.[56]

In addition to eliminating the embrace of white notions of superiority, whites must speak out against racial wrongs when they see them. Speaking out will ensure that notions of white superiority are not reinforced. Silence implies acceptance.

Evidence suggests that whites are changing. For example, racist references about your being an "affirmative action" candidate or being "the black candidate" were roundly condemned by an increasing number of whites.[57] Much of this condemnation comes from whites under forty years of age, who have grown-up in a post-*Brown*[58] environment.[59] They have lived, gone to school, and worked with significant numbers of blacks. Whites who have had such interaction tend to be more outspoken against racism than other whites. You, President Obama, must encourage such outspokenness. In the same way that it will be impossible to forge a new multiracial America without an attitude change among significant numbers of blacks, it will be as difficult to do so without having many whites confront their own personal prejudices.

C. The Recommended Approach

I would suggest an approach that utilizes the transformative power of the law. Color blind and race-neutral approaches to the racial divide are inadequate, in light of the continuing notion of white superiority. Radical changes are necessary to alter long-held notions of white superiority. Racist choices camouflaged in neutral-sounding rules and practices must be prevented.

---

[55] CAL. CONST. art. I, § 31. This provision was added by initiative measure Proposition 209. 1996 Cal. Legis. Serv. Prop. 209.

[56] *See generally* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (2000) (1998).

[57] *Searching for the Promised Land; Race in Obama's America*, ECONOMIST, Dec. 6, 2008 (U.S. ed.).

[58] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[59] *Searching for the Promised Land, supra* note 57.

1. Anti-discrimination policies and practices

By equalizing public school funding, passing inclusionary housing laws, and implementing affirmative action programs, for example, you can make concrete differences in the lives of everyday Americans. You can accomplish these changes through unilateral executive orders, encouraging congressional action, and Supreme Court appointments.

If the opportunity presents itself to replace one or more of the five conservative justices on the Court, you must make certain that you replace them with individuals committed to the belief that government can play a significant role in creating racial justice. Since so many decisions on racial justice issues are five votes to four, replacing one conservative justice could alter the entire direction of the Court and reshape equality law for generations. Your recent nomination of Judge Sonia Sotomayor to replace retiring Justice David Souter on the Supreme Court was a wise choice. While unlikely to alter the direction of the court on racial equality issues since Justice Souter was a reliable vote for the liberal wing of the court, Judge Sotomayor's long and distinguished career reflects a commitment to equal justice reminiscent of past liberal justices like William Brennan, whom I have referred to as possessing "extraordinary wisdom and compassion."[60]

Some have criticized now-confirmed Justice Sotomayor for lacking the proper judicial temperament. In particular, these critics have focused on her remarks honoring another judge who had died prematurely. Then-Judge Sotomayor stated: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Critics such as Newt Gingrich and Rush Limbaugh have referred to then-Judge Sotomayor as "a Latina racist," a very serious charge if true.[61]

As a federal judge in 1974, I faced a similar charge. In *Union of Operating Engineers*,[62] I responded to a motion asking that I recuse myself because I was black. This was a civil rights employment action brought by black construction workers against two contractors associations. The defendants moved for my recusal specifically because of comments that I had made while speaking at a luncheon organized by the Association for the Study of Afro-American Life and History. At the luncheon I stated that African Americans could no longer rely exclusively on the Supreme Court as an instrument for social change. In

---

[60] Higginbotham, Jr., *supra* note 2, at 1008.

[61] Newt Gingrich subsequently apologized for this characterization, but Rush Limbaugh reiterated the charge. Tom LoBianco, *Gingrich Retreats on "Racist" Charge Against Nominee; Challenge Her Record, He Says*, WASH. TIMES, June 4, 2009, at A07.

[62] Commonwealth v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155 (E.D. Pa. 1974).

responding to this recusal motion, I explained that the presence of bias—not skin color—should be the determining factor for recusal.[63] I explained:

> I concede that I am black. I do not apologize for that obvious fact. I take rational pride in my heritage, just as most other ethnics take pride in theirs. However, that one is black does not mean, *ipso facto*, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant.[64]

I spoke from the heart in that opinion, and indicated that I was a proud black man who understands and appreciates the obstacles, sacrifices, and accomplishments of those African Americans who had fought and in some cases died for freedom and equality. This recognition did not make me anti-white. I spent my entire professional career writing, speaking, and treating all individuals—irrespective of race—as equal and respected members of the human family.[65] I was not going to allow wealthy and powerful white litigants to characterize me as less objective than white judges merely because I happened to be black.

Similarly, merely because Justice Sotomayor acknowledges that experiences, including racial ones, may influence judgment does not mean that she is racist. As with my recusal decision in 1974, much more would need to be established to indicate even the possibility of bias than this reflective remark. Of course experiences—both positive and negative—influence judgment, which is why I have always felt that values should be the most important factor in judicial

---

[63] *Id.* at 159-60.

[64] *Id.* at 163.

[65] *See* F. Michael Higginbotham, *Speaking Truth to Power: A Tribute to A. Leon Higginbotham, Jr.*, 20 YALE L. & POL'Y REV. 341 (2002); Colleen L. Adams et al., *A Life Well Lived: Remembrances of Judge A. Leon Higginbotham, Jr.—His Days, His Jurisprudence, and His Legacy*, 33 LOY. L.A. L. REV. 987 (2000); Margaret Chon, *A Symposium Tribute to Judge A. Leon Higginbotham, Jr.: The Mentor and His Message*, 33 LOY. L.A. L. REV. 973 (2000); L. Barry Costilo, *An Unforgettable Year Clerking for Judge Higginbotham*, 33 LOY. L.A. L. REV. 1009 (2000); Michael A. Fitts, *The Complicated Ingredients of Wisdom and Leadership*, 16 HARV. BLACKLETTER L.J. 17 (2000); Henry Louis Gates, Jr., *Remembering Leon*, 6 HARV. J. AFR. AM. PUB. POL'Y 1 (2000); Clifford Scott Green & Stephanie L. Franklin-Suber, *Keeping Thurgood Marshall's Promise—A Venerable Voice for Equal Justice*, 16 HARV. BLACKLETTER L.J. 27 (2000); F. Michael Higginbotham, *A Man for All Seasons*, 16 HARV. BLACKLETTER L.J. 7 (2000); F. Michael Higginbotham, *Promises Kept*, 6 HARV. J. AFR. AM. PUB. POL'Y 11 (2000); F. Michael Higginbotham & Jose Felipe Anderson, *A Tribute to Judge A. Leon Higginbotham, Jr.: Who Will Carry the Baton?*, 33 LOY. L.A. L. REV. 1015 (2000); Joseph S. Nye, *Harvard Farewell*, 6 HARV. J. AFR. AM. PUB. POL'Y 5 (2000); Mitsi Sellers, *Working with the Judge*, 6 HARV. J. AFR. AM. PUB. POL'Y 7 (2000); Charles J. Ogletree, Jr., In Memoriam, *A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1801 (1999); William J. Brennan, Jr., *Tribute to Judge A. Leon Higginbotham, Jr.*, 9 LAW & INEQ. 383 (1991); Cliff Hocker, *A. Leon Higginbotham: "A Legal Giant"*, NAT'L B. ASS'N MAG., Mar.-Jun. 1999, at 16.

selection. Justice Sotomayor is hardworking, bright, experienced, and, most importantly, committed to values, such as the rule of law, the principle of democracy, and the rights of due process and equal protection. These are some of the same values that have made the United States the great country that it is today. That is why I believe that her nomination and confirmation were appropriate. President Obama, you must make certain that any future minority nominees are examined carefully and thoroughly, but under the same standards as those white nominees recently confirmed, whose values were deemed by members of the Senate to be acceptable for service on the Supreme Court.[66]

Should the Supreme Court fail to change its jurisprudence on race-conscious remedies, you should encourage Congress to pass new laws fostering racial equality. The first step is for Congress and state legislatures to ensure that the American people know the full story of our nation's racial oppression, as well as its successes. Information is empowering. The truth will serve to undermine negative stereotypes by revealing how and why they were created. What is required is an accurate education on the history of racism, including depictions of slavery, Reconstruction, and segregation, and acknowledging—rather than hiding—statistics that demonstrate high rates of discrimination. Often our nation's history classes and books omit the horrendous treatment that minorities endured and continue to face.[67] A congressionally-sponsored truth commission should be created that will go beyond the Civil Rights Commission, which I served on in the mid-1990s, to provide advice and guidance to the president.

---

[66] When then-Judge Samuel Alito, my former colleague on the United States Court of Appeals for the Third Circuit, was confirmed to the Supreme Court in 2006, my name was invoked in error by Alito supporters even though I had passed away some eight years earlier. I have pleasant memories of the occasions in which Alito appeared before me as a lawyer. I often remarked to colleagues that he was one of the best appellate advocates that had ever come before me on the bench. His oral arguments were clear, well-reasoned, and conveyed in a forthright manner. His briefs were thoroughly annotated, carefully structured, and intricately detailed. Alito's work ethic was equally apparent in the few years that he and I sat together as colleagues on the Third Circuit Court of Appeals. Then-Judge Alito's Supreme Court nomination confirmation hearings served to remind me of those times. He was a valued colleague whom I respected for his intellect, integrity, and dedication, and I knew first-hand that he possessed the ability to be a superb Supreme Court justice. While Alito's ability was beyond question, his approach to adjudicating individual rights—insofar as I could discern it from his record as a lawyer and a judge—gave me some cause for concern. At the time of then-Judge Alito's nomination, prior to and during the confirmation hearing, a senator and a witness invoked my name to suggest that had I been living I might not have opposed the nomination. Let me now set the record straight. Although I regard Justice Alito with great respect, this suggestion could not have been further from the truth. *See* Michael Higginbotham, *Setting The Record Straight: Judge Higginbotham on Judge Alito*, BALTIMORE AFRO-AMERICAN, Jan. 28, 2006, at A11; *cf. infra* note 109.

[67] *See* A. Leon Higginbotham, Jr., *The Bicentennial of the Constitution: A Racial Perspective*, STAN. LAW., Fall 1987, at 8.

You can create such a truth commission to identify issues, hold hearings, facilitate discussion, and promulgate recommendations to federal and state agencies. You should hold radio or town hall meetings that focus on an aspect of the racial divide that would allow for discussion of both the past and the present. President Franklin Delano Roosevelt held "fireside chats."[68] You could hold "town hall meetings for equality." I recognize that this path is risky, potentially opening up racial "wounds" that could exacerbate tensions among races. Given the recent actions of some Republicans bent on de-railing your healthcare plan at town hall meetings, perhaps this format will need to be revamped and reconsidered.[69] Yet, I am comforted by your amazing ability to bring people together across racial lines. As you did at the White House with respect to the dispute between my good friend, Professor Henry Louis Gates, and the Cambridge, Massachusetts Police Officer who arrested him, you could facilitate a discussion on a larger and more comprehensive scale.

For some whites, you are the right shade of blackness; light "enough" and of mixed race, thus reducing the stigma that blackness carries in America, and at the same time, dark enough to be black when you won the presidency so that Americans could embrace the accomplishment of electing a minority for the first time. For many blacks you were almost too "white," but black enough to be considered one of their own.

Your international heritage positions you to call on the international community to fight racism worldwide. A global initiative would be well-received within the United Nations and in many countries such as South Africa, Brazil, Cuba, and Australia. Navanethem (Navi) Pillay, the United Nations High Commissioner for Human Rights (whom I worked with closely in the 1980s on anti-Apartheid efforts), has called for such an approach. You must recognize that no president since Nelson Mandela[70] has had the potential to have greater international impact. In 1994, when Mandela asked me to come to South Africa to mediate a South African election dispute between several rival political parties, we joked that no one (not even I, who was known for judicial bridge-building) was better than him at creating and solidifying cross-racial coalitions. You, like Mandela, must use your image as an asset and attack racism by building international coalitions in ways that no other American president has or could. You have already begun this process with an overture to Cuban President Raul Castro.[71]

---

[68] *See* FDR'S FIRESIDE CHATS (Russell D. Buhite & David W. Levy eds., 1992).

[69] Kathleen Gray & Dawson Bell, *Passionate Debaters Stir Up Health Care Town Halls: Lawmakers Get a Fight*, DETROIT FREE PRESS, Aug. 13, 2009, at 1A.

[70] Nelson Mandela was the first democratically-elected president in post-apartheid South Africa.

[71] *Obama, Raul Castro Start to Thaw Relations Between U.S. and Cuba*, CAN. BROADCASTING CORP., Apr. 17, 2009, www.cbc.ca/world/story/2009/04/17/cuba-obama-castro

This is a wise beginning, but you missed a wonderful opportunity when you boycotted, albeit "with regret," the United Nations' Conference on the Elimination of Racism.[72] While you were correct to oppose excessively harsh language against Israel included in the conference's final declaration, and State Department Deputy Spokesperson Robert Wood stressed the United States' continued commitment to "halt racism and discrimination wherever it occurs," your boycott of the conference was inconsistent with your conciliatory strategy abroad. You have offered an open hand in exchange for an unclenched fist when it comes to a new foreign policy approach.[73] As you did with Cuba, you must engage first before you decide to say "no" to coalition building on racism internationally.

2. Education

Another important goal must be the equalization of the quality of public schools throughout the country. This should include increased spending per pupil in the poorest districts. The constitutional promise of equal education for which Thurgood Marshall fought so fervently as an attorney in *Sweatt v. Painter*,[74] and subsequently in *Brown v. Board of Education*,[75] is not being adequately protected by the judiciary. Today, the series of school desegregation decisions, including the recent *Parents Involved*[76] case, have basically eviscerated the Fourteenth Amendment's equality guarantee to the extent that it applies to primary and secondary public education.[77] The current trend in Supreme Court jurisprudence to prevent government-backed race-conscious remedies aimed at decreasing racial segregation is clear.[78]

You must take an alternate route that does not merely support affirmative action programs to the extent that they remain necessary in both secondary and university contexts. You must also fundamentally rethink the way that this

---

016.html.

[72] Matthew Lee, *Obama to Boycott U.N. Conference on Racism*, VIRGINIAN-PILOT, Apr. 19, 2009, at A3.

[73] President Barack Obama, Inaugural Address (Jan. 20, 2009).

[74] Sweatt v. Painter, 339 U.S. 629 (1950) (holding that the separate black law school was not "substantially equal" to the law school of the University of Texas, thus making petitioner's rejection from the law school of the University of Texas unconstitutional). In my first year of law school I was fortunate enough to watch the great Thurgood Marshall argue on behalf of Heman Sweatt before the United States Supreme Court in *Sweatt*.

[75] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[76] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[77] *See, e.g., id.* (holding that in the primary and secondary school context, absent vestiges of segregation, the use of racial classification schemes to achieve "diversity" broadly defined is unconstitutional).

[78] *See, e.g., id.*

country funds and provides education. You have said that you will begin by providing additional funding to the important but practically unfunded "No Child Left Behind" program.[79] You and Secretary of Education Arne Duncan should devise a method for low-performing students to receive the assistance they need. In a time when, as you put it, our "nation's schools are crumbling,"[80] we need creative solutions that create opportunities for those most harmed by the continuing effects of de facto segregation, rather than merely shift funding around. You must find a way to strike the proper balance reflecting both merit in assessing educational achievement and, at the same time, leveling the playing field for America's black students. You can achieve equality in education by ending school funding based on property taxes. Instead, promote an educational equity law that requires equal funding for all public primary and secondary schools, and provides economic incentives and rewards for previously under-funded districts when those districts excel. Doing so will help traditionally disadvantaged and disenchanted minority students,[81] and at the same time create an opportunity for all American students to become globally competitive.

Your presence alone is inspiring. Your presidential campaign success had such a potent effect that it has been coined the "Obama effect."[82] According to a Vanderbilt University study, black test-takers who usually perform worse than their white peers when tests identify their race, performed better or at the same level as their white peers when administered a test directly after your election.[83] It seems that your symbolic inspiration helps improve the self-esteem and abilities of black test-takers who normally worry that their results will be considered a reflection of their race. The results of this preliminary study are certainly encouraging and speak volumes. You have an incredible opportunity to change the educational landscape in this country and you should affirmatively embrace it.

---

[79] *See* BarackObama.com, Organizing for America—Education, http://www.barackobama.com/issues/education/ (last visited Nov. 30, 2009).

[80] Speech on Race, *supra* note 20.

[81] *See* Hazel Trice Edney, blackvoicenews.com, *New "Doll Test" Produces Ugly Results*, Aug. 21, 2006, http://www.blackvoicenews.com/content/view/39840/16/ (discussing an experiment where a preschool-aged black girl selects a black doll as one that "looks bad" relative to a white doll, and yet acknowledges that the black doll looks more similar to herself).

[82] Sam Dillon, *Study Sees an Obama Effect as Lifting Black Test-Takers*, N.Y. TIMES, Jan. 23, 2009, at A15.

[83] *Id.*

3. Housing and urban development

Housing and urban development are probably the two areas where the lasting effects of slavery and segregation are most visible. Reflective of this is whites' continual embrace of the "tipping point" notion in housing integration. Instead of forging communal ties with their new neighbors, many whites associate the mere presence of blacks in their homogeneous communities as both a threat and an indication of a decline in property value, so they flee their neighborhoods for less diverse suburbs. "Tipping point" bigotry was exemplified by Jeremy Parady, who plead guilty in 2005 to conspiracy to commit arson in a new housing development because many of the buyers were black.[84] Parady admitted that he set fire to this development because many of the buyers were blacks and the surrounding neighborhood was mostly white.

Furthermore, urban development schemes tend to benefit community outsiders, and, to the extent that they are successful, they have a tendency to drive out minority residents from their urban center homes. I think you are on the right track with your plans to create more low-income housing opportunities, stimulate economic prosperity, and fund community development projects. You can go one step further by providing special grants, tax cuts, or funding for current community residents to start or continue operating businesses in economically-depressed neighborhoods. This would help keep long-time residents in renewing neighborhoods while fostering an environment of success and achievement among urban minorities.

Publicly-financed housing projects must be strategically located to facilitate racial integration—not segregation, as they have in the past. Housing laws should mandate such strategic locations and this mandate should be vigorously enforced. Integrated housing is crucial to reduce the racial divide because so many of life's activities, especially education, revolve around communities. If Americans are racially divided in housing, they are likely to be divided in other areas of life. You have the tools in your box to truly transform the face of America. You should seize the opportunity to re-integrate and reinvigorate our urban communities. With Congress on your side, you can literally transform "Main Street."

4. The economy

Economic inequities must be substantially reduced. White high school graduates are more likely to be hired than black college graduates and white college graduates are more likely to be hired than blacks with doctorate

---

[84] Gary Gately, *Pall of Racism Remains Over Neighborhood Repaired After Arson*, N.Y. TIMES, Oct. 6, 2005, at A16.

degrees.[85] This must change, for the maintenance of these economic inequities makes bridging the racial divide virtually impossible. Anti-discrimination laws in employment must be strengthened by reducing burdens of proof for plaintiffs and increasing monetary penalties and criminal sanctions for violators.

I am pleased by the announcement of your economic stimulus plan. I know that you have learned from the mistakes made while you were in Congress. You realize that providing lump sum payments to banks without restrictions will not do the most to help the American people. Words cannot convey the level of despair I felt when I saw the video of the California man, Robert Daniel Webb, who was recently laid off from his job, hold up a drug store cashier at gunpoint while Webb's nine-year-old daughter watched in disbelief.[86] As you implement your desperately needed plan to help America's working and middle classes, be sure to focus on the workers themselves. Those who toil tirelessly in factories and those who are seeing their jobs disappear need your help even more than the nation's bank executives. You must devise a way to re-educate them to put their human capital to the hard work of building America for the Twenty-First Century and beyond. Collectively, Americans have always been a creative and hardworking people. Give them the chance to show these traits to the world once again.

As a leader in developing technology, America has the unmatched capability to retrain and retool the same factories that gave us a thriving middle class and assured our economic prominence in the world. Your focus on green technology and innovation is astute and could help re-employ thousands of jobless Americans. Your creation of a "Green Jobs Czar" certainly shows that your focus is in the right place. But do not forget that it was the manufacturing industry—auto, steel, railroads, and mining—not banks, Wall Street, or hedge funds that gave blue-collar workers their first jobs and a chance for a better economic future.

When blacks were blocked from other trades and employment opportunities, it was the manufacturing industry that opened its doors. Now that this industry is failing, you can expect a decline in the black middle class that nourished you, economically and emotionally, throughout much of your presidential campaign. While some in the United States would simply like to ignore the casualties in working class towns like Philadelphia, Chicago, and Detroit, retraining those who helped build this country to create a new technologically-advanced and environmentally friendly nation will serve you better than continuing to open government coffers to banks and other financial institutions.

---

[85] NATIONAL URBAN LEAGUE, STATE OF BLACK AMERICA REPORT 2006 (Stephanie R. Jones & George E. Curry eds., 1998).

[86] Man Robs Store with 9-Year-Old Daughter in Tow, NBC News & News Service, Apr. 2, 2009, http://www.msnbc.com/id/30013901.

As a former Commissioner of the Federal Trade Commission (FTC), I am concerned that your focus on jobs "shipped offshore" is a bit short-sighted. In a globalized economy it will be inevitable that certain types of jobs will either exist beyond national boundaries or become obsolete. Stoking the fires of xenophobia will not create new American jobs; it could, however, exacerbate racial tensions. I am reminded of the Vincent Chin incident when Detroit was facing drastic job cuts in the 1980s, and I see striking similarities with today's economic climate.[87] Chin was killed in racially-charged riots directed at recent immigrants. The same climate that led to Chin's death is fomenting throughout the country today. As the United States' demographics change, alienating ethnic groups by focusing on job losses to other nations will create new ethnic divides that America does not need. Your support of the Dream Act, which allows undocumented college graduates of American universities who are long-term residents of the United States to acquire lawful resident status, would be a step in the right direction.[88]

5. Criminal justice

On the eve of your inauguration an unarmed black man was killed by the Oakland transit police while laying face down, sparking riots reminiscent of those that occurred in the 1960s.[89] Several months before that, three New York City police officers were acquitted after being arrested for killing another unarmed black man on his wedding day in 2006 in Queens, New York.[90] These stories are shocking, painful, and unfortunately all too common. Police brutality, if not on the rise, is at least as prominent now as it was when I served as an Assistant District Attorney in Philadelphia in the early 1960s. To make matters worse, the perpetrators who use excessive force—predominately against black men—seem to escape any sort of criminal punishment. This must stop.

The integrity of our police force is instrumental to the function of our society. If a few police officers are permitted to be criminals in blue uniforms and immune to the strictures of our criminal justice system, we can expect more fatal "mistakes," more riots, and a citizenry increasingly mistrustful of state

---

[87] *See generally* American Citizens for Justice, Home, http://www.americancitizensforjustice.org/ (last visited Nov. 30, 2009). American Citizens for Justice is an organization dedicated to restoring justice in the Vincent Chin case and preventing similar racial injustice.

[88] *See* Development, Relief, and Education Act for Alien Minors Act of 2009 (DREAM Act of 2009), S. 729, 112th Cong. (2009).

[89] Sean Maher, *New Video Shows BART Officer Shooting Hayward Man in the Back*, CONTRA COSTA TIMES (Cal.), Jan. 4, 2009, at My Town; Alameda.

[90] Michael Wilson, *Judge Acquits Detectives in 50-Shot Killing of Bell*, N.Y. TIMES, Apr. 26, 2008, at A1.

authority. The police have been allowed for many years to embrace strategies that employ racial profiling and curb civil liberties. As Vice-Chairman of the National Commission on the Causes and Prevention of Violence in 1969, I disagreed with a majority of Commission members by including dissenting language in the report that nonviolent protests paved the way for the elimination of Jim Crow practices.[91] As the Chief Executive, it is time for you to send a strong message that these policies are unacceptable and will not be tolerated in the post-racial America that you hope to forge. The risk that such policies will continue to lead to fatalities and discrimination is too great.

Harsher criminal punishment for blacks is common, even today. National statistics indicate that blacks are prosecuted and imprisoned at a rate more than five times that of whites. Blacks are arrested at rates several times that of whites, are less likely to receive prosecutorial discretion in the courtroom, and often receive longer sentences than whites for identical crimes. The stories of Tim Carter and Richard Thomas exemplify this inequality. Both men were arrested in 2004, "in separate incidents, three months apart, in nearly the same location."[92] "Police found one rock of cocaine on Carter, who is white, and a crack pipe with cocaine residue on Thomas, who is black."[93] Neither had prior felony arrests or convictions, and both claimed drug addictions and potentially faced five years in prison.[94] Carter's prosecution was withheld and the judge sent him to drug rehabilitation.[95] Thomas was prosecuted, convicted, and jailed.[96] Their only apparent difference was race.

While you provide hope for anyone who wants to succeed in this country, the potential role models from urban homes are increasingly being taken away, locked up, and forgotten. In early April, Attorney General Eric Holder made it clear to all federal prosecutors that such bias was unacceptable and would not be tolerated.[97] This is a much needed step in the right direction as our jails are disproportionately filled with black men.

Many murders of civil rights workers that occurred during the Jim Crow era remain unsolved, however, because of the lack of rigorous investigation at the time the crimes were committed. Modern forensic techniques, along with a renewed commitment by law enforcement, could bring about justice that would

---

[91] *See* TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 87, 108-18 (1969).

[92] Eric Lotke, Joint Center for Political and Economic Studies, *Racial Disparity in the Justice System: More Than the Sum of its Parts Bias Infects System from Investigation to Incarceration*, FOCUS MAG., May-June 2004, at 3-4.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Eric Holder, Att'y Gen., Remarks at the National Black Prosecutors Association's Profiles in Courage Luncheon (July 22, 2009).

create goodwill and start a healing process. Solutions must not stop with prosecutions of elderly white racists who have ceded their leadership positions in terrorist organizations such as the Ku Klux Klan to other younger members. The government must demonstrate a commitment to racial justice in new racial hatred cases as well.

Tackling racism in the criminal justice system, though near to your heart as a lawyer by trade, will be extremely difficult from your position. That said, while occupying the highest office in the land your words carry great weight. You have already condemned the state of the criminal justice system in America as a presidential candidate. It is time that you do it again. It is no time for "politics as usual" when it comes to these matters of life and death. You must send a strong message that indiscriminate killing of young black men is not a state-sanctioned activity and provide district attorneys, judges, and other professionals with viable alternatives to incarceration for non-violent criminals.

6. Politics

Although you are one of the rare exceptions thus far, white reluctance to support black candidates has made successful state and national black candidacies scarce. In fact, that race needed to be "transcended" for your candidacy to garner enough support reinforces the central premise that racism still haunts the political arena. Black candidates continue to be hyper-scrutinized for their endorsements and associations former and current (aside from their policies), because of a fear that they may have hidden racial biases. Even their supporters face questions.

For example, when Republican and retired General Colin Powell announced his endorsement of you on *Meet the Press*, host Tom Brokaw questioned whether race played a role in Powell's decision.[98] When television star Oprah Winfrey endorsed you, many assumed racial bias.[99] Curiously, the racial motives of your high-profile white supporters, like conservative columnist David Brooks, went unquestioned.

A look back provides some explanation. During slavery, plantation owners intentionally separated families and enforced laws prohibiting black slaves from congregating for fear that they would plot rebellion or attempt to escape. After emancipation and even through the Civil Rights era, blacks were routinely jailed under vagrancy or loitering statutes for exercising their constitutionally guaranteed right of assembly. As columnist Michel Martin noted, this phenomenon can be seen in work environments across the nation where blacks

---

[98] *Meet the Press* (NBC television broadcast, Oct. 19, 2008).

[99] *Can I Just Tell You?* (NPR radio broadcast, Oct. 20, 2008).

say to one another: "uh, oh, there's three of us; better bust it up."[100] Even your wife, Michelle (my former student at Harvard Law School), was reluctant to date you when both of you worked at the law firm of Sidley Austin, because she was concerned about the appearance of "the only two black people" at the firm dating.[101] Unfortunately, as you are well aware, black politicians have the added onus of not only needing to appear completely race-neutral in their everyday lives, but also preventing the appearance of a black agenda. The subconscious fear of many (and the conscious fear of a few) whites, that blacks will band together to advance a specifically "black" agenda, is too great for black candidates to ignore and still capture a significant amount of white votes.

The "Bradley effect," named after black California gubernatorial candidate Tom Bradley who lost his election while polls showed him with a significant lead, describes the impact of what social scientists call the "social desirability bias." Put simply, when white voters are polled before elections involving a non-white candidate, they are less likely to admit their intentions not to vote for the minority candidate because of race. Because racism is socially discouraged, these voters claim they will vote for the minority candidate. When the same voters get into the voting booth, however, they cast their votes against the minority candidate, possibly based on racist beliefs. Many have used this phenomenon to explain the discrepancy between polling data and actual election data in political contests, including those of Harold Ford, Jr., Tom Bradley, and Doug Wilder.

As a result of your election, the "Bradley effect" has come under scrutiny. Indeed, pre-election support for you seemed to accurately predict your victory. The accuracy of much of the 2008 election polling, where pollsters such as Nate Silver of FiveThirtyEight.com came within fractions of a percentage point in their predictions, undermines the continued existence of the "Bradley effect." While I am optimistic that race relations have changed enough in the United States that the "Bradley effect" will be less potent than perhaps it has been in the past, I remain skeptical that race will not negatively impact some future black political candidates.

After you announced your economic stimulus plan, one that could prove to be a hallmark of your presidency, the *New York Post* ran a cartoon depicting you as a monkey.[102] This was only the beginning. You have been called a "Nazi" and a supporter of "white slavery," and your American citizenship continues to be questioned by those who call themselves "the birthers." Some even questioned whether it was appropriate for you to speak to schoolchildren

---

[100] *Id.*

[101] Lisa Mundy, *When Michelle Met Barack*, WASH. POST MAG., Oct. 5, 2008, at W10.

[102] *See* Brent Staples, Editorial, *The Ape in American Bigotry, From Thomas Jefferson to 2009*, N.Y. TIMES, Feb. 28, 2009, at A22.

about the importance of education. Moreover, some of the opposition to your healthcare reform initiative and, in particular, the tactics employed by your opponents, appear unduly disrespectful, perhaps indicating a racial animus as former President Jimmy Carter has noted.[103] For example, Congressman Joe Wilson's disruption of your speech to a joint session of Congress by shouting "you lie" in response to your characterization of recent immigration legislation was unprecedented.[104]

As I detail in my two books, *In the Matter of Color*[105] and *Shades of Freedom*,[106] code words and other symbolism long utilized by bigots to signify racial inferiority are likely to return to vogue. Inevitably, some politicians will run for election on platforms that promise a return to earlier, supposedly better, times. By continuing to uphold your principles of bipartisanship and inclusion, you can show skeptical voters that they have little to lose by casting their lots with a black candidate.

Your election managed to generate the highest voter turnout this country has ever seen. Yet, barriers still exist for blacks attempting to exercise their constitutional right to vote. Gerrymandering schemes in Texas and other states could have made the black vote practically ineffectual. Reports of traffic stops, arbitrary ticketing by Florida police, and libelous telephone calls to black homes discouraging residents from voting all occurred during your presidential campaign. Felony disenfranchisement prevents thousands of blacks from voting even after they have paid their debts to society. My first law clerk (and one of my favorites), Eleanor Holmes Norton, still fights daily for universal suffrage as the non-voting representative for your new home, Washington D.C. Each day she presses her colleagues to rectify the disenfranchisement of one of the largest black urban populations in this country.

These "ghosts of Jim Crow,"[107] as my nephew Michael calls them, are not worse but are certainly still as harmful as the Jim Crow laws themselves—including poll taxes and literacy tests—which I fought against in the early 1960s as the President of the Philadelphia Branch of the NAACP. You will need to build some strong coalitions and fight with all your heart to correct these wrongs. Your candidacy alone proves that you are capable. Your inaugural address proves that you have the will.

---

[103] Carl Hulse, *House Votes to Rebuke Lawmaker Who Shouted "You Lie" at the President*, INT'L HERALD TRIB., Sept. 17, 2009, at 4.

[104] *See id.*

[105] A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978).

[106] A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996).

[107] F. Michael Higginbotham, Keynote Address, "Ghosts of Jim Crow", Washington B. Ass'n, Wash. D.C. (Oct. 19, 2006).

IV. CONCLUSION

Based on what I have seen from you thus far, I am confident in your ability to unify a country scarred by the racially divisive institutions of slavery and segregation. Ridding the country of the ubiquitous "ghosts of Jim Crow" will not be easy. If you find yourself the victim of racial attacks (for example, when, during your campaign, Fox News commentator E.D. Hill referred to a "fist bump" between you and your wife as a possible terrorist gesture),[108] you will again have to rise above the fray and combat them with your actions and words. The unity of your multiracial coalition may be challenged, but you must lead it and keep your coalition together with focused and principled leadership. In your 2008 campaign speech from Philadelphia, you called for a new conversation on race. Since then however, with the exception of the profiling incident involving Cambridge, Massachusetts police officer James Crowley and Harvard Professor Henry Louis Gates, you have said very little on the subject. I recognize that the economic, crime, and military problems facing the country are enormous. As a black man appointed to several powerful positions in my time, I know, first hand, the weight of office. But racial inequality, in good times and bad, has plagued America since its founding, and it will not end without new and more vigorous efforts. That is why I felt compelled to encourage you to continue the conversation on race even as you grapple with other problems. I will watch your progress from my vantage point in Heaven with pride in your accomplishments and hope for your success as the forty-fourth president of the United States.

Sincerely,

A. Leon Higginbotham, Jr.[109]
Chief Judge (Retired)
United States Court of Appeals for the Third Circuit

---

[108] *America's Pulse* (FOX News television broadcast, June 6, 2008); *see also* Alex Spillius, *TV Presenter is Sacked for Obama "Terrorist Fist" Jibe*, DAILY TELEGRAPH (London), at 20.

[109] The sentiments expressed in this letter reflect the author's best judgment as to what Judge Higginbotham might have felt and written had he been living today.

Emerging Trends in International, Federal, and State and Local Government Procurement in an Era of Global Economic Stimulus Funding

Danielle M. Conway*

I. INTRODUCTION

The American Recovery and Reinvestment Act of 2009[1] ("ARRA") is enormous in volume and scope, touching everything from executive compensation paid by past and future recipients of funds under the Troubled Assets Relief Program[2] ("TARP") and nationwide broadband services development[3] to the Consolidated Omnibus Budget Reconciliation Act ("COBRA") Continuation Health Coverage,[4] and the New Construction, Substantial Rehabilitation, and Loan Management Programs[5] administered by the U.S. Department of Housing and Urban Development ("HUD"). The ARRA has followed the trend of predecessor spending bills that have sought to pump lifeblood into the American economy during times of instability and financial crisis by force-feeding the government contracts machine.[6]

---

* Professor of Law & Director, University of Hawai'i Procurement Institute. I am grateful to The John Marshall Law School for inviting me to present an early draft of this article during the 2009-2010 Faculty Scholarship Roundtable Series. I am especially grateful to Professor Kim David Chanbonpin for personally extending the JMLS invitation. Finally, I wish to thank Kelly Higa and Jennifer Allen for their superior research assistance.

[1] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[2] *Id.* Div. B, Tit. VII, § 7001, 123 Stat. at 516-20. TARP was authorized by the Emergency Economic Stabilization Act ("EESA") of 2008, which Congress passed on October 3, 2008. Under TARP, the United States Treasury used funds to make direct equity investments in financial institutions. Section 7001 amended and restated in their entirety the EESA provisions regarding executive compensation.

[3] *Id.* Div. B, Tit. VI, § 6001, 123 Stat. at 512-16. Section 6001 established "a national broadband service development and expansion program in conjunction with the technology opportunities program," referred to as the Broadband Technology Opportunities Program. *Id.*

[4] *Id.* Div. B, Tit. III, § 3001, 123 Stat. at 455-66.

[5] *Id.* Div. A, Tit. XII, 123 Stat. at 225-26; Patton Boggs, LLP., No Small Change: The Stimulus Package and its Impact, 81-87 (Apr. 21, 2009), http://www.pattonboggs.com/ (follow "Patton Boggs Economic Stimulus Analysis The American Recovery and Reinvestment Act of 2009" hyperlink) [hereinafter Boggs].

[6] *See* Div. A, 123 Stat. at 116-305. *See generally* Boggs, *supra* note 5.

As with previous economic downturns, the federal government is looking to contractors to stave off the tide of recession. Economists note that, in the end, government spending is meant to entice other economic agents to start spending.[7] One segment of this broad group of economic agents is private sector contractors, which include construction and engineering companies.[8] As such, the ARRA has been described as "good news for government contractors."[9] This article considers the ARRA's impact on contractors operating in international, federal, and state and local procurement sectors while attempting to identify the emerging trends in compliance and reporting requirements, competition requirements, domestic preference regulatory requirements, and heightened transparency and oversight requirements.

Section two of this paper provides a basic summary of the ARRA in the context of government contracting. Section three offers examples of the scope of contracting opportunities from select industries. Section four examines the federal government's competition policy. Section five explores the murky arena of domestic preferences and their impact on America's precarious foreign trade relations. Section six examines the federal government's enhanced oversight and investigatory authority. Section seven focuses on the intersection between the oversight and reporting requirements and potential liability under the False Claims Act. And finally, the article concludes by forecasting the long-term impacts of the ARRA on parties who accept or administer economic stimulus funds over the next two years.

II. SUMMARY OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

The ARRA was enacted on February 17, 2009, amending myriad scattered sections of the United States Code.[10] By all accounts it is considered one of the most significant pieces of tax relief and government spending legislation since the Great Depression.[11] The ARRA is officially described as "[a]n Act

---

[7] N. Gregory Mankiw, *Is Government Spending Too Easy an Answer?*, N.Y. TIMES, Jan. 10, 2009, at BU6.

[8] Francisco J. Gonzalez et al., *The American Recovery and Reinvestment Act of 2009: An Immediate Look at the Legal, Governmental, and Economic Ramifications of President Obama's Stimulus Package*, 2009 Aspatore Special Rep. 8 (2009).

[9] *See* Boggs, *supra* note 5, at 114.

[10] *See* 123 Stat. 115.

[11] *See* Boggs, *supra* note 5, at 11. In comparing today's economic stimulus package with the Great Depression and President Franklin Roosevelt's New Deal Legislation, it is important to contrast the relative severity of the latter to the former. The Gross Domestic Product ("GDP") in 1929, adjusted for today's dollars, is considered miniscule. In addition, by 1933 the stock market lost 90% of its 1929 value; the 2008 stock market decline was severe, but its 2008 value loss was only 30%. The figures for unemployment between then and now are also quite

[m]aking supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for the fiscal year ending September 30, 2009, and for other purposes."[12] The ARRA authorized the commitment of approximately $800 billion of federal funds to jumpstart an American economy crippled by the jaw dropping financial crisis of 2008.[13]

The ARRA dedicates federal funding to a laundry list of new programs, existing programs, and expanded or newly established competitive grants. These programs and grants are administered by federal, state, and local entities and they impact innumerable private sector industries. The individual components of the ARRA fall into six broad categories: individual income tax cuts; a two-year patch to the alternative minimum tax; investment incentives; aid to people directly hurt by the recession; state fiscal relief, and direct government investment spending.[14] In the scope of this article, the last two categories—state fiscal relief and direct government investment spending—are of major import.

In the context of state fiscal relief, the ARRA provides for state legislative authority to appropriate funds included in the ARRA. There are six types of ARRA funded programs: current programs with no requirement for state matching funds; current programs that require the state to match funding, thereby requiring the state to accept any, some, or all of federal funds; current programs where the Brown Amendment applies, dealing specifically with the Temporary Assistance for Needy Families block grant ("TANF"), and the child care block grant; competitive grants, such as grants for high-speed rail; new federal-state programs; and, finally, support for the State Fiscal Stabilization Fund.[15]

In the context of direct government investment spending, the ARRA authorizes federal agency expenditure of funds pursuant to contract actions and competitive grant awards encompassing virtually every aspect of government contracting.[16] Federal agencies will spend on highway and transportation projects; renewable energy and broadband infrastructure development; construction, repair, and maintenance projects; and research, development, and

---

disparate, 25% unemployment during the Great Depression compared to 7-10% today. Boggs, *supra* note 5, at 11.

[12] 123 Stat. at 115.

[13] COUNCIL OF ECONOMIC ADVISORS, EXECUTIVE OFFICE OF THE PRESIDENT, ESTIMATES OF JOB CREATION FROM THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 2 (May 2009), http://www.whitehouse.gov/assets/documents/Job-Years_Revised5-8.pdf.

[14] *Id.*

[15] NATIONAL CONFERENCE OF STATE LEGISLATURES, LEGISLATIVE APPROPRIATIONS AUTHORITY AND THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 1-2 (Feb. 25, 2009), http://www.ncsl.org/print/statefed/ARRA-LegislativeAuthority.pdf.

[16] *See generally* Div. A., 123 Stat. 115.

testing. Accompanying spending authority granted by the ARRA, the act hoists upon government contractors and other recipients of stimulus funds unprecedented requirements for reporting, accountability, and compliance to guarantee a uniquely high level of transparency and oversight to the American taxpayer. To this end, the ARRA adds an additional layer of oversight to a procurement system that has existing checks and balances to curb fraud, waste, and abuse. The new oversight mechanisms established by the ARRA to scrutinize expenditures of stimulus funds include, but are not limited to: mandates for review by the United States Government Accountability Office and the Congressional Budget Office; the formation of the new Recovery Accountability and Transparency Board; and review by "any inspector general of a Federal department or executive agency."[17]

The General Provisions of the ARRA dictate various up front requirements.[18] For example, the ARRA funds remain available for obligation until September 30, 2010.[19] For infrastructure investments, a project must be "shovel-ready," meaning that preference is given to projects that can be started and completed expeditiously.[20] The ARRA also excludes certain enumerated projects, for example, funds cannot be used "for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool."[21] In addition, the ARRA has significant new domestic preference requirements implicated by the Buy American Act.[22] The ARRA requires contractors to pay laborers and mechanics prevailing wage rates,[23] and requires governors to certify their intent to use funds.[24] Finally, the ARRA restricts the hiring of non-immigrants.[25]

III. GOVERNMENT CONTRACTING OPPORTUNITIES UNDER ARRA

One visit to the Recovery Act website[26] and the American taxpayer receives a detailed snapshot of how twenty-eight federal agencies are spending the ARRA funds through contracts and grants to states and contractors. The world-

---

[17] *Id.* Tit. XV, 123 Stat. at 286-89.

[18] *Id.* Tit. XVI, 123 Stat. at 302-05.

[19] Key Deadlines, Staterecovery.org, http://www.staterecovery.org/key-deadlines (last visited Dec. 18, 2009).

[20] U.S. GOV. ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, RECOVERY ACT: AS INITIAL IMPLEMENTATION UNFOLDS IN STATES AND LOCALITIES, CONTINUED ATTENTION TO ACCOUNTABILITY ISSUES IS ESSENTIAL, GAO-09-580, 21 (Apr. 2009), http://www.gao.gov/new.items/d09580.pdf [hereinafter GAO REPORT].

[21] Div. A, Tit. XVI, § 1604, 123 Stat. at 303.

[22] *Id.* § 1605, 123 Stat. at 303.

[23] *Id.* § 1606, 123 Stat. at 303.

[24] *Id.* § 1607(a), 123 Stat. at 303.

[25] *Id.* § 1611(b), 123 Stat. at 305.

[26] Recovery.gov, http://www.recovery.gov (last visited Dec. 18, 2009).

wide-web is abuzz with lists of contracting opportunities for contracting veterans and newcomers. The opportunities appear endless—but for the temporary availability of the ARRA funds.

The Government Accountability Office ("GAO") reports that "[n]early half of the approximately $580 billion associated with Recovery Act spending programs will flow to states and localities," with "three of the largest streams of funds flowing to" (1) temporary increases in Medicaid Federal Medical Assistance Percentage awards amounting to "approximately $87 billion in assistance; (2) the State Fiscal Stabilization Fund, which will provide nearly $54 billion to help state and local governments avoid debilitating budget cuts; and (3) highway infrastructure investment funds of approximately $27 billion."[27] These figures do not include the allocations to the twenty-eight federal agencies to engage in direct spending.

In the arena of direct federal agency expenditures, the Department of Energy received $36.7 billion in ARRA funding for various initiatives, including promoting energy efficiency, deploying renewable energy, and scientific research.[28] The General Services Administration received $5.55 billion in ARRA funding for United States courthouses, federal buildings, border stations, and for converting federal buildings to high-performance green buildings.[29] The Department of Defense plans to use approximately $2 billion of ARRA funding for "construction and facility repair projects . . . in 49 states, plus Guam and the District of Columbia."[30] The projects are reported to be primarily new facility construction, repair, or replacement of hospitals and military medical facilities.[31]

Considering the Department of Transportation's authority to award grants and contracts for highway infrastructure and the authority of the remaining twenty-seven federal agencies to engage in direct investment spending, there is no argument that the amount of money the government is investing in the economy is unprecedented, staggering, and a bit intoxicating to those in the government contract community. But along with the wealth of opportunity comes the burden of obligation to the government and ultimately to the taxpayer. The current embarrassment of riches to federal agencies, states and localities, and contractors only begs the question about the commensurate obligations that must be met. More incisively, it also begs the question of

---

[27] GAO REPORT, *supra* note 20, at 3.

[28] *See* Div. A, Tit. IV, 123 Stat. 115, 138; *see also* U.S. Dep't of Energy, http://www.energy.gov/recovery/ (last visited Dec. 18, 2009).

[29] Div. A, Tit. V, 123 Stat. at 149.

[30] U.S. Dep't of Defense, Department of Defense Information Related to the American Recovery and Reinvestment Act of 2009 (Recovery Act), http://www.defenselink.mil/recovery/ (last visited Dec. 18, 2009) [hereinafter Department of Defense].

[31] *Id.*

whether heightened burdens and obligations will persist and become the norm even after the ARRA funding commitments are exhausted.

IV. COMPETITION POLICY, RISK MANAGEMENT, AND THE ARRA

Each Administration's approach to procurement policy generally results in a shift in competition policy and a change in the strategic outlook on acquisition planning to achieve that policy. The Obama Administration has identified that the U.S. procurement system is broken.[32] Paradoxically, the Obama Administration also admits that the U.S. procurement system is an integral component in the plan to prompt economic recovery through implementation of the ARRA.[33] To respond to this paradox and to accomplish the goals established in the ARRA, the Administration has concentrated its rhetoric and spending power on the time-honored principle of full and open competition.[34] Contemporaneously, the Administration is targeting methods to reduce and manage risk through an express preference for agency use of fixed-price contract types in ARRA-funded procurements, along with a reinvestment in the U.S. acquisition workforce.[35]

The rhetoric of competition is nothing new to those intimately involved with or who are assailed by the news of the latest spending scandal. It seems that each fiscal year a report of some fraud, waste, or abuse has rocked the procurement world.[36] In most cases, improper contract awards were made on sole source bases. Reports by agency Inspectors General and the GAO repeatedly show that noncompetitively awarded contracts have resulted in waste, mismanagement, poor contractor performance, and/or inadequate accountability.[37] Yet, stating a strong policy for agencies to use full and open

---

[32] *See* Office of the Press Secretary, The White House, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Government Contracting* (2009), http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/ [hereinafter *Government Contracting*].

[33] *See id.*

[34] *Id.*

[35] *Id.*

[36] *See, e.g.*, Warren Hoge, *U.N. Looking at Charges of Fraud in Procurement*, N.Y. TIMES, Jan. 24, 2006, at A6.

[37] *See* GAO Report to Congressional Committees, As Initial Implementation Unfolds in States and Localities, Continued Attention to Accountability Issues is Essential, GAO 09-580, 9 (Apr. 2009); *see also* GAO, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874 (Washington, D.C. July 30, 2004); *Interagency Contracting: Problems with DOD's & Interior's Orders to Support Military Operations*, GAO-05-201 (Washington, D.C. April 29, 2005); *Rebuilding Iraq: FY2003 Contract Award Procedures and Management Challenges*, GAO-04-605 (Washington, D.C. June 1, 2004).

competition to the maximum extent practicable does not make it true, nor does it address procurement realism.

In terms of procurement realism, the Obama Administration acknowledges that government contract spending has more than doubled since 2001 and, "[d]uring this same period, there has been a significant increase in the dollars awarded without full and open competition."[38] The reality is that increases in noncompetitively awarded contracts have escalated due in large part to increases in spending, the complexity of agency needs, and the cannibalism of the ranks of the acquisition workforce. These factors have come together in a perfect storm to produce an environment where oversight of contractors is nonexistent at worst and poor at best during the administration of procurement contracts. Now add to this reality the ARRA's unprecedented levels of agency spending within a concentrated timeframe and the concoction is a brew of potential over-reliance on noncompetitively awarded contracts.

In addition, while the language of the ARRA promotes competition, the condensed timeframe for spending ARRA funds and the speed at which procurement professionals must obligate funds and award contracts mean that shortcuts will be exploited to feign competition. For example, members of the acquisition corps pressed to meet the ARRA's timelines may actually circumvent competition by relying on the issuance of task and delivery orders against multiple award contracts ("MACs") or modifications to preexisting contracts. In the former example, task and delivery orders against MACs would thwart competition because orders against MACs do not enhance competition; rather, they only redistribute orders among a preselected group of contractors. In the latter example, modifications to preexisting contracts would not enhance competition because no new contractors would have the opportunity to bid or propose on the work as modified. Accordingly, the ARRA has the potential to stymie the competition policy that the Obama Administration intends to protect.

The Obama Administration also focuses heavily on risk management as a key feature of its plan for economic recovery.[39] In the procurement arena, managing risk requires sound acquisition planning. Sound acquisition planning in turn relies on a well-trained, well-supported, and well-paid acquisition workforce. In managing risk, procurement professionals evaluate several factors including, but not limited to: market conditions, market research, the agency's minimum needs, cost estimates and incentives, and contract types.[40]

---

[38] *Government Contracting*, *supra* note 32.

[39] *See* Executive Office of the President, Office of Management and Budget, Memorandum for the Heads of Departments and Agencies, Subject: Improving Government Acquisition, http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-25.pdf [hereinafter Improving Government Acquisition].

[40] *See id.*; *see also* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. ("FAR")

The federal government has targeted contract types as a primary mechanism to manage and contain risks associated with the increased spending mandated by the ARRA.[41]

The contract type selected defines the expectations, obligations, incentives, and rewards for both the government and the contractor during the life of an acquisition.[42] Generally, there are two basic contract types: fixed-price contracts and cost-reimbursement contracts.[43] In a firm-fixed-price contract, the contractor must complete the work to receive payment.[44] Under this type of contract, the risk of performance is allocated to the contractor. The contractor may receive contract financing from the government, but the payments are subject to finance costs.[45] A firm-fixed-price contract is required in sealed bid procurements.[46] This contract "utilizes the basic profit motive of business enterprise" by placing the risk on the contractor to perform at a specified price.[47]

The government's purpose is to place the risk of performance on the contractor without unduly subjecting him to unreasonable, uncontrollable, or unpredictable risks.[48] Under a firm-fixed-price contract, there is no compensation for unforeseen contingencies.[49] The government must be cautious about this type of contract because both parties are at risk. The contractor's risk stems from a possible failure to perform when the cost of performance exceeds the price quoted in the bid or offer. The government loses when the contractor is financially unable or unwilling to complete the work required under the contract.

When using a firm-fixed-price contract, the contracting officer should ensure that specifications are detailed and definitive, and prices can be established fairly and reasonably—as when the following occurs:

> (a) [t]here is adequate price competition; (b) [t]here are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data; (c) [a]vailable cost or pricing information permits realistic estimates of the

---

7.102 and FAR pt. 10.

[41] *Id.*

[42] *See generally* JOHN CIBINIC, JR. ET AL., ADMINISTRATION OF GOVERNMENT CONTRACTS, 245-377 (4th ed. 2006).

[43] Selecting Contract Types: General, 48 C.F.R. § 16.101(b) (2009).

[44] Federal Acquisition Regulation (FAR) 16.202-1. The Federal Acquisition Regulation is the primary source of regulatory authority governing the procurement process. The FAR appears in Title 48 of the Code of Federal Regulations.

[45] FAR 32.005.

[46] 48 C.F.R. § 16.102(a).

[47] *Id.* § 16.103(b).

[48] FAR 16.104.

[49] FAR 16.202-1.

> probable costs of performance; or (d) [p]erformance uncertainties can be identified and reasonable estimates of their cost impact can be made.[50]

A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract.[51] This type of contract is "suitable for acquiring commercial items[,] . . . other supplies or services on the basis of reasonably definite functional or detailed specifications . . . when the contracting officer can establish fair and reasonable prices at the outset."[52]

In contrast to fixed-price contracts, cost-reimbursement contracts "provide for payment of allowable incurred costs[] to the extent prescribed in the contract."[53] "These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer."[54] Cost-reimbursement contracts "may be used only when—(1) [t]he contractor's accounting system is adequate for determining costs applicable to the contract; and (2) [a]ppropriate [g]overnment surveillance during performance will provide reasonable assurance that efficient methods and effective cost controls are used."[55]

The cost-reimbursement contract contains a standard "Limitation of Cost" clause.[56] This clause provides that the contractor is under no further obligation to continue performance or incur costs if all of the funds contemplated by the contract have been fully expended.[57] If the government provides additional funds, then the contractor must continue performance as long as funds are available or until completion of the specified work.[58] The government will pay the contractor's costs during contract performance up to a certain dollar amount.[59] The government pays the contractor's allowable costs plus a fee as prescribed in the contract.[60] To be allowable, a cost must be reasonable, allocable, follow standards and contract terms, and not specifically disallowed.[61]

---

[50] 48 C.F.R. § 16.202-2.
[51] *Id.* § 16.202-1.
[52] *Id.* § 16.202-2.
[53] *Id.* § 16.301-1.
[54] *Id.*
[55] *Id.* § 16.301-3(a)(1)-(2).
[56] *Id.* § 32.705-2(a).
[57] *Id.* § 52.232-20(d)(2)(i).
[58] *Id.*
[59] *Id.* §§ 32.702, 52.232-20.
[60] *Id.* § 32.703-1(a).
[61] *Id.* § 31.201-2(a).

The two most common types of cost-reimbursement contracts are the cost contract and the cost-plus-fixed-fee contract ("CPFF").[62] A cost contract is a cost-reimbursement contract in which the contractor receives no fee.[63] "A cost contract may be appropriate for research and development work, particularly with nonprofit educational institutions or other nonprofit organizations."[64]

In CPFF contracts, the parties separately negotiate the estimated cost of performance and the pre-established fee resulting from performance.[65] The fixed fee is stated as a set amount of dollars that will vary only if the contractor is required to perform additional work not included in the original contract.[66] The estimated cost will ideally reflect the best estimate of the amount that will be spent in accomplishing the work called for by the contract. Estimated cost, however, might be underestimated for two reasons: (1) to fall within the government's available funding and (2) to increase or enhance competition.

In an attempt to manage risk, notwithstanding the benefits of cost-type contracts, the Obama Administration has expressly stated a preference for use of fixed-price contracts for spending under the ARRA.[67] In support of this position, the Obama Administration identifies that cost-reimbursement contracts "provide limited incentive to control costs."[68] The Obama Administration also recognizes that development, negotiation, and management of cost-reimbursement contracts generally demand more in depth programmatic knowledge and experience, and a higher level and broader range of skills than for competitively awarded fixed-price contracts.[69]

---

[62] *Id.* § 16.306(a). Other types of cost-reimbursement contracts are the cost-plus-incentive-fee contract, the cost-plus-award-fee contract, and the cost-sharing contract. "A cost-plus-incentive-fee contract is a cost-reimbursement contract that provides for an initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs." *Id.* § 16.304. "A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of (a) a base amount (which may be zero) fixed at inception of the contract and (b) an award amount, based upon a judgmental evaluation by the Government, sufficient to provide motivation for excellence in contract performance." *Id.* § 16.305. "A cost-sharing contract is a cost-reimbursement contract in which the contractor receives no fee and is reimbursed only for an agreed-upon portion of its allowable costs." *Id.* § 16.303(a). "A cost-sharing contract may be used when the contractor agrees to absorb a portion of the costs, in the expectation of substantial compensating benefits." *Id.* § 16.303(b).

[63] *Id.* § 16.302(a).

[64] *Id.* § 16.302(b).

[65] *Id.* § 16.306(a).

[66] *Id.*

[67] *Government Contracting*, *supra* note 32.

[68] PETER R. ORSZAG, DIRECTOR OF OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES: IMPROVING GOVERNMENT ACQUISITIONS 5 (July 29, 2009), http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-25.pdf.

[69] *See id.*

In the last two decades, procurement professionals have relied on cost-reimbursement contracts because of the lack of available and capable professionals to conduct the procurement planning necessary to meet the upfront requirements that would otherwise facilitate the use of fixed-price contracts.[70] Because of this lack of professional capability, the desire to ameliorate the risks associated with overspending are not remedied by simply stating a preference for fixed-price contracts when cost-type contracts are made part of the acquisition plan. This procurement reality is evident in the obligation of ARRA funds. For example, more than one-half of the ARRA contracts that federal agencies have awarded are cost-reimbursement contracts.[71] As of August 2009, "agencies had obligated $10.18 billion in stimulus contracts."[72] Only $4.38 billion—43 percent—are firm-fixed-price agreements. Comparatively, data shows agencies have spent $5.44 billion—53 percent—on cost-type contracts.[73]

The impact of the ARRA spending mandate is to place members of the acquisition workforce in the unenviable position of having to implement the preference for fixed-price contract types even though "shovel-ready" projects may not have undergone sufficient acquisition planning to allow use of these contract types. This potential insufficiency creates its own risks. The risk of failed performance by a contractor that cannot underwrite potential funding shortfalls only means that contracts will have to be terminated for convenience or default, agency needs will have to be re-procured, and in that event a re-procured contract might only motivate contractors to compete if the agency decides to shift to cost-type contracts to address risk to the contractor. To manage risk in the spending of ARRA funding, agencies will have to weigh the preference for the fixed-price contract type against the mandate to quickly obligate funds, award contracts, and have contractors begin performance.

While the Obama Administration articulates its goals to achieve full and open competition through a preference of contract awards based on fixed-price contract types, it is likely that there will be a trend upward in the use of cost-type contracts for undefined and complex agency acquisition needs. In a time of unprecedented government investment in the economy, policymakers need to show courage in distinguishing between the rhetoric of a preference for fixed-price contracts and the reality of the two-decade trend of using cost-type contracts to satisfy agency needs with an understaffed and inadequately trained acquisition workforce.

---

[70] *See* Improving Government Acquisition, *supra* note 39.

[71] Robert Brodsky, Many Recovery Act Contracts Fall into High-Risk Category (Aug. 31, 2009), http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0809/083109rb1.htm&oref=search.

[72] *Id.*

[73] *Id.*

V. THE BUY AMERICAN ACT, INTERNATIONAL TRADE POLICY, AND THE ARRA

The Buy American provision in the ARRA forbids the use of ARRA funding "for the construction, alteration, maintenance, or repair of a public building or public work project unless all of the iron, steel, and manufactured goods used in the project are produced in the United States."[74] To temper the harsh impact that the ARRA Buy American provision will have on foreign contractors, the ARRA requires that the Buy American provision comply "with United States obligations under international agreements."[75] The provision "ensures that parties to the World Trade Organization government procurement agreement and other free trade deals can bid on government contracts.[76]

Although the ARRA's Buy American provision borrows its framework from the Buy American Act of 1933 ("BAA")[77] and the Federal Acquisition Regulation,[78] it is noticeably distinct in its unique regulatory agenda and application. In contrast to the ARRA's Buy American provision ban on foreign products, the BAA regulates "acquisition of foreign supplies, services, and construction materials."[79] With limited exceptions, the BAA, unlike the ARRA's Buy American provision, does *not* prohibit foreign firms from competing in federal acquisitions nor does the BAA prohibit the agencies from purchasing foreign-made goods.[80] With respect to construction materials, the BAA requires, with some exceptions, the use of only domestic construction materials in contracts for construction in the United States.[81] One of the exceptions to the BAA is the removal of discriminatory treatment for those countries having trade agreements with the United States.[82] Accordingly, the BAA is not applicable to acquisitions subject to certain trade agreements. In acquisitions so governed, construction materials from certain countries receive nondiscriminatory treatment in evaluations alongside domestic offers.

While the BAA provides for nondiscriminatory treatment of construction materials bid on or proposed by contractors in countries where the United States has a government trade agreement, the ARRA language narrows

---

[74] Div. A, Tit. XVI, § 1605, 123 Stat. at 303.

[75] *Id.*

[76] Roberta Rampton, *Update 2—Canada Has Few Rights in "Buy American" Flap—USTR*, REUTERS, June 10, 2009, http://www.reuters.com/article/marketsNews/idUSN10450524200 90610.

[77] 41 U.S.C. §10(a)-(d) (2006). The Buy American Act of 1933 is a Depression-era protectionist statute.

[78] 48 C.F.R. § 25.000 (2009).

[79] *Id.* § 25.202.

[80] *Id.* § 25.103.

[81] *Id.* § 25.101.

[82] *Id.* § 25.402.

opportunities for foreign contractors by instituting a default rule for use of ARRA funding involving a "public building or public work" by requiring that "all of the iron, steel, and manufactured goods" be "produced in the United States."[83] The ARRA arguably does not specifically require the components of construction materials to be produced in the United States. Thus, an item is a domestic construction material and eligible for use in an ARRA-funded project if it is manufactured in the United States, regardless of the origin of the components.[84] Viewed by current and potential foreign trading partners, the ARRA's Buy American provision can be seen as a large step toward inward protectionism, at least in terms of construction project work involving iron, steel, and manufactured goods.

Despite the protectionist stance that can be interpreted into the ARRA, the provision can be read to confirm that the United States intends to honor its trade agreements and will continue to commit to allowing least developed nations special access to the "walled garden" of U.S. procurement.[85] Specifically, the Federal Acquisition Regulation provides that listed "least developed countr[ies]" are also included as exceptions to the Buy American Act even though they are not parties to U.S. free trade agreements or explicitly protected by the legislative language.[86]

While virtually all contractors performing federal stimulus projects and various federally funded state stimulus projects can choose from a variety of country sources so long as they meet the U.S. produced "iron, steel, and manufactured goods" requirement,[87] except for bright-line ineligible countries

---

[83] Div. A, Tit. XVI, § 1605, 123 Stat. at 303.

[84] 48 C.F.R. § 52.225-9.

[85] *See* Div. A, Tit. XVI, § 1605(d), 123 Stat. at 303.

[86] 48 C.F.R. § 25.404.

[87] *See* Matthew C. Hoyer, *Country-of-Origin Requirements Facing Federal Construction Contractors*, 6 No. 8 INT'L GOV'T CONTRACTOR ¶ 62 (2009) (explaining that the fears associated with the more restrictive ARRA have not come to fruition because of the regulatory implementation that lessened the impact on foreign contractors working on construction projects exceeding $7.4 million). According to Hoyer, the ARRA applies the BAA, but places additional domestic-preference restrictions for iron and steel on contracts below the $7.4 million TAA threshold. *Id.* The TAA exception still applies to those contracts with an estimated value of $7.4 million or more. *Id.* According to Hoyer, Congress did not explicitly include the TAA exception in the ARRA. *Id.* Instead, the ARRA states that the domestic-preference provisions "shall be applied in a manner consistent with United States obligations under international agreements." *Id.* (citing Div. A, Tit. XVI, § 1605, 123 Stat. at 303). As such, the implementing regulations had to incorporate the TAA exceptions so that the U.S. would not violate various trade agreement obligations. The implementing regulations alleviate the concern about the impact of the ARRA's domestic preference for federal contracts. The concern remains, however, for ARRA-funded grants for state and local procurements because those regulations include no TAA exception (and may never), as does the FAR. In the final analysis, the ARRA impacts only iron and steel below the $7.4 million TAA threshold in the following manner: iron

such as China, Brazil, and India,[88] the ARRA can potentially undermine global and American economic recovery goals. Critics of ARRA's Buy American provision argue that the United States is endangering the following goals: preserving trade relations among nations in a time of economic downturn; creating more jobs in the United States; and developing confidence in the global economy.[89]

Leaders from around the world continue to press for open markets, especially in a time of economic downturn. The leadership of the United Kingdom and Canada promote global procurement opportunities as the correct response to the economic downturn.[90] They convey that the United States will exacerbate the economic downturn by embracing protectionist legislation.[91] To them, the ARRA's provisions can be seen as the beginning of a "downward spiral" of national protectionist policies and practices, which forgo collective action to remedy the global economic downturn.[92]

America's trade partners warn that the ARRA's Buy American provision will have an unintended and deleterious effect on job creation within the United States.[93] American stakeholders are also echoing this concern. A study completed by the U.S. Chamber of Commerce estimates that "to lose just 1 percent of potential foreign stimulus procurement opportunities" could equal a loss of 176,800 jobs.[94] The ARRA's Buy American provision has already sparked backlash from current and potential United States trade partners. For example, the ARRA prompted "the Chinese [to] put in place an explicit 'Buy China' provision in their own stimulus package."[95]

---

and steel must still meet the BAA 51-percent test, but they must also meet the additional requirement that all manufacturing processes take place in the U.S. In other words, practically speaking, the ARRA requires all steel and iron components, as well as the final construction material, to be manufactured in the U.S. To bring this new rule under the familiar rubric of the 51-percent rule, steel and iron must consist of 100-percent domestic components. *Id.*

[88] W. Noel Keyes, *The Trade Agreements Act of 1979 and NAFTA*, GCFAR § 25.3(a) (West 2009).

[89] *See, e.g.*, Gary Clyde Hufbauer & Jeffrey J. Schott, "Buy American: Bad for Jobs, Worse for Reputation," PIIE Policy Brief 09-02 (Feb. 2009), *available at* www.petersoninstitute.org/publications/pb/pb09-2.pdf. *See generally* Nelson D. Schwartz, *World Leaders Wary of U.S. Economic Measures*, N.Y. TIMES, Feb. 2, 2009, at B6.

[90] Steven L. Schooner & Christopher Yukins, *Tempering "Buy American" in the Recovery Act—Steering Clear of a Trade War*, 51 No. 10 GOV'T CONTRACTOR ¶ 78 (Mar. 11, 2009).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] LAURA M. BAUGHMAN & JOSEPH F. FRANCOIS, U.S. CHAMBER OF COMMERCE, TRADE ACTION—OR INACTION: THE COST FOR AMERICAN WORKERS AND COMPANIES 4 (2009), http://www.uschamber.com/assets/international/uscc_trade_action_inaction_study.pdf.

[95] Eswar Prasad, Opinion Asia, *A Dangerous Game of Trade "Chicken": The U.S. China Spat Could Have Global Consequences*, WALL ST. J., Sept. 14, 2009,

Recently, the ARRA Buy American provision prompted Canadian Prime Minister, Stephen Harper, to visit the Capitol to request an exemption from the provision for Canadian businesses after noticeable strain on Canadian-American trade relations.[96] For example, the town of Peru, Indiana rejected "sewage pumps made outside of Toronto."[97] At another project in Camp Pendleton in California, Canadian pipe fittings were removed and replaced with American-made fittings.[98] Subsequently, Ontario towns retaliated against being shut out of the American market by "barring U.S. companies from [Canadian] municipal contracts."[99]

The backlash to the ARRA's Buy American provision negatively impacts the American economy because reciprocal exclusions harm U.S. companies that own Canadian firms.[100] One of these companies is Trojan Technologies, a wholly owned subsidiary of Washington D.C.-based Danaher Corp., which makes water-treatment products in London, Ontario.[101] In order to comply with the ARRA's Buy American provision, Trojan Technologies moved its production from Ontario, Canada to Valencia, California.[102] The move that allows Trojan Technologies' products to be used in ARRA-funded projects has come with the disadvantages of delays and increased costs to consumers.[103] Not all companies, however, are able to handle the increased costs associated with moving and, therefore, are inevitably shut out of some competition.[104]

While some foreign companies are seeing orders decline because of the ARRA's Buy American provision, others are threatened by total corporate demise. For example, "Duferco Farrell Corp., a Swiss-Russian partnership," is on the verge of shutting down operations because the coils it manufactures "do not fit the current definition of made in the USA."[105] Because Duferco does not meet the requirement, "its largest client—a steel pipemaker located one

---

http://online.wsj.com/article/SB10001424052970203917304574411883297685844.html.

[96] Sheldon Alberts, *Harper Asks Congress to Fight Buy American*, VANCOUVER SUN, Sept. 17, 2009, *available at* http://www.vancouversun.com/business/fp/Harper+asks+Congress+fight+American/2004525/story.html. Although Canada is subject to the NAFTA and the WTO trade agreements, Canada "chose to exclude its provinces and towns from procurement rules that would have put them beyond the reach of the new provision." Peter Fritsch & Corey Boles, *How "Buy American" Can Hurt U.S. Firms*, WALL. ST. J., Sept. 17, 2009, at A5.

[97] Anthony Faiola & Lori Montgomery, *Trade Wars Brewing in Economic Malaise*, WASH. POST, May 15, 2009, at A1.

[98] *Id.*

[99] *Id.*

[100] Annys Shin, *"Buying American" Puts a Strain on U.S. Trade with Canada*, WASH. POST, Aug. 11, 2009, at A9.

[101] *Id.*

[102] Fritsch & Boles, *supra* note 96.

[103] *Id.*

[104] *Id.*

[105] Faiola & Montgomery, *supra* note 97.

mile down the road" from the manufacturing plant—notified Duferco that it would no longer be purchasing from the company because it was being forced to buy from companies meeting the requirements of the Buy American provision.[106] As a result of the decreased demand, Duferco has had to furlough eighty percent of its workforce.[107]

VI. OVERSIGHT, TRANSPARENCY, AND ACCOUNTABILITY UNDER THE ARRA

The Obama "[A]dministration has stipulated that every taxpayer dollar spent on economic recovery must be subject to unprecedented levels of transparency and accountability."[108] To ensure a high level of accountability to American taxpayers, the Office of Management and Budget ("OMB") issued detailed guidance to federal departments and agencies for implementing and administering the ARRA expenditures.[109] OMB Recovery Act Guidance was drafted to help federal agencies implement the ARRA.

Division A, Title XV of the ARRA covers accountability and transparency.[110] The ARRA presents a list of deadlines that must be met and reports that must be filed to cement a culture of transparency and accountability at the federal and state levels.[111] One of the public availability measures that the ARRA prescribes is that all reports prepared and submitted by the Inspectors General of the various agencies "shall be made publicly available and posted on the website established by section 1526."[112] The website is a "portal or gateway to key information" regarding the ARRA, and provides links to other government websites with other important information.[113] The Recovery Accountability and Transparency Board's website includes information about how the ARRA funds are allocated by agencies and their corresponding reports.[114] These reports must "include a link to estimates of the jobs sustained or created by the Act."[115] The reports prepared and submitted by

---

[106] *Id.*

[107] *Id.*

[108] GAO REPORT, *supra* note 20, at 8.

[109] ORSZAG, *supra* note 68.

[110] Div. A, Tit. XV, 123 Stat. at 286.

[111] *See, e.g., id.* § 1512(c)-(d), 123 Stat. at 287-88.

[112] *Id.* § 1523(b)(4)(A), 123 Stat. at 291.

[113] *Id.* § 1526(b) & (c)(10), 123 Stat. at 293; *see* Recovery.gov, http://www.recovery.gov (last visited Dec. 20, 2009).

[114] The Recovery Accountability and Transparency Board maintains the recovery website. The Board, Recovery.gov, http://www.recovery.gov/About/board/Pages/ TheBoard.aspx (last visited Dec. 20, 2009).

[115] Div. A, Tit. XV, § 1526(c)(8), 123 Stat. at 293.

Inspectors General consist of worksheets of data addressing the allocation of funds and major completed and planned activities.[116]

In addition, the ARRA requires that governors or other appropriate chief executives "certify that the infrastructure investment[s] ha[ve] received the full review and vetting required by law."[117] This certification process includes a description of the investment, the estimated total cost, and the amount of covered funds to be used.[118] This information is also to be posted on a website and linked to www.recovery.gov pursuant to the requirements of section 1526 of Title XV, Division A.[119]

At the state level, governors have moved quickly to certify projects to receive ARRA funding.[120] Additional oversight from the states can be found in some state constitutional requirements that "all expenditure[s], regardless of the source, [are] to be made through legislative appropriation."[121] In addition to these constitutional provisions, thirty-four states and the Virgin Islands have proposed legislation related to the ARRA.[122] For example, Washington State proposed a bill "relating to the economic stimulus capital budget intending to stimulate Washington's economy and to reduce the state's unemployment rate by creating jobs with infrastructure projects funded by ARRA."[123] Fifteen states and American Samoa have executive orders relating to the ARRA.[124] For example, in anticipation of the ARRA, Oregon established the *Oregon Way Advisory Group* "to advise and assist those seeking competitive federal stimulus grants."[125]

Many states have established their own recovery websites to allow the public to see what they are doing.[126] For example, the state of Washington's website provides a county-by-county overview of how the ARRA funds are being

---

[116] Recovery.gov, http://www.recovery.gov (follow "Accountability" hyperlink, then choose department and follow "Status Report" hyperlink) (last visited Dec. 20, 2009).

[117] Div. A, Tit. XV, Subtit. A, § 1511, 123 Stat. at 287.

[118] *See id.* § 1511, 123 Stat. at 287 (Section 1511 certification).

[119] *Id.* § 1526(c)(10), 123 Stat. at 293-94.

[120] State Recovery, http://www.staterecovery.org/state-responses (last visited Dec. 20, 2009).

[121] *Id.*

[122] *Id.*

[123] State Recovery, State Responses, http://www.staterecovery.org/state-responses (follow "Washington" State Legislation Related to ARRA link) (last visited Dec. 20, 2009). Some of the proposed projects in Washington include improving higher education campuses, cleaning up the Puget Sound, replacing aging local infrastructure, and creating green jobs. H.R. 1425, 61st Leg., Reg. Sess. (Wash. 2009).

[124] State Recovery, *supra* note 123.

[125] Oregon Office of the Governor, Exec. Order No. 09-06, 2 (2009), *available at* http://governor.oregon.gov/Gov/docs/executive_orders/eo0906r.pdf.

[126] *See, e.g.*, Recovery.wa.gov Homepage, http://www.recovery.wa.gov/ (last visited Dec. 20, 2009).

used.[127] It also provides a list of all the projects that were allocated funding, the funding amount obligated, the amount actually awarded, and the amount expended to date.[128]

The Counsel of State Governments has also created a website, www.staterecovery.org, permitting states to "rapidly decipher potential funding opportunities" and "share best practices by tracking how the executive, legislative, and judicial branches of state government are responding to and impacted by" the ARRA.[129] The website has compiled lists of states that have executive orders and legislation related to the ARRA.[130] In July of 2009, Good Jobs First ranked the state of Washington's ARRA highway reporting website as second in the nation and its main ARRA website as third in the nation[131] based on the effectiveness of "conveying information about the categories of stimulus spending; the distribution of that spending in different parts of the state; and specific projects being carried out by private contractors, including their employment impact."[132]

The study found that most states' main ARRA site and their respective highway projects sites (because they are a high-profile aspect of stimulus spending), did not score very high.[133] The scoring for the main ARRA pages, based on "ten factors relating to quality and quantity of the information presented,"[134] range from zero (Illinois and Utah) to 80 (Maryland).[135] The scoring for the highway project sites range from zero (Illinois and Kentucky) to 75 (Maryland).[136] Hawaii's main ARRA website scored 20 points and ranked 28th, and its highway project site scored 15 points and was ranked 46th.[137] The average score was 28.2 and the median score was 25 for the main ARRA

---

[127] County Reports, http://www.recovery.wa.gov/map/county.asp (last visited Dec. 20, 2009).

[128] American Recovery Grant Awards and Spending (2009), http://www.recovery.wa.gov/documents/EstimatedAwardedSpent.pdf. The Washington website reports that $4.8 billion has been committed to Washington, $2.4 billion has been awarded, and $1.2 billion has been paid. Recovery.wa.gov Home Page, http://www.recovery.wa.gov/default.asp (last visited Nov. 6, 2009).

[129] Staterecovery.org Homepage, http://www.staterecovery.org/ (last visited Dec. 20, 2009).

[130] Staterecovery.org State Responses, http://www.staterecovery.org/state-responses (last visited Dec. 20, 2009).

[131] Phillip Mattera et al., Show Us the Stimulus: An Evaluation of State Government Recovery Act Websites 3 (2009), http://www.goodjobsfirst.org/pdf/ARRAwebreport.pdf.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 7.

websites and the average score was 37.8 and the median score was 38 for the highway project site categories.[138]

The report also gives an idea of how states are reporting their information. For example, the report identifies those states "us[ing] interactive maps to display county breakdowns" of stimulus spending (such as Oregon, Washington, and Tennessee), and notes that 37 states provide detailed information on ARRA spending on specific programs.[139] The study indicates that one of the best ARRA websites was actually a city and not a state website—New York City's stimulus tracker is cited as an excellent example of disclosure and effective presentation.[140]

This guidance also emphasizes the ARRA's requirements for timely and accurate reporting to achieve a high level of transparency and accountability. The OMB expects to provide "unprecedented transparency into how and where Federal funds are spent."[141] The OMB also mandates that Recovery Act reporting be separate from all other reporting of results.[142] To further ensure reporting compliance, OMB requires that all federal agency guidance must be immediately posted on the agency's Recovery Act webpage.[143] In addition, agencies are to provide weekly funding reports to the OMB. States, however, are supposed to be given flexibility in collecting and transmitting required information.[144]

Recipients are responsible for reporting funds used by themselves and by any sub-awardees, with the "initial statutory reporting deadline of October 10, 2009."[145] Recipients must also report on "an estimate of the number of jobs

---

[138] *Id.* at 3.

[139] *Id.* at 4.

[140] *Id.* at 14.

[141] PETER ORSZAG, MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES: UPDATED IMPLEMENTING GUIDANCE FOR THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 24 (2009), http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-15.pdf.

[142] *Id.* at 13-16.

[143] *Id.* at 13.

[144] *Id.* at 26-27.

[145] *Id.* at 25. Information posted on Recovery.gov includes information about how contracts are awarded, how prime contractors are using funds, and how subcontracts are awarded by primes. Information about how the grants are made, how the prime recipients are using the funds, and any sub-awards that are made are available for review at http://www.recovery.gov/Transparency/RecipientReportedData/Pages/RecipientLanding.aspx. On this page, taxpayers will be able to view all data, charts, reports and summaries submitted by recipients. The reports are prepared by recipients of federal contracts, grants, and loans who reported by the October 10, 2009 deadline. This reporting event is historical, as it is the first time recipients of awards have been required to make reports available directly to the taxpayer. The first statutory reporting requirement covered the period from February 17, 2009 to September 30, 2009. The reports were submitted to FederalReporting.gov—the government website created to collect all the recipient data. The second statutory reporting deadline is circa

created or retained by [each] project or contract," including information that describes the types of jobs created or retained in the United States.[146]

The ARRA also establishes the Recovery Accountability and Transparency Board ("RATB"), which is responsible for the oversight of all funds under the Recovery Act and provides the public a direct link to www.recovery.gov.[147] To aid in this process, the Antitrust Division of the United States Department of Justice has launched a Recovery Initiative "aimed at preparing government officials and contractors to recognize and report efforts by parties to unlawfully profit from the stimulus projects."[148]

In addition to the reporting required in the ARRA itself, the Federal Acquisition Regulation was amended to include provisions for ARRA reporting.[149] The Regulation requires contractors receiving funding from the ARRA to do the following:

> report information including, but not limited to—(a) [t]he dollar amount of contractor invoices; (b) [t]he supplies delivered and services performed; (c) [a]n assessment of the completion status of the work; (d) [a]n estimate of the number of jobs created and retained as a result of the Recovery Act funds; (e) [n]ames and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded; and (f) [s]pecific information on first-tier subcontractors.[150]

VII. COMPLIANCE AND REPORTING REQUIREMENTS AND FALSE CLAIMS ACT EXPOSURE UNDER THE ARRA

"The False Claims Act, also known as the 'Lincoln Law,' was enacted during the Civil War to combat the fraud perpetrated by companies that sold supplies to the Union Army."[151] At the time "[w]ar profiteers were shipping boxes of sawdust instead of guns . . . and swindling the Union Army into purchasing the same cavalry horses several times."[152] One profiteer boasted he "made millions unloading moth-eaten blankets to the military."[153]

January 10, 2010 and covers the period from September 30, 2009 to December 31, 2009.

[146] *Id.* at 26.

[147] Div. A, Tit. XV, Subtit. B, § 1523(b)(4)(a), 123 Stat. at 291.

[148] DEP'T OF JUSTICE, ANTITRUST DIVISION ANNOUNCES INITIATIVE TO HELP PROTECT RECOVERY FUNDS FROM FRAUD, WASTE, AND ABUSE 1 (2009), http://www.justice.gov/atr/public/press_releases/2009/245776.pdf.

[149] *See* 48 C.F.R. § 4.1500(a)-(f) (2009).

[150] *Id.*

[151] The False Claims Act: History of the Law, http://www.allaboutquitam.org/fca_history.shtml (last visited Dec. 20, 2009).

[152] *Id.*

[153] *Id.*

The False Claims Act:

> contained "*qui tam*" provisions that allowed private citizens to sue, on the government's behalf, companies and individuals that were defrauding the government. "*Qui tam*" is short for a Latin phrase, *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which roughly means "he who brings an action for the king as well as for himself."[154]

"The original False Claims Act assessed wrongdoers double damages and a $2,000 civil fine for each false claim submitted. Those who filed lawsuits, known as 'relators,' were entitled to receive 50 percent of the amount the government recovered as a result of their cases."[155]

In 1943, Congress emasculated the False Claims Act, leaving it fallow until the mid-1980s.[156] Spurred by reports of widespread fraud and abuse during the Cold War build up, Congress re-examined the law.[157] "Congress decided to revise the False Claims Act to encourage more whistleblowers to come forward and to create incentives for private attorneys to use their own resources to investigate fraud."[158] "Congress sought to create a partnership between public institutions and private citizens" to generate a market response to ensure the checks and balances necessary to deter fraud, waste, and abuse.[159]

The Civil False Claims Act is the primary weapon for combating fraud in government procurements.[160] In general, the Civil False Claims Act imposes liability for civil penalties and treble damages on "any person who knowingly—(A) presents, or causes to be presented, a false or fraudulent claim

---

[154] *Id.*

[155] *Id.* "The statute remained virtually unchanged until 1943 when Congress radically altered the qui tam provisions. The changes included a drastic cut in the relator's reward, so there was less of an incentive for people to report fraud." *Id.*

[156] *Id.*

[157] *Id.* The public read about outrageous billing practices, such as the Navy paying $435 for an ordinary claw hammer and $640 for a toilet seat. In 1985, the Department of Defense reported that 45 of the largest 100 defense contractors—including nine of the top 10—were under investigation for multiple fraud offenses.

> Government enforcement agencies, meanwhile, complained that their efforts to investigate and stop fraud were hamstrung by insufficient resources, a lack of adequate legal tools and the difficulty of getting individuals with knowledge of fraud to speak up for fear they would lose their jobs.

Id.

[158] *Id.*

[159] *Id.*

[160] The False Claims Act Legal Center, What is the False Claims Act & Why is it Important?, http://www.taf.org/whyfca.htm (last visited Dec. 20, 2009).

for payment or approval; (B) makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[161]

The Civil False Claims Act authorizes an individual, in his or her private capacity, to bring suit in the name of the United States.[162] As an inducement to be a whistleblower, the statute provides such person percentages of any judgments or settlements against the defendants.[163] Twenty-five states now "have their own versions of the False Claims Act with *qui tam* provisions,"[164] and the value of recoveries obtained under these laws has steadily increased in recent years.[165]

Because of the spending contemplated by the ARRA and the Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*,[166] Congress amended the False Claims Act by passing the Fraud Enforcement and Recovery Act ("FERA") of 2009.[167] The FERA expands the jurisdiction of the False Claims Act to cover not only claims made to the federal government but also claims submitted to a contractor, grantee, or other recipient so long as the money to pay a claim comes from or will be reimbursed by the government.[168] Thus, the FERA expands the scope of liability under the False Claims Act to subcontractors and subgrantees.[169] This change will impact all recipients of ARRA funds, including those performing infrastructure investment projects where invoices are submitted for payment to state and local governments. The FERA also legislatively overrules the Supreme Court's decision that liability for False Claims Act violations must be premised upon a showing of intent.[170] Specifically, the FERA states that the "knowing" and "knowingly" prongs of a cause of action under the False Claims Act does not require "proof of specific intent to defraud" the government.[171]

---

[161] 31 U.S.C.A. § 3729(a)(1) (2009).

[162] *Id.* § 3730(b).

[163] *Id.* § 3730(d).

[164] The False Claims Act Legal Center, State False Claims Acts, http://www.taf.org/statefca.htm (last visited Dec. 20, 2009).

[165] *See generally* TAF Publications, The False Claims Act Legal Center, http://www.taf.org/publications.htm (last visited Dec. 20, 2009).

[166] ___ U.S. ___, 128 S. Ct. 2123 (2008) (rejecting the interpretation that liability would attach because a false statement resulted in the use of government funds to pay or approve a false claim).

[167] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[168] *See* 31 U.S.C.A. § 3729(a)(1) (2009) (expanding liability by foregoing the requirement that a claim be submitted to a federal official; instead liability hinges upon whether money to pay a claim comes from or will be reimbursed by the government).

[169] *See id.*

[170] *See Allison Engine*, ___ U.S. at ___, 128 S. Ct. at 2128.

[171] 31 U.S.C.A. § 3729(b)(1)(B) (2009).

In addition to the Civil False Claims Act, the Criminal False Claims Act[172] covers procurement fraud. Criminal liability results from the submission of "any claim upon or against the United States . . . knowing such claim to be false, fictitious, or fraudulent."[173] The Criminal False Claims Act is generic because it applies to any type of false claim submitted to the government.[174] For example, it applies to Medicare and state health plans just as easily as it applies to construction.[175]

Furthermore, the Criminal False Statements Act attaches criminal liability to anyone who "knowingly and *willfully*—(1) *falsifies*, conceals or covers up . . . a material fact; (2) makes any intentionally false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry."[176] Section 1001 is frequently employed to prosecute individuals or entities that make misleading or false statements to, or conceal facts from, federal investigators during audits and investigations.[177] In this regard, it is notable that the statute reaches concealment or falsification of a material fact and affirmatively making false or fraudulent statements.[178] The state of mind requirement, however, is somewhat stringent because the government must prove that the defendant acted "willfully."[179]

The ARRA has strengthened whistleblower protections, broadened the application of the False Claims Act, and created the Recovery Accountability and Transparency Board.[180] In addition, the acceptance of ARRA funds by a contractor authorizes the government to conduct on-site audits and permits greater transparency of contractor books and records than under ordinary federal contracts.[181] The unprecedented levels of oversight and enforcement in the legislative and regulatory agendas in an era of economic stimulus funding are intended to ensure that recipients of federal funds are held accountable to the government. The enhanced whistleblower protections alone will guarantee that *qui tam* relators and their attorneys will make use of the False Claims Act to police federal and state project fraud on behalf of the government and

---

[172] 18 U.S.C.A. § 287 (2009).

[173] *Id.*

[174] *See id.*

[175] *See generally* Pamela H. Bucy, *Crimes by Health Care Providers*, 1996 U. ILL. L. REV. 589, 591-92 (1996) (explaining that Medicare and Medicaid fraud are primarily prosecuted under mail fraud, false statements, and conspiracy statutes).

[176] 18 U.S.C.A. § 1001 (2009) (emphases added).

[177] *See id.*

[178] *See id.*

[179] *See id.*

[180] *See supra* notes 147, 161-71.

[181] *See* Pub. L. No. 111-5, §§ 901-02, 1514-15, 1521, 1523, 1526, 123 Stat. at 191, 289, 290, 293.

taxpayers. The 2009 amendments to the False Claims Act and the enhanced whistleblower protections signal Congress's intent that the government also have the tools to respond to fraud, waste, and abuse.

The congressional message is clear that recipients of federal stimulus funds are to be held to the task of establishing compliance and reporting programs that will ensure candor in government contract negotiations, submission of justifiable and accurate claims to all recipients of federal stimulus funds, and access to documentation to prove the legitimacy of claims for payment and the absence of false certifications. The expanded scope of the False Claims Act on the heels of the ARRA signals a definite trend toward the establishment of an enforcement framework that likely will become the new model in policing against fraud, waste, and abuse long after the sunset of President Obama's federal economic stimulus legislation of 2009.

VIII. CONCLUSION

There are certain statutory and policy measures in the ARRA that will have long term continuing impacts on international, federal, and state and local government procurement beyond the two year life of funds anticipated by the ARRA. The trend of increased oversight and transparency will endure long after the last dollar of the ARRA funds have been spent. Now that Congress and the Executive Branch have started down the road of transparency in reporting expenditures to the taxpayer, there would likely be a backlash if these reporting and transparency tools were recalled. The trend will be to continue reporting and requiring transparency for all areas, specifically in the procurement arena where the taxpayer has come to expect access to information regarding how taxpayer dollars are spent.

Another trend that will likely continue beyond the ARRA spending is the use of the False Claims Act to police the private sector in their reporting of information, statements, and claims made to the government. The reach of the False Claims Act has broadened as a result of the passage of the FERA. The taxpayer can expect to see False Claims Act litigation spike with the auditing of ARRA expenditures and then taper off to a steady increase beyond the life of ARRA funding.

Setting Aside Transfers of Property in Foreign Countries:

How Long Is the Reach of the United States Bankruptcy Court?

Don Jeffrey Gelber*

The rapid expansion of international trade and the fact that many domestic United States corporations and other business entities do business simultaneously in the United States and abroad mean that, when a debtor with multinational operations seeks relief in a United States bankruptcy court, questions will arise that involve the possible application of United States bankruptcy law to the debtor's transactions in a foreign country. In 2006, two such cases were reported. They did not arise, however, in the sophisticated circles of international trade or in the demise of a large multinational corporation. Rather, the cases involved more pedestrian circumstances—an attempt to keep foreign property "within the family" while the debtor's financial affairs were deteriorating and a "Ponzi" scheme involving transfers from a foreign deposit account. The cases examined the jurisdiction of United States bankruptcy courts to set aside the transfer of property in a foreign country—jurisdiction which, if it exists, could affect substantial and more conventional transactions. The cases reached significantly different results.[1]

I.

The legislative power of the United States is vested in Congress by Article I of the Constitution.[2] Article I provides a panoply of subjects over which Congress is entitled to assert its power,[3] including the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[4] Certain of the enumerated legislative powers—e.g., "To define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations"; "To declare War, grant Letters of Marque and Reprisal, and

* Stanford University, A.B.; Stanford Law School, J.D.; Gelber, Gelber & Ingersoll, Honolulu, Hawai'i.

[1] *See* discussion *infra*, Parts III and IV.

[2] U.S. CONST. art. I, § 1.

[3] *Id.* art. I, § 8.

[4] *Id.* art. I, § 8, cl. 4.

make Rules concerning Captures on Land and Water"; and "To make Rules for the Government and Regulation of the land and naval Forces"—require that, in appropriate circumstances, the legislative power of the United States extend beyond its borders.[5]

The Constitution also provides for the creation of a judicial system to match Congress' legislative power and to interpret, and adjudicate disputes concerning, the laws enacted by Congress.[6] The judicial power of the United States—the power to say what federal law means and to enter orders for its enforcement—is vested, by Article III of the Constitution, in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[7] The Constitution defines the *extent* of the jurisdiction of United States courts generally by reference to the law that governs the resolution of a case[8] or by reference to the parties to a controversy.[9] The specific grant of judicial power "to all Cases of admiralty and maritime Jurisdiction," to cases arising under treaties, and to cases involving ambassadors, other foreign representatives, and foreign states and citizens suggests or requires that the judicial power of the United States extend beyond the borders of the United States in appropriate circumstances.[10]

The United States bankruptcy courts are among the several types of "inferior courts" that Congress has ordained and established.[11] The statutory grant of jurisdiction to the bankruptcy court in each judicial district is expansive.[12] The grant of jurisdiction is derived from, and must be understood in relation to, the grant of jurisdiction to United States district courts. The Judicial Code (title 28 of the United States Code) provides that "the district court shall have original and exclusive jurisdiction of all cases under title 11."[13] Title 11 is the

---

[5] *Id.* art. I, § 8, cls. 10, 11, 14.

[6] *Id.* art. III.

[7] *Id.* art. III, § 1.

[8] *Id.* art. III, § 2 ("all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," and "all Cases of admiralty and maritime Jurisdiction").

[9] *Id.* (extending jurisdiction to "all Cases affecting Ambassadors, other Public Ministers and Consuls; . . .—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects").

[10] *Id.*

[11] *See* 28 U.S.C. § 1334 (2006).

[12] *See id.*

[13] *Id.* § 1334(a). Subsection (b) provides that "the district courts shall have original but *not exclusive* jurisdiction of all *civil* proceedings arising under title 11, or arising in or related to cases under title 11." *Id.* § 1334(b) (emphasis added).

Bankruptcy Code.[14] The Judicial Code also grants to the district court "exclusive jurisdiction . . . of all of the property, *wherever located*, of the debtor as of the commencement of [the] case, and of property of the [bankruptcy] estate."[15]

The commencement of a case under the Bankruptcy Code "creates an estate" comprised of designated property "*wherever located* and by whomever held."[16] The designated property includes, with certain exceptions, "all legal or equitable interests of the debtor in property as of the commencement of the case,"[17] and various property added to the estate after commencement,[18] but subject to the right of an individual debtor to exempt (remove) from the estate certain assets deemed necessary for a fresh start.[19]

The Judicial Code makes the bankruptcy court a part of the district court.[20] The "bankruptcy judges . . . constitute a unit of the district court to be known as the bankruptcy court for that district."[21] The district court may, and by standing order almost always does, refer "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11" to the bankruptcy judges for the district (i.e., the bankruptcy court).[22]

The bankruptcy judges may *both hear* and *determine* (enter a judgment in) "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11."[23] A "case under title 11" is the main bankruptcy case commenced by the filing of a petition for relief. A core proceeding is a proceeding under or related to title 11 that directly affects the administration and distribution of the bankruptcy estate.[24] With respect to a "proceeding that is not a core proceeding but that is otherwise related to a case under title 11," a bankruptcy judge may only hear the matter and submit proposed findings of fact and conclusions of law to a district court judge for consideration in rendering a final judgment.[25] Unless the parties agree that the

---

[14] 11 U.S.C. § 101, *et seq.* (2006).

[15] 28 U.S.C. § 1334(e) (emphasis added).

[16] 11 U.S.C. § 541(a) (2006) (emphasis added).

[17] *Id.* § 541(a)(1).

[18] *Id.* §§ 541(a)(3), (4), (5), (6), and (7). Section 541(a)(3) provides that the estate includes: "Any interest in property *that the trustee recovers* under section . . . 550 . . . of this title." 11 U.S.C. § 541(a)(3) (emphasis added). Section 550 permits the trustee to recover either the property or its value when the court, at the trustee's request, has avoided (set aside) a transfer of property. *Id.* § 550.

[19] *Id.* § 522.

[20] *See* 28 U.S.C. § 151 (2006).

[21] *Id.*

[22] *Id.* § 157(a).

[23] *Id.* §157(b)(1).

[24] *See id.* § 157(b)(2) (setting forth a non-exclusive list of core proceedings).

[25] *Id.* § 157(c)(1).

bankruptcy judge may both hear and determine the proceeding, only the district judge may enter a final order or judgment (after reviewing *de novo* any finding or conclusion to which a party objects).[26]

Title 28 specifically provides that "proceedings to determine, avoid, or recover preferences" and "proceedings to determine, avoid, or recover fraudulent conveyances" are core proceedings—matters which the bankruptcy judge may hear and adjudge.[27]

II.

The sweeping legislative jurisdiction[28] that Congress has claimed—the enactment of a code to govern an estate comprised of designated property "wherever located and by whomever held"—and the judicial jurisdiction[29] it has bestowed on bankruptcy courts (to enter orders to enforce that code with respect to property "wherever located") may extend beyond traditional notions of territorial jurisdiction.[30] Traditional concepts hold that, "[b]efore a person or property may be subjected to the court's jurisdiction, the person or property must have the adequate territorial connection with the state *and* certain prescribed steps must be taken to subject that person or property to the court's authority."[31]

Because courts are "constituted by governments, including national governments within the international community and state governments within our federal union," and each government's authority "for most purposes is defined by reference to [its] legal boundaries or territorial limits," courts "have

---

[26] *Id.* § 157(c)(1) and (2).

[27] *Id.* § 157(b)(2)(F) and (H).

[28] 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL ¶ 108.01 [1] (3d ed. 2006) ("Legislative jurisdiction . . . refers to the state's authority to enact and to apply its laws (both decisional and statutory) . . . . Legislation is effective with respect to all persons and property that have the adequate territorial connections with the state." (citation omitted)).

[29] *Id.* ("Judicial jurisdiction . . . refers to [the] power of the courts to hear a dispute and to render a valid judgment, one that will be recognized by other courts." (citation omitted)).

[30] *Id.* Judicial jurisdiction rests on the court's "territorial jurisdiction, or jurisdiction over persons and property" which enables "courts to hear a dispute and to render a valid judgment." *Id.* Ch. 108 (introduction) at 108-1. With respect to property, "[a] state may exercise jurisdiction to determine interests in a thing if the relationship of the thing to the state is such that the exercise of jurisdiction is reasonable." RESTATEMENT (SECOND) OF JUDGMENTS § 6 (1982).

[31] MOORE ET AL., *supra* note 28, ¶ 108.01[1]. In addition to adequate territorial jurisdiction, a court must also be competent to hear and decide the controversy; that is, it must have been granted authority, by the constitution or legislature (or other authorizing agent) of the sovereign, to hear and decide controversies of the type presented—also referred to as subject matter jurisdiction. *Id.* ¶ 108.04[1].

an authority that is correspondingly defined, at least in part, in territorial terms."[32]

If a bankruptcy trustee asserts and proves that, before the bankruptcy case was commenced, the debtor made a transfer of property in the United States that was either preferential[33] or fraudulent,[34] it seems clear that a United States bankruptcy judge could enter a judgment setting aside (avoiding) the transfer and permitting the trustee to recover the property or its value either from the initial transferee (or the entity for whose benefit such transfer was made) or from "any immediate or mediate transferee of such initial transferee."[35]

If the same debtor transferred property located in a foreign country to a transferee in that country, could the United States bankruptcy court grant the same relief? Would the answer be different if the transfer (either an outright transfer or the creation of a lien) was regarded as valid and not avoidable under the law of the foreign country? Finally, what effect, if any, would a United States court's decree have in setting aside a transfer of property in another country if both the property and the transferee remained in that country and its courts regarded the transfer as valid and not subject to avoidance? Recent cases show that there is substantial disagreement on the first question. The last two questions are beyond the scope of this article.

III.

It is not disputed—at least in American law—that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."[36] There is, however, a substantial difference between authority and the intent to exercise that authority.

Foley Bros., Inc. v. Filardo[37] was the first of a series of relatively recent cases to address whether Congress intended to exercise legislative power

---

[32] RESTATEMENT (SECOND) OF JUDGMENTS Ch. 2, Introductory Note (1982). "[T]here must be a proper connection between the person or property and the state's (or sovereign's) territory." MOORE ET AL., *supra* note 28, ¶ 108.01[2][a]. "A state may . . . assert its power over any property within its borders." *Id.* ¶ 108.02[2]. "A federal court may exercise jurisdiction over persons in an action if: (a) The court has a territorial jurisdictional relation to the action . . . ; and (b) The exercise of jurisdiction is not impermissible under federal law, or other applicable restriction." RESTATEMENT (SECOND) OF JUDGMENTS § 4 (1982). "The definition of proper territorial jurisdiction of courts within the United States (federal or state) with respect to transnational transactions derives from these limitations [i.e., constitutional limitations and state law limitations] and also those of treaty and international law." *Id.* cmt. a.

[33] 11 U.S.C. § 547 (2006).

[34] *Id.* § 548.

[35] *Id.* § 550(a)(2).

[36] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

[37] 336 U.S. 281 (1949).

beyond the territorial limits of the United States.[38] In *Foley*, the Supreme Court examined whether the Eight Hours Law[39] applied to construction projects in foreign countries. The Court started with "the assumption that Congress is primarily concerned with domestic conditions."[40]

The Court noted that there was a presumption "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[41] The Court reviewed the language of the Eight Hours Law to see whether it gave "any indication of a congressional purpose to extend [the Law's] coverage beyond [the] places over which the United States has sovereignty or has some measure of legislative control."[42]

The Court concluded that the statute did not indicate a "contrary intention" to apply the statute outside the United States because, among other reasons, the statute did not exempt aliens from its application.[43] Without this exemption, application of the statute outside the United States would indicate Congressional intent to regulate both the hours of United States citizens and the hours of the citizens of the country where the project was located. Such regulation would create a potential conflict with the laws of the foreign country that govern its citizens. The Court concluded that Congress did not intend the United States law to reach that far.[44]

More recently, the Court faced the issue of the application of United States labor laws in another context. In *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"),[45] a United States citizen brought an action against a United States employer claiming that, while he was working abroad, his employer unlawfully discriminated against him because of his race, religion, and national origin.[46] The question presented was whether Title VII of the Civil Rights Act of 1964 ("Title VII")[47] applied to and regulated the employment practices of United States employers who employ United States citizens abroad.[48]

---

[38] *See also* Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957).

[39] The Eight Hours Law was originally enacted in 1892. 27 Stat. 340. It has thereafter been amended on a number of occasions. The current version is codified as 40 U.S.C. §§ 3701-3708 (2006), which limits the number of permitted working hours per workweek for a worker on a federal construction project.

[40] *Foley*, 336 U.S. at 285.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 286 (citing 34 Op. Att'y Gen. 257).

[45] 499 U.S. 244 (1991).

[46] *Id.* at 247.

[47] 42 U.S.C. § 2000e (1988).

[48] *Arabian Am. Oil Co.*, 499 U.S. at 246.

Chief Justice William Rehnquist, writing for the Court, stated that the presumption enunciated in *Foley*[49]—"that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States"[50]—is a long-standing principle of American law that "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[51]

Title VII, unlike the Eight Hours Law, contained a specific exemption for aliens.[52] Nonetheless, the Court concluded that the "petitioners' evidence, while not totally lacking in probative value, falls short of demonstrating the *affirmative congressional intent* required to extend the protections of Title VII beyond our territorial borders."[53] The Chief Justice, citing numerous statutes extending the reach of United States laws to the high seas and to United States citizens employed by United States corporations in foreign countries, stated that Congress knew how to make clear its intent to extend the reach of United States legislation beyond its territorial borders.[54] The Chief Justice further opined that "Congress, should it wish to do so, may . . . amend Title VII and in doing so will be able to calibrate its provisions in a way that [this Court] cannot."[55] Congress promptly did so. A few months later, Congress extended the protection of Title VII to United States citizens employed in foreign countries.[56]

IV.

Maryland resident Betty Irene French purchased a house in the Bahamas in 1976. Five years later, at a Christmas party in Maryland, she gave her children, both United States residents, a "deed of gift" to the house.[57] Two decades passed. Fortunes changed and the Christmas gift gave rise to *French v.*

---

[49] Foley Bros., Inc. v. Filardo, 336 U.S. 281, 286 (1949).

[50] *Arabian Am. Oil Co.*, 499 U.S. at 248 (quoting *Foley*, 336 U.S. at 285).

[51] *Id.*

[52] 42 U.S.C. 2000e-1.

[53] *Arabian Am. Oil Co.*, 499 U.S. at 249 (emphasis added). In the process, the majority opinion brushed aside the Equal Employment Opportunity Commission's interpretation that the statute applied beyond the borders of the United States. The majority said that "the EEOC's interpretation [was] insufficiently weighty to overcome the presumption against extraterritorial application." *Id.* at 258.

[54] *Id.* at 258.

[55] *Id.* at 259.

[56] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (1991) (codified as amended at 42 U.S.C. § 2000e(f) (2006)). The amendment added to the definition of "employee" the sentence: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." *Id.* This amendment and others were made "to respond to recent decisions of the Supreme Court." *Id.* § 3(4), 105 Stat. at 1071.

[57] *Id.*

Liebmann (In re French),[58] a case that required the Court of Appeals for the Fourth Circuit to consider whether a bankruptcy trustee's attempt to avoid the transfer required the extraterritorial application of the Bankruptcy Code.

Mrs. French's children, the transferees, did not record the deed in the Bahamas at the time they received the gift. "In the late 1990's, Mrs. French and her husband began experiencing serious financial problems," and in mid-2000 the transferees decided to record the deed and did so through a lawyer in the Bahamas.[59] "In October 2000, Mrs. French's creditors filed an involuntary Chapter 7 bankruptcy petition against her," and the court granted relief in early 2001.[60] Approximately one and one-half years later "the bankruptcy trustee . . . filed an adversary proceeding against the transferees."[61] The trustee sought "to recover the [Bahamian] property or its fair market value for the benefit of the estate" on the basis that "the debtor had been insolvent at the time of the transfer and had received less than a reasonably equivalent value in exchange."[62] All the parties agreed that, under 11 U.S.C. § 548(d)(1), the transfer is deemed to have taken place when the transferees recorded the deed in the Bahamas.[63] The transferees "conceded that the debtor was insolvent in 2000 when the deed was recorded."[64] As the Court noted, "[t]hese facts would normally be sufficient to establish constructive fraud,"[65] and make the transfer avoidable under 11 U.S.C. § 548 (a)(1)(B).

The transferees, nonetheless, moved for dismissal of the trustee's case based on the presumption against the extraterritorial application of United States law and the contention that international comity required the application of Bahamian bankruptcy law, which the transferees asserted would have allowed the transferees to keep the property.[66] The bankruptcy court denied the motion to dismiss and granted the trustee's motion for summary judgment.[67] The district court[68] and the Fourth Circuit[69] affirmed.

Judge Motz, writing for the Fourth Circuit, acknowledged the presumption stated in *Foley Bros.* and *Aramco*, but found that it had "no bearing . . . when regulated conduct is domestic rather than extraterritorial" and that, although

---

[58] 440 F.3d 145, 148 (4th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* n.1.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 149.
[67] Liebmann v. French (*In re* French), 303 B.R. 774, 783 (Bankr. D. Md. 2004).
[68] French v. Liebmann (*In re* French), 320 B.R. 78, 86 (Bankr. D. Md. 2004).
[69] *French*, 440 F.3d at 154.

both parties had "treated the application of [section] 548 to the transfer . . . as extraterritorial," the "assumption may not be warranted."[70]

The Fourth Circuit found the application of section 548 was not extraterritorial because "the perpetrator and most of the victims of the fraudulent transfer—all except a single Bahamian creditor" were located in the United States.[71] The court also found that the "conduct constituting the constructive fraud occurred in the United States,"[72] referring to the domestic debts and assets that led to the insolvency and the decision to make the gift, which the court oddly phrased as "the decision not to provide a 'reasonably equivalent value' for the transfer . . .—whether we consider the relevant decision to be Mrs. French's gift of the deed in 1981, or the transferees' recordation of the deed in 2000."[73] The court considered recordation of the deed in the Bahamas to be "at most 'incidental,'"[74] ignoring the fact that the recordation of the deed in the Bahamas was the transfer that the trustee sought to avoid.

The court acknowledged the strength of the transferees' argument that, because the trustee was attempting to set aside a transfer of Bahamian real property and because the law of the situs generally applies to real property, the application of section 548 to Bahamian real property was an attempt to apply United States law extraterritorially,[75] contrary to the presumption against such application. The court, however, said that it "need not resolve [the] slippery question"[76] of whether section 548 focuses on the conduct involved in the transfer or, rather, on the property transferred. In the latter case, under the facts presented, the "application of United States law could affect Bahamian real property."[77] Instead, the court found that "several indicia of congressional intent rebut the presumption against extraterritoriality."[78]

The several indicia are a convoluted reading of sections 541 and 548 of the Bankruptcy Code. First, the court noted that the bankruptcy court has *in rem* jurisdiction over "property of the estate,"[79] wherever that property is located, both within and without the United States. The court then went on to state its controlling proposition:

---

[70] *Id.* at 149.

[71] *Id.* at 150. The court did not disclose or discuss the nature and magnitude of the Bahamian creditor's claim.

[72] *Id.*

[73] *Id.* (quoting 11 U.S.C. § 548(a)(1)(B)).

[74] *Id.*

[75] *Id.* at 149.

[76] *Id.* at 151.

[77] *Id.* at 150.

[78] *Id.* at 151.

[79] *Id.*

> Section 541 defines "property of the estate" as, *inter alia*, all "interests of the debtor in property." In turn, § 548 allows the avoidance of certain transfers of such "interest[s] of the debtor in property." By incorporating the language of § 541 to define what property a trustee may recover under his avoidance powers, § 548 plainly allows a trustee to avoid any transfer of property that *would have been* "property of the estate" prior to the transfer in question—as defined by § 541—even if that property is not "property of the estate" *now* . . . . Through this incorporation, Congress made manifest its intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, wherever that property is located.[80]

The Fourth Circuit thus recognized an inchoate and "springing" future interest in property that the trustee might recover through an avoidance action. The text of section 541 would seem to indicate that property recovered through the use of the avoiding powers becomes property of the estate *when* it is recovered,[81] a reading apparently accepted by most courts but not discussed by the *French* court.

Finally, with respect to the transferee's reliance on international comity, the court said that "comity involves the recognition that there are circumstances in which the application of foreign law may be more appropriate than the application of our own law."[82] The court found that, because there was "no parallel insolvency proceedings taking place in the Bahamas," and therefore, in the court's view, "no danger that the avoidance law of the . . . United States [would] in fact conflict with Bahamian avoidance law," the "many contacts between this fraudulent transfer and the United States justify the application of United States rather than Bahamian law."[83]

V.

Later in 2006, the Bankruptcy Court for the Central District of California was presented with another bankruptcy trustee's attempt to apply section 548 to the transfer of property outside of the United States. The case, *Barclay v. Swiss Fin. Corp. Ltd. (In re Bankr. Estate of Midland Euro Exch. Inc.)*,[84] involved a "multinational" enterprise—"a massive [international] Ponzi scheme run in

---

[80] *Id.* at 151-52 (alteration in original) (emphasis in original) (internal citations omitted).

[81] *See supra*, note 18.

[82] *French*, 440 F.3d at 153.

[83] *Id.* at 154. Judge Wilkinson filed a concurring opinion, in which he stated that the broad definition of estate property in section 541(a) "reflects congressional support for the Code's extraterritorial application in appropriate circumstances," that "[b]ankruptcy is, in general, materially different from those provisions held not to apply extraterritorially," and therefore bankruptcy law "provides little occasion to set forth general pronouncements on extraterritoriality." *Id.* at 155 (Wilkinson, J., concurring).

[84] 347 B.R. 708 (Bankr. C.D. Cal. 2006).

Southern California."[85] The trustee alleged that two individuals (the Leichners) used the debtor companies (the "Midland Entities"), which the Leichners owned and controlled, "to collect money from investors all over the world with a promise of extraordinary returns from trades in the foreign exchange market," and used the funds received from later investors to repay earlier investors the promised returns.[86] The trustee filed an adversary complaint in an attempt "to set aside and recover allegedly fraudulent transfers of at least $897,000 . . . in fees and commissions"[87] that one of the Midland Entities paid to Swiss Finance Corporation Limited ("SFC"), which, not withstanding its name, was "a foreign exchange brokerage [firm] formed under the laws of England and headquartered in London."[88] The trustee, relying on *French*, argued that: (1) "[w]ith respect to [section] 548, . . . Congress intended to extend its reach extraterritorially"; (2) if the section did not reach such transactions, "unscrupulous debtors [would] conceal their assets abroad"; (3) in any event, under the specific facts of the case, the presumption against extraterritoriality did not apply; and (4) international comity did not prevent the bankruptcy court from exercising its jurisdiction over the trustee's claim.[89] SFC moved for dismissal for failure to state a claim; it argued that "Congress did not intend [section] 548 to apply extraterritorially" and that "the [c]ourt should abstain from exercising jurisdiction . . . on the grounds [sic] of international comity."[90]

For purposes of a motion to dismiss for failure to state a claim for relief, the court was required to accept the allegations of the trustee's complaint as true. The complaint alleged that the Leichners had set up one of the debtor corporations as a Barbados corporation to hold title to the Ponzi scheme proceeds. In order "[t]o create an aura of legitimacy and to be able to market itself as a successful currency trader," the Barbados corporation "contacted SFC . . . to open a foreign exchange trading account."[91] SFC conducted an investigation of both the Leichners and the Midland Entities and discovered that: (1) the Leichners had substantial unsatisfied judgments against them; (2) a bankruptcy petition filed by the Leichners a few years earlier was dismissed without a discharge of indebtedness; (3) the California Department of Corporations had issued a cease and desist order against one of the Leichners and one of the Midland Entities; (4) one of the outstanding judgments against the Leichners arose from a complaint concerning fraud and breach of fiduciary duty in connection with the operation of a foreign exchange trading business;

---

[85] *Id.* at 710.
[86] *Id.* at 711.
[87] *Id.*
[88] *Id.* at 712.
[89] *Id.* at 711.
[90] *Id.*
[91] *Id.* at 712.

(5) there was a pending lawsuit for recovery of sixteen million dollars from the Leichners and some of the debtors for breach of contract, conversion, and fraud and, in that lawsuit, the court had issued a preliminary injunction barring certain Midland Entities from transferring assets; (6) the National Futures Association had suspended one of the Midland Entities "to protect [its] customers" because of false and deceitful conduct of the entity and its management; and (7) "the United States Commodity Futures Trading Commission (the 'CFTC') announced its intention to suspend or restrict [one of the Midland Entities'] registration with the CFTC as a futures merchant."[92]

Notwithstanding this information, SFC opened an account for one of the Midland Entities. One million dollars was transferred from another Midland Entity account at Lloyds Bank in London to SFC's bank in New York, and the funds were then transferred to an SFC bank account in England.[93] Thereafter, but prior to the involuntary bankruptcy petition against the Midland Entities, the Midland Entities "conducted currency trades in the SFC account."[94] SFC transferred a total of $897,000 from the initial deposit (which had come to rest in England) either as incidental fees and commissions earned on transfers between third parties (according to SFC) or as profits (according to the trustee).[95]

The trustee sought to avoid the transfers and recover the property or its value on the basis that the transfers were made with actual intent to hinder, delay, or defraud one or more creditors. The court granted SFC's motion to dismiss. Moreover, the court refused to grant the trustee leave to amend the complaint.[96]

First, the court said that the trustee had properly pled a prima facie case for fraudulent conveyance under section 548 because "[t]he mere existence of the Ponzi scheme is sufficient to prove the [d]ebtor's actual intent to hinder, delay, or defraud its creditors."[97] This was particularly important in the context of the case because, if section 548 applied to the transfers in England,

> the [t]rustee would be able to recover from SFC by merely proving the existence of [the] Ponzi scheme and the fact that the transfers actually occurred. Otherwise, the [t]rustee [would] not only face the logistical difficulties of bringing the suit in England, but he [would] also have to prove, under British law, that SFC had actual knowledge of the Midland Entities' scheme to defraud its creditors.[98]

---

[92] *Id.* at 712-13.

[93] *Id.* at 713.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 720.

[97] *Id.* at 715 (citing *In re* Agric. Research & Tech. Group, Inc., 916 F.2d 528, 535 (9th Cir. 1990); *In re* Old Naples Sec. Inc., 343 B.R. 310, 319 (Bankr. M.D. Fla. 2006)).

[98] *Id.*

Second, the court addressed the trustee's contention that the presumption against extraterritorial application did not control because the "regulated conduct" had a substantial effect within the United States.[99] After identifying the regulated conduct as the various transfers to SFC, the court concluded that the initial transfer of funds through a New York bank, in apparent violation of a United States state court injunction, did not constitute "substantial effects" within the United States.[100]

Third, in addressing "whether Congress intended universal extraterritorial application"[101] of section 548, the court said that the issue was one of first impression in the Ninth Circuit, but noted that a bankruptcy court in the Second Circuit had held that a similar provision, section 547 (dealing with preferential transfers), could not be applied in an extraterritorial fashion,[102] and that the Fourth Circuit, in *French*, had upheld extraterritorial application of section 548 (but that, at the time, a petition for writ of certiorari was pending).[103] The court found that the Fourth Circuit had conflated "two correct premises" to reach an erroneous conclusion. The court said that the Fourth Circuit mistakenly relied on the fact that, under section 541, the "property of the estate" includes "all 'legal and equitable interests of the debtor in property as of the commencement of the case,'" and the fact that "[section] 548 allows the avoidance of certain transfers of such 'interest[s] of the debtor in property,'" to conclude that, in an avoidance action, "'property of the estate' includes property that could be, but has not yet been, recovered as the object of a fraudulent transfer."[104] The majority of courts have concluded, to the contrary, that "property held by third-party transferees only becomes 'property of the estate' *after* the transfer has been avoided."[105]

Judge Mund stated that she found the reasoning of the majority of courts that had considered the issue "more logical and defensible" and held that "allegedly fraudulent transfers do not become property of the estate until they are avoided."[106] She was especially critical of the Fourth Circuit's reasoning:

> It ignores the language in § 541(a)(1) and (a)(3) that the debtor must have an interest in the property "as of the commencement of the case" and that property of the estate includes "any interest in property that the trustee *recovers* under section . . . 550 . . . of this title."

---

[99] *Id.* at 716.

[100] *Id.* at 717.

[101] *Id.*

[102] *In re* Maxwell Commc'n Corp., 170 B.R. 800, 814 (Bankr. S.D.N.Y. 1984), *aff'd on other grounds*, 93 F.3d 1036 (2d Cir. 1996).

[103] *Midland Euro Exch.*, 347 B.R. at 717.

[104] *Id.* at 717-18.

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

[106] *Id.* at 718.

. . . .

> *In re French* totally ignores § 541(a)(3) and uses an unclear and convoluted method to reach its conclusion. I have a great deal of trouble following the Fourth Circuit's reasoning and am not persuaded that it leads to the proper conclusion. Thus I find no basis for holding that Congress intended the trustee's avoiding powers to apply extraterritorially.[107]

The Fourth Circuit's policy observation—that applying section 548 to set aside transactions in other countries would comply with the purpose of the Bankruptcy Code to prevent debtors from "disposing of property that should be available to their creditors"—was, in Judge Munds' view, insufficient to support its decision.[108] "[T]he Ninth Circuit," Judge Mund said, "does not view policy considerations alone as valid grounds for overcoming the presumption against extraterritoriality."[109] So much for characterization of the Fourth Circuit as a judicially conservative court and the Ninth Circuit as a liberal and "activist" court.

Fourth, SFC also sought dismissal on the basis of international comity.[110] The court noted that international comity "is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws."[111] SFC argued that international comity required dismissal of the complaint "because the 'center of gravity'[112] of the transaction [was] in England[,] and because England [had a] greater interest in adjudicating [the] dispute."[113] The court, having decided that section 548 does not apply extraterritorially, found it unnecessary to reach the merits of the argument.[114]

VI.

It is difficult to draw a unified, easily-articulated, neutral principle that takes into account both *French* and *Midland Euro.* Whether the avoiding powers should be applied to set aside pre-bankruptcy transfers that have taken place in

---

[107] *Id.* at 719.

[108] *Id.*

[109] *Id.* (citing Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088, 1096 (9th Cir. 1994)).

[110] *Midland Euro Exch.*, 347 B.R. at 719.

[111] *Id.* at 720 (quoting *In re* Simon, 153 F.3d 991, 998 (9th Cir. 1998)).

[112] See *infra* note 134, regarding the use of the phrase "center of gravity" as a label for those facts that courts have found significant in determining whether the application of United States law to an international transaction would constitute an extraterritorial application.

[113] *Midland Euro Exch.*, 347 B.R. at 719-20.

[114] *Id.* at 720.

foreign countries is a policy decision for Congress to make after carefully weighing the possibility of "unintended clashes between our laws and those of other nations which could result in international discord."[115] The *French* court concluded that Congress has made the decision in favor of extraterritorial application.[116] The *Midland Euro* court found nothing in the language of the Bankruptcy Code that supports that conclusion and held that the presumption against extraterritoriality controls—and, in the process, expressed its view that the *French* court's reasoning was "unclear and convoluted."[117]

A more restrained formulation of the avoiding powers may permit application of the trustee's avoiding powers in a way that neither offends traditional notions of territorial jurisdiction nor requires extraterritorial application of United States law to property in a foreign country, but which may result in substantially the same recovery (and, in most cases, the identical recovery) that would be available if one were to conclude that the Bankruptcy Code applied beyond the territorial borders of the United States.

Traditionally, the trustee's avoiding powers are thought of as powers to avoid (that is, cancel or set aside) a transfer of property and to "recover . . . the property transferred or, if the court so orders, the value of such property."[118] The sequence and focus of the statutory language—which puts primary emphasis on the recovery of property and only secondarily (and conditional upon court approval) permits the recovery of the value of the property—invite the unnecessary conclusion that the application of the avoiding powers to a debtor's pre-bankruptcy transfers of property in a foreign country must involve an application of United States law beyond the territorial jurisdiction of the United States.[119]

The purpose of the bankruptcy avoiding powers, in so far as pre-bankruptcy transfers are concerned, is to define and provide a remedy for those pre-bankruptcy transfers by the debtor (including the granting or affixing of liens and other forms of indirect transfers) that resulted in the estate, upon its creation at the commencement of the case, having less property or value for unsecured creditors than otherwise would have been the case.[120] If the exercise of the avoiding powers is viewed not as an attempt to recover specific property

---

[115] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963)).

[116] French v. Leibmann (*In re* French) 440 F.3d 145, 151 (4th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006).

[117] *Midland Euro Exch.*, 347 B.R. at 718-20.

[118] 11 U.S.C. § 550 (2006).

[119] *See id.*

[120] Although the avoiding powers are primarily focused on pre-bankruptcy transfers, *see* 11 U.S.C. §§ 544, 545, 547, 548, they may also apply in certain circumstances to post-petition transfers, *id.* § 549.

but as an attempt to obtain redress (monetary or otherwise) against those who have participated in and received the benefits of an improper transfer, a United States bankruptcy court that is asked to grant relief with respect to a foreign transfer may tailor the relief (monetary recovery) to the territorial jurisdiction of the United States.

The bankruptcy court has "original and exclusive jurisdiction of all cases under [the Bankruptcy Code],"[121] "original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code],"[122] and exclusive jurisdiction "of property of the estate."[123] A bankruptcy trustee "is the representative of the estate,"[124] and has the "capacity to sue."[125] Among the trustee's rights and powers is the capacity to bring actions to avoid improper pre-bankruptcy transfers.[126] Whether the right to assert an avoidance claim is viewed as an equitable interest of the debtor in property as of the commencement of the case (but held by the trustee upon his appointment as representative of the estate), a view apparently held by the *French* court, or is viewed (more correctly) as a supplemental statutory right granted to the trustee, the bankruptcy court has jurisdiction to hear and determine any action brought by the trustee to avoid a fraudulent or preferential transfer.[127] In legal parlance, "avoidance" means that the matter avoided, such as a transfer, is, or is deemed to be, of no effect.[128]

In a proceeding brought by a bankruptcy trustee or a Chapter 11 debtor in possession against a person over whom the court has personal jurisdiction (whether because of physical presence or because the person or entity conducts business within the territorial jurisdiction of the court), the court has judicial and subject matter jurisdiction, for the purpose of administering the estate[129] and resolving the rights and obligations of the parties before it, to review the debtor's pre-bankruptcy transfers to or for the benefit of the defendant, wherever they occurred, and to determine, in accordance with United States transfer avoidance law, whether those transfers should be regarded as effective

---

[121] 28 U.S.C. § 1334(a).

[122] *Id.* § 1334(b).

[123] *Id.* § 1334(e).

[124] 11 U.S.C. § 323(a).

[125] *Id.* § 323(b).

[126] *Id.* §§ 544, 545, 547, 548, 553. These transfers are "improper" because, regardless of other factors affecting legality, they alter the distribution scheme that the Bankruptcy Code considers proper.

[127] 28 U.S.C. §§ 1334, 157.

[128] BLACK'S LAW DICTIONARY 125 (5th ed. 1979) ("Avoidance" means "making void, useless, empty, or of no effect; annulling, cancelling, escaping or evading.").

[129] It would make no difference under this view that the estate did not include property in the hands of a transferee in a foreign country.

or ineffective for the purpose of adjudicating the trustee's monetary claims.[130] If the court determines that a transfer should be regarded as having "no effect" (or "avoided") for the purpose of the United States proceedings, the court has jurisdiction over the transferee or other beneficiary of the transfer who is before the court to enter a judgment for the economic loss to the estate (in most cases, the net value of the property) caused by the transfer,[131] regardless of whether the court has jurisdiction over the transferred property itself.

This formulation of the avoiding powers with respect to transfers in foreign countries does not answer the question of whether Congress intended the Bankruptcy Code's transfer avoidance provisions to be applied in this fashion.[132] It does, however, permit the application of the remedial provisions of the Code without requiring that the transferred property be considered estate property before it is recovered (or that the transferred property be recovered at all), and the implementation of the avoiding powers in this manner does not require that a United States court assert jurisdiction over property in a foreign country. Even under this formulation there is a residual trace of applying United States law extraterritorially because the foreign transfer is reviewed (for the purpose of administering the United States proceeding) in accordance with United States standards. This limited degree of extraterritorial application, however, would hardly seem likely to result in "unintended clashes between our laws and those of other nations which could result in international discord."[133]

It is, of course, possible to argue that, in the context of modern international transactions, territorial considerations are an inappropriate basis for determining or limiting jurisdiction. The location of some forms of property, such as land, is self-evident. The location of other forms of property, such as goods in transit, changes rapidly. The location of money—the lifeblood of commerce—is usually determined only by reference to something else (the location of an obligor). Except in rare circumstances where "funds" are represented by paper currency, itself evidence of an obligation, the assertion that "the funds came to rest in England" or that "the funds were deposited in a

---

[130] 28 U.S.C. § 157.

[131] 11 U.S.C. § 550 (a) ("The trustee may recover . . . the property transferred, or, if the Court so orders, the value of the property, from . . . the initial transferee . . . or any immediate or mediate transferee of such initial transferee."). The court could also permit or compel the transferee to unwind the transfer in the foreign country, if possible, but the basis for the court's authority would be jurisdiction over the case and the person—not the property.

[132] Congress could conclude that requiring foreign transferees who receive property in compliance with the law of the situs to consider the legal implications of the transfer under United States bankruptcy law (in the event the transferor thereafter becomes a debtor in a United States bankruptcy proceeding) might chill international commerce or lead to "unintended clashes between our laws and those of other nations which could result in international discord." EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

[133] *Id.*.

London bank account" is true only in a metaphorical sense. The use of the word "funds" is a result of a common and convenient misconception that is a holdover from the time when all money was represented by something tangible such as bullion, coins, or currency of one form or another. The misconception is that the money deposited is the same as the money that is subsequently withdrawn. In actuality, the "deposit" creates a monetary obligation on the part of the bank in favor of the depositor to pay the depositor in accordance with contractual arrangements made at the time of the deposit (e.g., with or without interest, on demand or otherwise). The termination, in whole or in part, of the obligation is often referred to as a "withdrawal" of funds. In international transactions, the deposit, transfer, and withdrawal of funds are generally caused by and are the result of electronic communications which can be transmitted from almost anywhere in the world.

In such circumstances, the primacy of territory as a determinant (or a presumptive determinant) of jurisdiction may give way to theories of jurisdiction based on other factors, including facts sometimes used to determine a transaction's "center of gravity."[134] Once territorial considerations give way

---

[134] When analysis is difficult to articulate, metaphors prevail. The phrase "center of gravity" has been used by courts to designate those facts related to an international transaction that the court found significant in determining whether the application of United States law to the transaction would constitute an extraterritorial application. See, for example, *In re* Maxwell Commc'n Corp., 170 B.R. 800, 809 (Bankr. S.D.N.Y. 1984), *aff'd on other grounds*, 93 F.3d 1036 (2d Cir. 1996), a case involving parallel insolvency proceedings in England and the United States, where the court said that it "must look at the facts of a case to determine whether they have a center of gravity outside the United States," and, if so, that "the court's attention should [then] shift to the propriety of the proposed extraterritorial application of U.S. law." The court found that "the debtor is an English corporation, the antecedents [sic] debts were incurred overseas, the transfers on account of these debts were made overseas and the recipients, although subject to [the court's] personal jurisdiction, are nonetheless all foreigners," and held that, "where a foreign debtor makes a preferential transfer to a foreign transferee and the center of gravity of that transfer is overseas, the presumption against extraterritoriality prevents utilization of section 547 to avoid the transfer." *Id.* at 809, 814; *see also* Florsheim Group, Inc. v. USA Int'l Corp. (*In re* Florsheim Group, Inc.), 336 B.R. 126, 131, 133 (Bankr. N.D. Ill. 2005) ("Because the most significant events surrounding the transfers occurred in the United States, the court concludes that the center of gravity of the transfers was in the United States." As a consequence, the court "need not consider whether Congress intended § 547 to apply extraterritorially."); *cf.* Hong Kong & Shanghai Banking Corp. Ltd. v. Simon (*In re* Simon), 153 F.3d 991, 991 (9th Cir. 1998) (dictum) ("In most cases, the court will defer to where the 'center of gravity' of multiple [insolvency] proceedings exists, if one can be determined.").

In addressing the related, but "wholly independent," issue of the choice of law to be applied to the transaction in *Maxwell*—because, "in certain circumstances, two or more nations may legitimately seek to exercise jurisdiction over conduct which falls within the reach of their prescribed jurisdictional powers"—the bankruptcy court said that, "to arrive at a reasoned selection for choice-of-law purposes," the court would have to consider not only the nation of incorporation, but also "factors such as where the debtor's 'nerve center,' assets, and creditors

to other factors, many sovereign countries will be free to claim jurisdiction over the same transaction. They will also be equally free to recognize or decline to recognize the assertion of jurisdiction by another country. The multiple claims of jurisdiction—and the need to determine which substantive law will be applied to decide the case and to address whether the court's judgment will be recognized in other countries—will require some sort of international protocol or the judicial development of a body of international rules on conflicts of law. Under any resolution, the need for clarity and ease of application, as well as the parochial concerns of nations, will probably make territorial considerations an important—and perhaps primary—element in determining the extent of a court's jurisdiction.

Whether jurisdiction to review transfers of property in foreign countries is resolved in accordance with the territorial considerations reflected in *French* and *Midland Euro*, or in accordance with a formulation which focuses on the parties before the court and monetary redress (or some other analysis) remains to be decided. In all events, however, consideration of international comity is the weakest and vaguest method for deciding issues of jurisdiction. Although considerations of international comity may lead a court that *has* jurisdiction over a controversy to abstain from exercising that jurisdiction based on a number of factors related to the case—including those facts sometimes used by courts in varying degrees to find a transaction's "center of gravity"—a decision whether a United States court has jurisdiction to apply United States law to a transaction in a foreign country should not depend on the discretionary considerations of comity, or on an *ad hoc* determination of the transaction's "center of gravity." One court's center of gravity may be another court's ethereal penumbra.

---

are located and where the debtor's business is primarily conducted." *Maxwell*, 170 B.R. at 817. Although "nerve center" was used by the court in an apparent reference to the "location" of the debtor's important or decision-making operations, and "center of gravity" was used by the court to "place" the transaction, it is not clear that these metaphors have distinct meanings (other than in the biological and physical sciences from which they are borrowed). The context in which they are used, however, would seem to suggest that the debtor's "nerve center" is an attribute, whereas the transaction's "center of gravity" is a conclusion.

Tax Justice and Same-Sex Domestic Partner Health Benefits: An Analysis of the Tax Equity For Health Plan Beneficiaries Act

Michelle D. Layser*

I. INTRODUCTION

In May of 2009, a bill was introduced in Congress that, if passed, would eliminate the discriminatory federal tax treatment experienced by same-sex couples who receive employer-provided health benefits. Language from the proposed Act has also been incorporated into the proposed Affordable Health Care for America Act, a major health reform bill that was passed by the House of Representatives in November 2009.[1] This article examines the proposed Tax Equity for Health Plan Beneficiaries Act of 2009[2] and explains why this proposed Act is important legislation necessary to eliminate a significant area of tax inequality in the Internal Revenue Code.

Under current law, the Internal Revenue Service ("IRS") allows taxpayers to exclude from income certain employer-provided health care benefits. This tax exclusion reduces costs to employers by reducing payroll taxes and compensation expectations, and it reduces the tax burden on individuals by lowering their taxable income.[3] But the tax exclusion for employer-provided health benefits is not equally available to all taxpayers. Gays and lesbians who receive health benefits for their same-sex spouses or domestic partners are unable to claim the exclusion. This unequal treatment results in significant tax inequities for same-sex couples.

---

* J.D., University of Southern California, Gould School of Law; Taxation LL.M. Candidate, New York University School of Law. Special thanks to Professor Thomas D. Griffith and to Nikki Usher.

[1] H.R. 3962, § 571, 111th Cong. (2009). *See also*, Michael Cole, House Passes Health Reform Bill with Key Provisions, HRC.com, Nov. 7, 2009, http://www.hrcbackstory.org/2009/11/house-passes-health-reform-bill-with-key-lgbt-provisions/.

[2] H.R. 2625, 111th Cong. (2009); S. 1153, 111th Cong. (2009).

[3] *See* Jackie Calmes & Robert Pear, *Administration Open to Taxing Health Benefits*, N.Y. TIMES, Mar. 15, 2009, at A1, *available at* 2009 WLNR 4926951 (noting that the exclusion may result in economically "inefficient and costly demands for health care and pressure on employers to hold down workers' pay as insurance expenses rise"). Critics of the exclusion argue that employer-provided health benefit exclusions actually increase overall health care costs by encouraging workers to absorb increases in health insurance premiums. *See also infra*, note 222.

Moreover, the number of gays and lesbians affected by this unequal treatment continues to increase as more states permit same-sex marriages, civil unions, and domestic partnerships. Despite recent setbacks,[4] significant advances for gay and lesbian rights flourished in recent years. Massachusetts became the first state to permanently[5] allow same-sex marriage in November 2003, with the state Supreme Court decision *Goodridge vs. Massachusetts Department of Public Health*.[6] For years, Massachusetts stood alone as the only state to permit same-sex marriage, while others merely allowed civil unions or domestic partnerships.[7] Then in 2008, California became the second state to allow same-sex marriage.[8] California voters, however, acted quickly to eliminate California's status as a same-sex marriage state through the ballot initiative Proposition 8, which amended the state constitution to prohibit same-sex marriage.[9] While California voters were approving Proposition 8, the Connecticut Supreme Court quietly granted same-sex marriage in its state, allowing Connecticut to replace California as the second state to allow same-sex marriage.[10]

---

[4] *See* Jesse McKinley, *California Releasing Donor List For $83 Million Marriage Vote*, N.Y. TIMES, Feb. 3, 2009, at A13, *available at* 2009 WLNR 2002492. Proposition 8, the most publicized of recent setbacks and which passed with a 52 percent vote, amended the California state constitution to define "marriage" as between one man and one woman. *Id.* The vote came just five months after the California Supreme Court had declared same-sex marriage a fundamental right in California. The court was asked to decide whether Proposition 8 was a legal amendment, and whether about 18,000 same-sex marriages that had been granted in California during the period between the court's initial decision and the passing of Proposition 8 would continue to be recognized in California. *Id.* The Court held that Proposition 8 was a valid amendment, but it upheld same-sex marriages that had been granted before Proposition 8 became law. Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009). *See also* Alexandria Sage & Peter Henderson, *California's Top Court Upholds Gay Marriage Ban*, GLOBE & MAIL, May 27, 2009, at A19, *available at* 2009 WLNR 10001158. Other recent setbacks include constitutional bans on gay marriage in Florida and Arizona, and a constitutional amendment in Arkansas to ban unmarried couples from adopting children. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1, *available at* 2008 WLNR 21173920.

[5] *See infra* notes 37 to 41 and accompanying text. Note that Hawai'i briefly allowed same-sex marriage in 1993.

[6] Goodridge v. Mass. Dep't of Pub. Health, 798 N.E.2d 941 (2003); Pam Belluck, *Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES, Nov. 19, 2003, at A1, *available at* 2003 WLNR 4643051.

[7] Stephanie Reitz, *Conn. Bill Would Update Law for Same-sex Marriages*, HUFFINGTONPOST.COM, Mar. 6, 2009, http://www.huffingtonpost.com/huff-wires/20090306/xgr-gay-marriage-connecticut/. Civil unions or domestic partnerships are allowed in Vermont, New Jersey, California, New Hampshire, Oregon, Washington, and the District of Columbia.

[8] Adam Liptak, *California Court Overturns a Ban on Gay Marriage*, N.Y. TIMES, May 16, 2008, at A1, *available at* 2008 WLNR 9268621.

[9] *See* Calmes & Pear, *supra* note 3.

[10] *Goodridge*, 798 N.E.2d 941; Lisa W. Foderaro, *A New Day for Marriage in Connecticut*,

Following Connecticut, three[11] other states updated their laws to permit same-sex marriages: Iowa,[12] Vermont,[13] and New Hampshire.[14] Although Maine voters overturned their same-sex marriage law by referendum on November 3, 2009,[15] on the same election day, voters in Washington upheld a law to grant state domestic partners the same legal rights as married spouses.[16] Notably, the Washington vote was the first to approve gay equality by popular vote.[17] Same-sex marriage bills were also introduced in Rhode Island,[18] New York,[19] and New Jersey,[20] and a same-sex marriage bill was introduced in Washington D.C. in late 2009.[21] State officials in New Jersey, which currently allows same-sex civil unions, maintain that gay marriage in their state is "not a matter of 'if' but 'when.'"[22]

N.Y. TIMES, Nov. 13, 2008, at A31, *available at* 2008 WLNR 21651103.

[11] Note that the legislature of a fourth state, Maine, also enacted a law to permit same-sex marriage in 2009. The law was signed by the governor, but it was overturned by voters via a "people's veto" referendum in the November 3, 2009 election. Abby Goodnough, *Maine Voters Repeal Law Allowing Gay Marriage*, NYTimes.com, Nov. 4, 2009, http://www.nytimes.com/ 2009/11/05/ us/politics/05maine.html?_r=1&hp.

[12] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (striking down Iowa's same-sex marriage ban as violative of Iowa's constitutional mandate of equal protection).

[13] VT. STAT. ANN. tit. 15 § 8 (LEXIS through 2009 legislation) (amending marriage definition as a union "between one man and one woman" to a union "between two people").

[14] N.H. REV. STAT. ANN. § 457:1-a, eff. Jan. 10, 2009 (LEXIS through 2009 legislation) ("Any person who otherwise meets the eligibility requirements of this chapter may marry any other eligible person regardless of gender.").

[15] Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, NYTIMES.COM, Nov. 4, 2009, http://www.nytimes.com /2009/11/05/us/politics/ 05maine.html.

[16] Sarah Kliff, *The Other Gay Rights Vote: Why Referendum 71 in Washington Matters*, NEWSWEEK.COM, Nov. 4, 2009, http://blog.newsweek.com /blogs/thegaggle/archive/2009/11/04/ the-other-gay-rights-vote-why-referendum-71-in-washington-matters.aspx.

[17] *Id.*

[18] H.B. 5774 2009-2010 Leg. Sess., (R.I. 2009) ("broaden[ing] the definition of persons eligible to marry to include persons of the same gender").

[19] A.B. 7732 2009 Leg., 232d Sess. (N.Y. 2009) ("Marriage is a fundamental human right. Same-sex couples and their children should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage.").

[20] A 2978 2008 Leg., 213th Sess. (N.J. 2008) ("Marriage" means the legally recognized union of two consenting persons in a committed relationship."). *But see* A. 648 2008 Leg., 213th Sess. (N.J. 2008) ("Persons of the same sex shall not marry.").

[21] D.C.B. 10 2009 Period 18 (D.C. 2009) ("A marriage legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction . . . shall be recognized as a marriage in the District."). A voter initiative to legalize same-sex marriage in Colorado may appear on the 2010 ballot if enough signatures are gathered. John Tomasic, *Gay Marriage Watchers Eye Colorado*, COLORADO INDEPENDENT, Apr. 15 2009, http://coloradoindependent.com/26748/gay-marriage-watchers-eye-colorado.

[22] Caren Chesler, *Push for Gay Marriage Meets Election Concerns*, N.Y. TIMES, Jan. 4,

Meanwhile, an increasing number of employers are offering health benefits to same-sex partners of employees. These benefits are called domestic partner benefits. Currently, seventeen states and the District of Columbia offer domestic partner benefits to state employees.[23] And, in the private sector, the majority of Fortune 500 companies now make domestic partner health benefits available to employees.[24]

Yet, whatever advancements gays and lesbians make in their home states is sharply limited by the federal Defense of Marriage Act ("DOMA"), enacted in 1996.[25] Under DOMA, no state is required to recognize out-of-state same-sex marriages, and "marriage" is defined for all federal statutes as a legal union between one man and one woman as husband and wife.[26] As a result, gays and lesbians who are married are not guaranteed recognition in any state but the one where their marriages were granted, and their marriages are never recognized for federal purposes.[27]

As of December 31, 2003, 1,138 federal laws turned on federal marital status.[28] Of these laws, 81 were tax provisions in the Internal Revenue Code.[29] Among the tax provisions that turn on marriage were provisions about the taxation of employer-provided health benefits.[30] The effect of the non-recognition of same-sex marriages and other same-sex unions with respect to these provisions is unequal taxation. While heterosexual married employees

---

2009, at NJ6, *available at* 2009 WLNR 152412.

[23] Nat'l Conference of State Legislatures, States Offering Benefits for Same-Sex Partners of State Employees, http://www.ncsl.org/programs/cyf/stateemployeebenefits.htm (last visited Jan. 19, 2010).

[24] Laura Smitherman, *Benefits for Gays: Proposal Would Extend Health Coverage to State Employees' Partners*, BALT. SUN, Feb. 3, 2009, at 3A, *available at* 2009 WLNR 2012498.

[25] Defense of Marriage Act, 28 U.S.C. § 1738C, 1 U.S.C. § 7 (1996).

[26] *Id.*

[27] *See* Human Rights Campaign, New York Marriage/Relationship Recognition Law, http://www.hrc.org/issues/1496.htm (last visited Jan. 19, 2010) (noting that only New York officially recognizes out of state marriages). Note that DOMA does not prohibit states from recognizing out-of-state marriages, so states that do not offer same-sex marriage are free to recognize same-sex marriages performed out of state. *See* Liz Robbins, *Washington, D.C., Council Approves Recognition of Out-of-State Gay Marriage*, NYTIMES.COM, May 5, 2009, http://www.nytimes.com/2009/05/06/us/06district.html (noting that Washington, D.C. City Council approved a bill to recognize out-of-state same-sex marriages in the District of Columbia).

[28] *See* Letter from Dayna Shah, Associate General Counsel, to The Honorable Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), http://www.gao.gov/new.items/d04353r.pdf [hereinafter *Shah Letter*].

[29] *See* Letter from Barry R. Bedrick, Associate General Counsel, to The Honorable Henry J. Hyde, Chairman, Committee on the Judiciary (Jan. 31, 1997), http://www.gao.gov/archive/1997/og97016.pdf (59 provisions as of 1996 report); *Shah Letter*, *supra* note 28, (detailing twenty-two additional provisions as of 2004 report).

[30] *See* I.R.C. § 105 (2008); I.R.C. § 106 (2006).

receive health benefits for their spouses on a tax-exempt basis, gay and lesbian employees who receive health benefits for their spouses or domestic partners are taxed on the full fair market value of those benefits.[31] As a consequence, the average employee who receives domestic partner benefits pays $1,069 more taxes per year than a married employee with the same coverage.[32] In addition, U.S. employers who offer domestic partner benefits collectively pay $57 million per year more payroll taxes than they would if domestic partner benefits were taxed the same way as spousal benefits.[33] Not only does such unequal tax treatment present serious civil rights concerns, but it also reflects a questionable tax policy in light of America's goals of expanding available and affordable health coverage and of reducing the economic strains and administrative burdens faced by American companies.

The proposed Tax Equity for Health Plan Beneficiaries Act would erase the unequal tax treatment of domestic partner health benefits by extending the tax exclusion currently available for employer-provided health coverage for employees' spouses to similar coverage for same-sex partners.[34] Although the proposed Act is limited in scope, and leaves much of the discriminatory tax treatment of same-sex couples in tact, it would effectively end nearly all discrimination related to the taxation of domestic partner benefits.

Before he became President, then-senator Obama co-sponsored the Tax Equity for Domestic Partner and Health Plan Beneficiaries Act,[35] which was the companion bill to an earlier version of the proposed 2009 Act. President Obama's past support for the companion bill suggests that he will probably sign the Tax Equity for Health Plan Beneficiaries Act if it passes in Congress.

This article analyzes the proposed legislation and recommends that Congress pass the proposed Act. Part II of this article discusses the tax status of same-sex couples under current law. Part III presents a brief overview of employer health benefits and explains the current tax treatment of domestic partner benefits under federal and state tax law. Part IV examines the text of the proposed Tax Equity for Health Plan Beneficiaries Act of 2009 for three purposes: to understand the scope and effect of the bill, to anticipate issues that will require attention from the IRS if the bill is passed, and to analyze the strategy employed by the proposed legislation. Finally, Part IV recommends passage of the proposed Act with slight modification to eliminate some

---

[31] M.V. LEE BADGETT, UNEQUAL TAXES ON EQUAL BENEFITS: THE TAXATION OF DOMESTIC PARTNER BENEFITS 6-7 (2007), *available at* http://repositories. cdlib.org/cgi/viewcontent.cgi?article=1023&context=uclalaw/williams.

[32] *Id.* at 7.

[33] *Id.* at 1, 7.

[34] H.R. 2625, 111th Cong. (2009); S. 1153, 111th Cong. (2009).

[35] S. 1556, 110th Cong. (2007).

remaining tax inequities in the area of health benefits not covered in the proposed statute.

II. BACKGROUND: STATUS OF SAME-SEX COUPLES UNDER CURRENT TAX LAW

The tax status of same-sex couples today can be traced to Hawaii in 1993. That year, the Hawaii Supreme Court held in *Baehr v. Lewin* that a law restricting marriage to opposite-sex couples created a "suspect category" under the Equal Protection Clause of the state constitution.[36] On remand, the law failed to pass strict scrutiny and was struck down as a constitutional violation, making same-sex marriage legal in Hawaii.[37] The public reacted. In response to the "perceived assault against traditional heterosexual marriage," Congress enacted DOMA in 1996.[38] President Clinton has defended his decision to sign DOMA, stating that he viewed the legislation as a states' rights measure as opposed to an anti- gay rights law.[39] Hawaii no longer allows same-sex marriage,[40] but DOMA remains on the books as the most expansive federal legislation about the status of same-sex couples. Among its many effects is to dictate the federal tax treatment of same-sex couples.

DOMA has two parts. The first part is codified at 28 U.S.C. § 1738C and states:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[41]

---

[36] Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

[37] Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct., Dec. 3, 1996).

[38] Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent upon Sexual Orientation?*, 33 IND. L. REV. 991, 1000-01 (2000).

[39] Nick Langewis, *Student Journalists Put Bill Clinton on the Defensive Over DOMA*, PAGEONEQ, Mar. 25, 2008, http://pageoneq.com/news /2008/clinton_032508.html ("In the political climate of 1996, Clinton says, it seemed like a reasonable alternative to an outright ban through constitutional amendment.").

[40] HAW. CONST. art. I, § 23 (declaring "[t]he legislature shall have the power to reserve marriage to opposite-sex couples"); Bob Mims, *LDS Church Hails Votes Barring Gay Marriage; Gay-Marriage Foes Thank LDS Church For Financial Aid*, SALT LAKE TRIB., Nov. 5, 1998, at A1, *available at* LEXIS. Same-sex marriage is no longer permitted in Hawaii. Hawaiian voters amended the state constitution by referendum to give the legislature authority to overrule *Baehr v. Lewin*.

[41] 28 U.S.C. § 1738C (2009).

This first part of DOMA suspends the Full Faith and Credit Clause in order to allow states to choose whether or not to honor out-of-state same-sex marriages. The result is that same-sex couples have different rights available to them from state to state, and their relationships' legal status can change when they cross state borders. This variable treatment of same-sex marriages extends to tax status. Thus, the tax status of same-sex couples differs from state to state.

The second part of DOMA, which is more significant for the purposes of this article, is codified at 1 U.S.C. § 7 and states:

> Definition of "marriage" and "spouse." In 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, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[42]

The effect of this second part of DOMA is nonrecognition of same-sex marriages for all federal purposes. For federal tax purposes, married or partnered same-sex couples are treated as unrelated third parties. Married gays and lesbians may not file joint federal tax returns or married filing separately tax returns; they always assume the tax status of an individual for federal tax purposes.

As a direct result of DOMA, the tax status of same-sex couples often differs from state level to federal level. Same-sex partners are never permitted to file joint federal tax returns. Yet, as of winter 2009, nine of the eleven[43] states that permit same-sex marriage, civil unions, or domestic partnerships did permit same-sex couples to file joint state tax returns.[44] First, same-sex spouses in

---

[42] 1 U.S.C. § 7 (2009). Note that Judge Reinhardt of the 9th Circuit recently held in *In Re Levenson* that DOMA is unconstitutional "to the extent that the application of DOMA serves to preclude the provision of health insurance coverage to a same-sex spouse of a legally married federal employee because of the employee's and his or her spouse's sex or sexual orientation." In Re Levenson, 560 F.3d 1145, 1151 (2009). However, *Levenson* does not establish precedent, and few if any other cases have held DOMA to be unconstitutional. Carol J. Williams, LATimes.com, Feb. 5, 2009, http://latimesblogs.latimes.com/ lanow/2009/02/gay-marriage.html. Moreover, the *Levenson* holding was narrow and only held that DOMA was unconstitutional when applied to preclude government employers from providing domestic partner benefits. *Levenson*, 560 F.3d at 1151. This issue is distinct from the question of whether DOMA is constitutional when applied to the Internal Revenue Code.

[43] *See infra* Part II. Eight states (California, Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, Oregon, and Vermont) plus the District of Columbia allow certain same-sex couples to file jointly.

[44] *See* Kiplinger, *Seven States and the District of Columbia Now Allow Same-sex Couples to File Joint Returns*, http://turbotax.intuit.com/tax-tools/tax-tips/family/domestic-partners-tax-filing.html (last visited Jan. 19, 2010). Beginning with tax year 2009, same-sex couples married

Massachusetts, Connecticut, California, and Iowa are required to file joint returns or married filing separate state tax returns.[45] Second, though no official guidance has been released, same-sex spouses in Vermont, and New Hampshire should also be permitted to file joint state tax returns.[46] Finally, members of same-sex civil unions in Connecticut, New Jersey, New Hampshire, and Vermont[47] are also required to file joint state tax returns or married filing separately state tax returns.[48] Whether same-sex partners in domestic partner

---

in Iowa will also be required to file Iowa tax returns as married persons, either jointly or separately. IOWA TAX TREATMENT OF SAME-SEX MARRIAGES 1 (2009), http://www.iowa.gov/tax/taxlaw/ssmarriage.pdf. [hereinafter IOWA TAX TREATMENT OF SAME-SEX MARRIAGES].

[45] Mass. Dep't of Revenue, TIR 04-17: Massachusetts Tax Issues Associated with Same-Sex Marriages, http://www.mass.gov/?pageID=dorte rminal&L=7&L0=Home&L1=Businesses&L2=Help+%26+Resources&L3=Legal+Library&L4=Technical+Information+Releases&L5=TIRs+-+By+Year(s)&L6=2004+ Releases&sid=Ador&b=terminal content&f=dor_rul_reg_tir_tir_ 04_17&c sid=Ador (last visited Jan. 19, 2010) ("For Massachusetts purposes, same-sex spouses have the option of filing either a Massachusetts joint return or a married filing separate return." (citing MASS. GEN. LAWS ANN. ch. 62C, § 6 (West 2008)); GLAD, Navigating Income Taxes for Married Same-Sex Couples 3 (2008), http://www.glad.org/uploads/docs/ publications /navigating-taxes-married-couples.pdf. Note that "married filing separately" is a mandatory filing status for married individuals who choose not to file a joint tax return. The tax rate associated with filing as "married filing separately" is not as favorable as the "married filing jointly" tax rate.

[46] *See* Roth & Co., *Same-Sex Marriage in Iowa: The Tax Stakes*, TAXUPDATEBLOG.COM, Apr. 3, 2009, http://www.Rothcpa.com/archives.php (follow "April 2009" hyperlink) ("Most same-sex couples will not see a difference in their Iowa taxes as a result of [the] Supreme Court ruling allowing them to wed in Iowa. The Iowa tax system allows married couples to file 'separately on a combined return,' giving them each a run up the brackets. Most married couples file this way; only couples with a single earner and very little joint investment property normally file an Iowa return with 'joint' status.") Practically speaking, however, many same-sex spouses in Iowa will probably continue to file separately on a combined return.

[47] Nat'l Conference of State Legislatures, Same-sex Marriage, Civil Unions and Domestic Partnerships, http://www.ncsl.org/Issues Research/HumanServices/SamesexMarriage (last visited Jan. 19, 2010). Note that on September 1, 2009, when Vermont's new Marriage Equality Act goes into effect, civil unions will no longer be available in Vermont. *See* Vt. Sec'y of State, Civil Marriage, http://www.sec.state. vt.us/municipal/civil_mar.htm (last visited Jan. 19, 2010). Civil unions will remain available in Vermont through August 31, 2009, and all civil unions obtained through that date will remain valid.

[48] CONN. DEP'T OF REVENUE SERVICES, FORM CT-W4 (2008), *available at* http://www.ct.gov/drs/lib/drs/forms/2008withholding/ct-w4.pdf ("Effective for taxable years beginning on or after January 1, 2006, parties to a civil union recognized under Connecticut law must file their Connecticut income tax returns as if they were entitled to the same filing status accorded spouses under the Internal Revenue Code."); Vt. Dep't of Banking, Ins., Sec. & Health Care Admin., Guide for Civil Union Partners in Vermont, http://www.bishca.state.vt.us /Civilunion/civiluguideweb.htm (last visited Jan. 19, 2010) ("For the [Vermont] state return, civil union couples may elect to file a joint return or separate returns in the same manner as married couples filing jointly or 'married filing separate."); N.J. Dep't of the Treasury, Civil

states[49] are permitted to file joint state returns varies; registered domestic partners in California, Oregon, and Washington D.C. are permitted to file joint state tax returns,[50] but registered domestic partners in Maine must continue to file separate state tax returns.[51] Domestic partners in Washington are afforded the same legal rights as married couples in the state, but Washington does not levy a personal income tax.[52] Hawaii recognizes "reciprocal beneficiaries," a legal status that gives same-sex couples certain rights with respect to survivorship, inheritance, property ownership and insurance,[53] but Hawaii reciprocal beneficiaries may not file joint tax returns.[54] In sum, eight states—

Union Act, http://www.state.nj.us/treasury /taxation/civilunionact.shtml (last visited Jan. 19, 2010) ("While civil union couples have the right to a joint filing status under New Jersey Gross Income tax law, that right can only begin to be exercised in 2008 for tax year 2007."). Note that New Hampshire does not impose a state income tax on earnings. *See infra* note 52.

[49] *See* Human Rights Campaign, Same-Sex Relationship Recognition Laws: State by State, http://www.hrc.org/issues/5366.htm (last visited Jan. 19, 2010) [hereinafter HRC Relationship Recognition]. California, Oregon, Maine, Washington, and Washington D.C. allow same-sex registered domestic partners. *Id.* [HRC Relationship Recognition]. Note that in California, "the Supreme Court's decision regarding same-sex marriages did not invalidate or change any of the Family Code statutes relating to registered domestic partners," and domestic partnerships will remain available regardless of the availability of same-sex marriage in the state. Cal. Sec'y of State Debra Bowen, Frequently Asked Questions, *available at*:http://www.sos.ca.gov/dpregistry/faqs.htm#question1 (last visited Apr. 16, 2009).

[50] Kathleen Pender, *Tax Impact of New Domestic Partner Law*, SAN FRANCISCO CHRONICLE, Oct. 8, 2006, at C1, *available at* LEXIS; Or. Dep't of Revenue: Pers. Income Tax, Oregon Registered Domestic Partnership (RDP) Frequently Asked Questions, http://www.oregon.gov/DOR/PERTAX /RDP_FAQs.shtml (last visited Jan. 19, 2010) [hereinafter *Oregon RDP FAQs*] ("For Oregon tax purposes, the same rules that apply to married individuals now also apply to RDPs."); Will O'Bryan, *Tackling Tomorrows Taxes: New Law Allows Joint Filing for D.C. Domestic Partners in 2008*, METRO WKLY, Mar. 29, 2007, http://www.metroweekly.com/gauge/?ak=2620.

[51] *See* Me. Ctr. for Disease Control and Prevention Office of Health Data and Program Mgmt., Domestic Partner Registry, http://www.maine.gov/dhhs/bohodr/domstcprtnrspge.htm (last visited Jan. 19, 2010); Wash. Sec'y of State, Laws and Regulations Pertaining to Domestic Partnerships in Washington State, http://www.secstate. wa.gov/corps/domesticpartnerships/laws_and_regulations.aspx (last visited Jan. 19, 2010); *See* WASH. SEC'Y OF THE STATE, DOMESTIC PARTNERSHIPS: A SUMMARY OF 2008 CHANGES TO STATE LAWS REGARDING DOMESTIC PARTNERSHIPS, 1 (2008) http://www.secstate.wa.gov/corps /domesticpartnerships/rights_ responsibilites_dp.pdf. Note that Washington does not currently have an income tax, and New Hampshire's income tax is limited to interest and dividend income. Fed'n of Tax Adm'rs, State Individual Income Taxes, http://www.taxadmin.org/fta/rate/ind_inc.html (last visited Jan. 19, 2010) [hereinafter *FTA State Taxes*].

[52] Washington State Department of Revenue, Income Tax, http://dor.wa.gov/content/FindTaxesAndRates/IncomeTax/ (last visited Nov. 5, 2009).

[53] *See, e.g.*, HAW. REV. STAT. § 431:10-234 (LEXIS through 2009 legislation) (allowing for reciprocal beneficiary to purchase life insurance policies); *id.* § 560:2-102 (providing for forced share in intestate succession).

[54] *Id.* § 235-93 ("A husband and wife, having that status for purposes of the Internal

California, Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, Oregon, and Vermont—plus the District of Columbia permit same-sex spouses or partners to file joint state tax returns.

While the ability of same-sex couples in some states to file joint state tax returns is generally a welcomed right, the process of filing joint state tax returns can be onerous for same-sex couples because of the inability to file such returns on the federal level. To determine state taxable income, all states that impose an income tax identify some federal reference point, such as federal adjusted gross income or federal taxable income, as an income base that will be adjusted upwards and downwards depending on state inclusions, exclusions, and deductions.[55] For married couples, this technique simplifies the process; once the couple files their federal tax return, they can easily import the relevant income figure into their state return and make the applicable adjustments. For same-sex couples filing joint returns, however, the process is complicated by dual filing status: same-sex couples may be treated as married under state law, but DOMA requires that they be treated as unmarried individuals under federal law. A common solution to this problem is to require the couple to prepare a "dummy" joint federal tax return.[56] The couple completes the dummy tax return as if it was a married couple, and then the relevant figures can be used to file a joint state tax return. As a result, many same-sex couples are forced to prepare four returns: two individual federal returns, one dummy married-filing-jointly federal return, and one married-filing-jointly state return.[57]

The dual filing status of same-sex couples complicates tax planning by creating, at times, directly opposed tax planning strategies. For a simple example, consider a married individual who is beginning a new job in year 2, at which time his spouse will stop working. The couple may anticipate a significantly lower joint income in year 2, while the individual may anticipate a significantly higher individual income in year 2. If the income difference is great enough, it may affect marginal tax rates. In such a case, planning strategies compete: it is advantageous for the individual to accelerate income

---

Revenue Code and entitled to make a joint federal return for the taxable year, may make a single return jointly of taxes."); *see also id.* § 572C-6 ("Unless otherwise expressly provided by law, reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage under chapter 572.").

[55] Claim based on author's survey of state tax codes. *See also* Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 110, n.14 (2008); Sharon C. Park, *Material on Federal Tax Incentives for Historic Preservation*, A.L.I. (2005).

[56] Andy Humm, *Same-Sex Marriage Showdown*, GOTHAM GAZETTE, May 2006, http://www.gothamgazette.com/article/civilrights/20060510/3/1847.

[57] *See, e.g.*, Oregon RDP FAQs, *supra* note 50 ("The federal government doesn't recognize domestic partners as married individuals for federal tax (IRS) purposes. RDPs must continue to file as unmarried individuals on their federal returns. You must create an 'as if' federal return from which you will use the federal information to complete your Oregon return.").

items to take advantage of the lower individual federal tax bracket in year 1, but it is advantageous for the couple to defer income items to take advantage of the lower joint state tax bracket in year 2.

Dual filing status makes tax preparation and filing more costly and time consuming. Because same-sex partners must prepare four tax returns—two individual federal returns, one dummy joint federal return, and one joint state return—the costs for tax preparation is higher for same-sex partners than for married couples who file only two returns—one joint federal return and one joint state return. As a result, same-sex couples who hire a professional to prepare their taxes must pay for four tax returns.[58] The cost of tax preparation for same-sex couples is sometimes twice the price of preparing an opposite-sex married couple's tax returns.[59] Same-sex couples who prepare their own taxes using commercially available tax preparation software also incur extra expenses, especially if they attempt to use the versions available online. A same-sex couple that wishes to use the online version of TurboTax, for instance, must create three accounts—two individual accounts (for federal individual returns) and one joint account (for a joint state return)—for as much as $75 per account.[60] A better strategy for these couples is to purchase a physical copy of the program, which costs between $60 and $100 and can file up to five returns.[61] Thus, while a married couple may file two returns (one federal, one state), same-sex partners must file at least three (one state, two federal) and, therefore, must pay an extra fee if they file online.

It is against this backdrop—DOMA and the dual tax status tax world it creates for same-sex couples—that the following discussion about employer health benefits must be understood. After introducing the concept of domestic partner benefits, Part III details the tax treatment of domestic partner benefits under current law.

III. THE PROBLEM: TAXATION OF DOMESTIC PARTNER BENEFITS UNDER CURRENT LAW

Most Americans who have worked for a large employer are familiar with the concept of employee health benefits. The system of employment based health benefits began as private, voluntary initiatives in response to federal tax laws,

---

[58] Eva Rosenberg, *Giant Tax Headache for Gay Couples*, MSN MONEY, http://articles.moneycentral.msn.com/Taxes/PreparationTips/GiantTaxHeadachesForGayCouples.aspx (last visited Jan. 19, 2010).

[59] *Id.*

[60] Matthew S. Bajko, *Another Year Brings Tax Headaches for Same-Sex Couples*, BAY AREA REPORTER, Mar. 12, 2009, http://www.ebar.com/news/article.php?sec=news&article=3787.

[61] *Id.*

labor laws, trade union collective bargaining strategies, and the political failure of universal health care proposals.[62] In the 1930s, the employment based health benefits system began a period of rapid expansion that lasted until the 1960s.[63] By 2008, health benefits were offered by 63 percent of employers, with 99 percent of large firms of 200 employees or more offering health benefits.[64] Eighty-two percent of employees who were eligible for employer-provided health benefits in 2008 accepted coverage.[65] Of these covered employees, 46 percent elect single coverage, 19 percent elect single plus-one coverage, and 36 percent elect family coverage.[66]

Health benefits are purchased by the employer for its employee under the employer's health plan. However, the employee is generally required to make a contribution as well. The employee's typical contribution amount varies depending on the type of plan—HMO, PPO, POS, or HDHP/SO. On average, an employee who elected single coverage in 2008 contributed $721 over the course of the year, while the average employer contribution was $3,983.[67] For family coverage, the average employee contributed $3,354 in 2008, while the average employer contribution was $9,325.[68] With respect to single plus-one coverage, the average employee contributed $1,903,[69] while the average employer contribution was $6,085.[70] It is with respect to the taxation of these last two types of health benefits—family coverage and single plus-one coverage – that there is unequal tax treatment of the benefits received by same-sex couples.

---

[62] MARILYN J. FIELD & HAROLD T. SHAPIRO, EMPLOYMENT AND HEALTH BENEFITS: A CONNECTION AT RISK 27 (National Academy Press 1993).

[63] *Id.*

[64] KAISER FAMILY FOUND., EMPLOYER HEALTH BENEFITS 2008 ANNUAL SURVEY 4 (2008), http://ehbs.kff.org/pdf/7790.pdf [hereinafter Kaiser Survey].

[65] *Id.* at 51.

[66] *Id.* at 53.

[67] *Id.* at 2.

[68] *Id.*

[69] MED. EXPENDITURE PANEL SURVEY, TABLE I.E.2 AVERAGE TOTAL EMPLOYEE CONTRIBUTION (IN DOLLARS) PER ENROLLED EMPLOYEE FOR EMPLOYEE-PLUS-ONE COVERAGE AT PRIVATE-SECTOR ESTABLISHMENTS THAT OFFER HEALTH INSURANCE BY FIRM SIZE AND SELECTED CHARACTERISTICS: UNITED STATES (2006), http://www.meps.ahrq.gov/mepsweb/data_stats/summ_tables/insr/national/series_1/2006/tie2.pdf [hereinafter MEP Survey Table I.E.2]. Note that the Medical Expenditure Panel Survey reflects 2006 data.

[70] *See* MED. EXPENDITURE PANEL SURVEY, TABLE I.E.1 (2006) AVERAGE TOTAL EMPLOYEE-PLUS-ONE PREMIUM (IN DOLLARS) PER ENROLLED EMPLOYEE AT PRIVATE-SECTOR ESTABLISHMENTS THAT OFFER HEALTH INSURANCE BY FIRM SIZE AND SELECTED CHARACTERISTICS: UNITED STATES, 2006, http://www.meps.ahrq.gov/mepsweb/data_tats/sum_tables/nsr/national/series_1/2006/tie1.pdf [hereinafter MEP Survey Table I.E.1]. Note that the Medical Expenditure Panel Survey reflects 2006 data.

Though there is a long history of employers offering health benefits to employees' spouses and dependents, the extension of coverage to employees' domestic partners is a more recent development. The first employer to offer domestic partner benefits was the Village Voice in 1982.[71] The trend was slow to start; only a few employers per year added domestic partner benefits in the 1980s, and by 1990 there were still fewer than twelve employers and no Fortune 500 companies that offered domestic partner benefits.[72] But by 1999, the HRC counted 2,856 employers that offered domestic partner benefits, observing:

> Many of the initial concerns surrounding domestic partner benefits have been resolved in the nearly two decades since they were first offered. When domestic partner benefits were first offered, the few insurance carriers that wrote such policies usually added a charge to cover any unexpected cost increase. Today, many insurance companies will cover domestic partners and most of those have stopped adding a surcharge.[73]

By 2008, the number of employers that offered domestic partner benefits had risen to 9,375, including: 57 percent of Fortune 500 companies; 39 percent of Fortune 1000 companies; 151 cities and counties; and 14 states and the District of Columbia.[74] One recent study estimated that in 2007 about 166,000 people received domestic partner benefits.[75]

The growing number of employers offering domestic partner benefits represents a significant advancement toward equal treatment of same-sex couples. Yet, same-sex couples' access to employer-provided health benefits continues to face serious hurdles due to unequal tax treatment of domestic partner benefits. The HRC rightly observed, "[f]or employees that do receive partner benefits, disparities in federal law typically result in higher individual income taxes — as well as higher employer payroll taxes — unless the partner qualifies as a tax dependent of the worker."[76] As discussed below, very few

---

[71] Kim I. Mills & Darl Herrschaft, HUMAN RIGHTS CAMPAIGN FOUNDATION, THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDERED AMERICANS 9 (1999), http://www.hrc.org/documents/sotw1999.pdf [hereinafter *HRC Workplace 1999*].

[72] *Id.*; M.V. Lee Badgett, *Calculating Costs with Credibility: Health Care Benefits for Domestic Partners*, 5 ANGLES 1 (2000).

[73] *HRC Workplace 1999*, *supra* note 71, at 19.

[74] HUMAN RIGHTS CAMPAIGN FOUNDATION, THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 2007-2008 9 (2009) http://www.hrc.org/documents/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf [hereinafter *HRC Workplace 2007-2008*].

[75] BADGETT, *supra* note 31, at 6.

[76] HRC Workplace 2007-2008, *supra* note 74, at 9.

domestic partners qualify for dependent treatment; therefore, the unequal treatment affects most same-sex couples.[77]

A. Federal Tax Treatment

The federal tax treatment of employer-provided health benefits is governed primarily by Internal Revenue Code sections 106 and 105. Section 106 controls employer-provided coverage under an accident or health plan; in other words, it determines the tax treatment of employer-provided health insurance. Section 105 controls the tax treatment of disability payments, medical reimbursements, and dismemberment payments.

1. Section 106: employer-provided accident and health plans

Under section 106(a), an employee's gross income does not include "contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents[.]"[78] The effect of section 106 is to exclude the value of employer-provided health benefits as long as the benefits are provided to the employee, the employee's spouse, or the employee's dependents. The advantage is twofold: (1) the employee is permitted to exclude from income any employer contributions to the health plan; (2) the employee is permitted to make any employee contributions to the health plan from pre-tax income by way of a salary reduction.[79]

The first of these advantages is the most straightforward. Section 106 expressly excludes from an employee's income the value of employer contributions to health plans. As such, contributions an employer makes to a health plan for the benefit of an employee, the employees' spouse, or the employee's dependent do not constitute income to the employee and are not reportable on the employee's W-2.[80] Aside from co-payments typically made from after-tax income, the employee receives all insurance benefits tax free.

---

[77] *See infra* Part III.A.3 and text accompanying note 92.

[78] Treas. Reg. § 1.106-1 (West 2009); *see also* I.R.C. § 106(a).

[79] Treas. Reg. § 1.106-1 (West 2009).

[80] *Id.* § 1.106-1 (West 2009); Rev. Rul. 56-632, 1956-2 C.B. 101 (holding that benefits excluded under 106 are not subject to income tax withholding); *see also* Form W-2 Wage and Tax Statement 2 (2009), http://www.irs.gov/pub/irs-pdf/fw2.pdf. The W-2 form does not include a separate line item for employer-provided health benefits, so the only way the value of employer-provided health benefits would appear on an employee's W-2 would be to include that value as employee wages (item 1). *Id.* Since employer-provided health benefits are excluded from wages, they do not constitute wages and are not included in this figure.

The second of these benefits is slightly more complicated. As discussed above, most employer health plans require employees to make contributions toward premiums. When an employer contribution is required, the employer will usually permit employees to make the contribution by reducing their salaries in an amount equal to the required contribution. This is called a salary reduction. Typically, a salary reduction occurs when an employer gives an employee the option of either receiving cash or taking a salary reduction that will be applied towards health benefits. In other words, the employee may elect to receive health benefits instead of cash.[81] Whether the value of those benefits (which equals the value of the salary reduction) are included in the employees' income depends on application of code section 125.[82]

Under section 125, an employee's gross income does not include the value of any benefit received as part of a written plan under which employees may choose between cash and certain qualified benefits.[83] A "qualified benefit" is "any benefit which . . . is not includible in the gross income of the employee by reason of [certain specified provisions of the Internal Revenue Code]."[84] Section 106 health benefits are qualified benefits; therefore, the value of a salary reduction attributable to section 106 health benefits is excludible from income.[85] In other words, sections 106 and 125 exclude the value of employees' contributions to premiums. The practical effect of this exclusion is to allow employees to pay the employee contributions using pre-tax income.

In sum, together sections 106 and 125 permit the exclusion of both employee and employer contributions to employer-provided health benefits as long as the benefits are received for the employee, the employee's spouse, and the employee's dependents. To understand the effect of section 106 on same-sex couples and their families, one must first define "spouse" and "dependents." The federal definition of "spouse" excludes same-sex spouses and all unmarried partners (same-sex or opposite-sex) and is limited to opposite-sex marriages. Since same-sex partners will never fit the section 106 definition of "spouse," whether domestic partner benefits will be excluded under section 106 hinges on the definition of "dependents."

The Internal Revenue Service has stated that if a domestic partner or same-sex spouse qualifies as a "dependent," then the partner or same-sex spouse will qualify for the section 106 income exclusion offered to employees' dependents.[86] For an adult to qualify as a dependent, section 152 requires that

---

[81] *See* I.R.C. § 125(d) (West 2008). The tax rules governing salary reduction benefit plans, called cafeteria plans, are not limited to health benefit plans.

[82] *See* Rev. Rul. 2002-3, 2002-1 C.B. 316; Prop. Treas. Reg. § 1.125-1(r)(1).

[83] I.R.C. § 125(a), (d).

[84] *Id.* § 125(f) (West 2008).

[85] *See id.*

[86] *See, e.g.*, I.R.S. Chief Couns. Adv. 200117038 (Apr. 2001); I.R.S. Priv. Ltr. Rul.

the same-sex partner not only must live with the taxpayer as part of the taxpayer's household, but must also meet restrictive income and dependency requirements:[87] (1) the partner's gross income must be less than the exemption amount of $3,650;[88] and (2) over one-half of the partner's financial support must come from the taxpayer.[89] These income and dependency requirements exclude most domestic partners and same-sex spouses from classification as dependents. In fact, as of 2006 less than 5 percent of unmarried partners received dependent coverage, as compared to 36 percent of married people who received coverage through their spouses' employee health plan.[90]

Because a domestic partner or same-sex spouse will never be treated as a "spouse" for the purposes of section 106, and usually will not qualify as a "dependent," in most cases domestic partner benefits will fail to qualify for the section 106 exclusion. Thus, the fair market value of the domestic partner benefits must be included in income and will be taxed as part of the employee's income,[91] and any salary reduction attributable to domestic partner benefits must be included in gross income.

The effect is best illustrated by an example. Assume two taxpayers are in the same 28 percent tax bracket.[92] The first taxpayer is in an opposite-sex marriage

---

200339001 (Sept. 26, 2003).

[87] I.R.C. § 152(d)(1) (West 2008).

[88] *Id.* The $3,650 exemption amount reflects the inflation adjusted exemption amount effective for the 2009 tax year. Rev. Proc. 2008-66, 2008-45 I.R.B. 1107 (West 2008).

[89] I.R.C. § 152(d)(1).

[90] Michael A. Ash & M. V. Badgett, *Separate and Unequal: The Effect of Unequal Access to Employment-Based Health Insurance on Same-Sex and Unmarried Different-Sex Couples*, 24 CONTEMP. ECON. POL'Y, 582, 588 (2006).

[91] *Health Benefits For Domestic Partner-Dependents Not Taxed To Employees*, FED. TAX WKLY, Oct. 2, 2003; *see also* I.R.S. Priv. Ltr. Rul. 200339001 (Sept. 26, 2003) (stating

> The excess of the fair market value of the medical and dental coverage provided by Taxpayers to a domestic partner who does not qualify as a section 152 dependent of the employee, over the amount paid by the employee for such coverage, is includable in the employee's gross income and is subject to income tax withholding and employment taxes.).

[92] AM. MED. ASS'N, HOW THE GOVERNMENT CURRENTLY HELPS PEOPLE BUY HEALTH INSURANCE: THE EMPLOYEE TAX BREAK ON JOB-BASED INSURANCE 1 (2008), http://www.ama-assn.org/ama1/pub/upload/mm/478/govtbuyins.pdf. The 28 percent tax bracket was chosen for this example because higher income taxpayers are more likely to work for employers that offer health benefits. In 2006, the top 30 percent of taxpayers were in the 25 percent tax bracket or higher. Author calculations based on filing data from the I.R.S. statistical table. *See* Internal Revenue Serv., SOI Tax Stats – Individual Statistical Tables by Tax Rate and Income Percentile, http://www.irs.gov/taxstats/indtaxstats/article/0,,id=133521,00.html (follow "2006" hyperlink for the "SOI Bulletin article - Individual Income Tax Rates and Tax Shares, Table 1"). The 28 percent tax bracket was chosen here to highlight the discriminatory effects that become more pronounced as the tax bracket increases. The discriminatory effects of sections

and receives health benefits for his opposite-sex spouse. The second taxpayer is in a same-sex marriage and receives health benefits for his same-sex spouse. Both elect single plus-one coverage for their spouses.

As noted above, because of DOMA, the same-sex couple's marriage is not recognized for federal tax purposes. Therefore, benefits received for the second taxpayer's same-sex spouse are not treated as tax-free marital benefits. For this reason, the coverage received for the second taxpayer's same-sex spouse are domestic partner benefits for tax purposes, even though the taxpayer may have received the benefits through his employer's marital benefits plan.[93] The portion of the benefits attributable to domestic partner benefits is fully taxable.

To determine the amount attributable to domestic partner benefits, it is necessary to calculate the increased value from single coverage to single plus-one coverage. Assume that the taxpayers pay the national average for health insurance.[94] As such, assume that single coverage costs $4,118,[95] and the employer requires the employee to contribute $788, while the employer contributes $3,330.[96] Single plus-one coverage costs $7,988,[97] and the employer requires the employee to contribute $1,903, while the employer

---

105 and 106 are greater at the 33 and 35 percent tax brackets. However, no increase in OASDI (Social Security) tax liability occurs at the 33 or 35 percent tax brackets because the 2009 cap on "wages" for OASDI purposes is $106,800, making the maximum OASDI tax liability $6,621.60. *See* Treas. Reg. § 31.3121(a)(1)(vii) (for FICA purposes, "wages" does not include amounts that exceed the contribution and benefits base, as designated in the Social Security Act section 230); Social Security Act 42 U.S.C. § 430. Therefore, the 28 percent tax bracket best demonstrates the discriminatory effects of the tax treatment of domestic partner benefits.

[93] Married same-sex couples in Iowa, for example, may be eligible to receive benefits through their employers' regular marital benefit plans (as opposed to through a "domestic partner benefits" plan). The benefits received, however, will not be eligible for tax exclusion like regular marital benefits. Instead, the benefits received will be fully taxable, as if they had been received through a domestic partner benefits plan. For simplification purposes, then, all benefits received for same-sex spouses or partners can be referred to as "domestic partner benefits."

[94] *See* NAT'L COALITION ON HEALTH CARE, FACTS ON HEALTH CARE COSTS 1 (2008), http://www.nchc.org/documents/Cost%20Fact%20Sheet-2009.pdf. Note that the averages used in this example are 2006 averages. Health insurance premiums have increased in recent years.

[95] MED. EXPENDITURE PANEL SURVEY, TABLE I.C.1 (2006) AVERAGE TOTAL SINGLE PREMIUM (IN DOLLARS) PER ENROLLED EMPLOYEE AT PRIVATE-SECTOR ESTABLISHMENTS THAT OFFER HEALTH INSURANCE BY FIRM SIZE AND SELECTED CHARACTERISTICS: UNITED STATES, 2006, http://www.meps.ahrq.gov/mepsweb/data_stats/summ_tables/insr/national/series_1/2006/tic1.pdf [hereinafter MEP Survey Table I.C.1].

[96] MED. EXPENDITURE PANEL SURVEY, TABLE I.C.2 AVERAGE TOTAL EMPLOYEE CONTRIBUTION (IN DOLLARS) PER ENROLLED EMPLOYEE FOR SINGLE COVERAGE AT PRIVATE-SECTOR ESTABLISHMENTS THAT OFFER HEALTH INSURANCE BY FIRM SIZE AND SELECTED CHARACTERISTICS: UNITED STATES 1 (2006), http://www.meps.ahrq.gov/mepsweb/data_stats/summ_tables/insr/national/series_1/2006/tic2.pdf [hereinafter MEP Survey Table I.C.2].

[97] MEP Survey Table I.E.1, *supra* note 70.

contributes $6,085.[98] When the two employees stepped up from single coverage ($4,118) to single plus-one coverage ($7,988), the value of the coverage increased by a total of $3,870. Of this total, the employee contribution increased by $1,115, and the employer contribution increased by $2,755.

For the opposite-sex couple, this $3,870 value is tax-free under section 106. But for the same-sex couple, this entire amount is taxable. Table 1 displays the added income tax burden attributable to health benefits for the two taxpayers.

Table 1: Effect of Section 106 on Income Tax of Same-sex Partners[99]

	Opposite-Sex Spouses			Same-Sex Spouses		
	Total Value of Benefits Received	Tax-Free Amount	Taxable Amount	Total Value of Benefits Received	Tax-Free Amount[100]	Taxable Amount[101] (DPBs)
Value of Salary Reduction: Employee Contribution	1,903	1,903	0	1,903	788	1,115
Value of Employer Contribution	6,085	6,085	0	6,085	3,330	2,755
Total	7,988	7,988	0	7,988	4,118	3,870
Income Tax on Benefits (x 28%)	0			1,084		

The second employee was taxed on the value of benefits received for his same-sex spouse. As a result of this added taxable income, the same-sex

---

[98] MEP Survey Table I.E.2., *supra* note 69.

[99] The numbers reflected in the chart show only the income tax consequences to the employee. As seen in later examples, there are additional payroll tax consequences to both employees and employers.

[100] The tax-free amount is the amount attributable to single coverage.

[101] The taxable amount is the amount attributable to domestic partner benefits. The amount attributable to domestic partner benefits equals the increase from single coverage ($4,118) to single plus-one coverage ($7,988), which is $3,870. As reflected in Table 1, above, the cost of the $3,870 domestic partner benefits is paid in part by the employee and in part by the employer. The employee, however, is taxed on the full $3,870 value of the domestic partner benefits.

couple owed $1,084 more income tax than the married couple. This figure is almost identical to the actual burden borne by same-sex couples. In fact, a recent estimate found that the average employee who receives domestic partner benefits pays $1,069 more in taxes per year than an employee who receives the same coverage for an opposite-sex spouse.[102]

The added tax liability is even more pronounced for high income taxpayers. Assume, for instance, that the two taxpayers are in the highest tax bracket, which in 2008 imposed a 35 percent marginal rate. In the 35 percent tax bracket, the taxpayer who receives benefits for his same-sex spouse will pay $1,355 more taxes than his co-worker who receives the same benefits for his opposite-sex spouse. Moreover, if Congress adopts President Obama's proposal to raise the top marginal rate to 39.6 percent in 2011,[103] the discriminatory effect at the highest tax bracket will become even greater. At the 39.6 percent rate, the employee who receives benefits for his same-sex spouse will pay $1,533 more in taxes than an employee who receives the same benefits for an opposite-sex spouse.

2. Section 105: disability payments, medical care reimbursements, and dismemberment payments

Section 105 controls the tax treatment of disability payments, medical reimbursements, and dismemberment payments. Section 105(a) sets forth the general rule that "amounts received by an employee through accident or health insurance for personal injuries or sickness shall be included in gross income" to the extent that such amounts are attributable to excluded employer contributions or are paid by the employer.[104] Section 105(a) refers to disability payments. Disability payments are payments to cover lost wages from time away from work due to accident or sickness.[105] Since no exclusion is available for any taxpayer with respect to disability payments, there is no discrimination between the tax treatment of opposite-sex married couples and same-sex couples under section 105(a).

Sections 105(b) and (c), however, make exceptions to the general rule of inclusion. Section 105(b) excludes amounts "paid, directly or indirectly, to the taxpayer to reimburse the taxpayer for expenses incurred by him for the medical care . . . of the taxpayer, his spouse, and his dependents."[106] This

---

[102] Badgett, *supra* note 31, at 1.

[103] Ryan J. Donmoyer & Hans Nichols, *Obama's $855,323 Tax Bill Would Be Bigger Under His Budget Plan*, BLOOMBERG.COM, Apr. 16, 2009, http://www.bloomberg.com/apps/news?pid=20601070&sid=a1soD_X9h1Qk&refer=home.

[104] I.R.C. § 105(a) (West 2008).

[105] *See* Tax-Exempt Benefits from Accident and Health Plans (CCH) ¶ 6702.01.

[106] I.R.C. § 105(b) (West 2008).

section covers medical reimbursements, which are reimbursements paid directly or indirectly to the taxpayer for expenses incurred for medical care.[107]

Section 105(c) excludes amounts that "constitute payment for the permanent loss or loss of use of a member or function of the body, or the permanent disfigurement, of the taxpayer, his spouse, or a dependent" as long as such amounts are "computed with reference to the nature of the injury without regard to the period the employee is absent from work."[108] This section applies to dismemberment payments, which are payments made to compensate an employee for permanent "loss or loss of use of an appendage of the body, the loss of an eye, the loss of substantially all of the vision of an eye, and the loss of substantially all of the hearing in one or both ears."[109] As will be discussed in greater detail in Part IV, the exclusion for dismemberment payments accounts for a small portion of overall tax expenditures in the area of health benefits, but the exclusion can be a considerable benefit to the relatively small number of people who suffer from permanent disabilities that qualify them for dismemberment benefits.[110]

Thus, both medical care reimbursements and dismemberment payments are excludible if they are for the benefit of the employee, the employee's spouse, or the employee's dependents. As with section 106, same-sex spouses and partners do not fall within the scope of section 105; the value of medical care reimbursements and dismemberment payments to same-sex spouses and partners must be included in income. Similar to section 106, same-sex couples suffer discrimination under sections 105(b) and 105(c).

3. Health flexible spending arrangements

A health flexible spending arrangement ("health FSA") is a special kind of employer-provided benefit program that "provides employees with coverage which reimburses specified, incurred expenses."[111] Employees contribute to an FSA through salary reduction, and employers may make contributions for specific coverage.[112] Subject to maximum-reimbursement limits, employees may then seek reimbursement for qualified medical expenses from a health FSA.[113]

---

[107] Treas. Reg. § 1.105-2 (West 2009).
[108] I.R.C. § 105(c) (West 2008).
[109] Treas. Reg. § 1.105-3 (West 2008).
[110] *See infra* Part IV.C.
[111] Prop. Treas. Reg. § 1.125-5.
[112] EXP ¶ 1254.05 Flexible Spending Arrangements, Income (USTR).
[113] *Id.*

The tax treatment of health FSAs is controlled by the section 125 cafeteria plan rules.[114] Under section 125, if a health FSA meets specified requirements, the health FSA qualifies for the sections 106 and 105 exclusions.[115] However, sections 106 and 105 will limit the health FSA exclusions to benefits provided to an opposite-sex spouse or to dependents, so FSA reimbursements may not be made to a domestic partner.

The discriminatory effect of unequal access to health FSAs can significantly increase the tax burden for same-sex couples. Once again, assume two employees are in the 28 percent tax bracket.[116] Both employees purchase $5,000 hearing aids for their spouses. The first employee, who purchased the hearing aid for his opposite-sex spouse, is eligible to receive a $5,000 reimbursement from a health FSA. Since the $5,000 is excluded from income, the employee saves $1,400 in taxes. The second employee, who purchased the hearing aid for his same-sex spouse, is ineligible for the health FSA reimbursement. As a result, the employee with a same-sex spouse will pay $1,400 more in taxes than a colleague who purchased the same hearing aid for an opposite-sex spouse. Table 2 demonstrates the discriminatory effect of health FSAs on the same-sex couple.

Table 2: Effect of Health FSAs on Same-Sex Couples

	Opposite-Sex Spouses	Same-Sex Spouses
Amount Paid for Hearing Aid	$5,000	$5,000
Amount Funded with Tax-Free Income through Health FSA	$5,000	0
Amount Funded with Taxable Income	0	$5,000
Tax Liability (x 28%)	0	$1,400

4. Withholdings and payroll taxes

The unequal tax treatment of domestic partner benefits increases the tax burden on both employers and employees through payroll taxes. There are two main types of payroll taxes: Social Security taxes under the Federal Insurance Contributions Act (FICA), and unemployment taxes under the Federal

---

[114] *See supra* note 80 and accompanying text.

[115] *Id.*

[116] *See supra* note 92 (explaining why the 28 percent tax bracket is used for illustrating the hypothetical).

Unemployment Tax Act (FUTA).[117] Employers[118] pay both of these taxes based on employees' wages. As a result, when an employee's wages increase, so does the employer's tax liability. Since domestic partner benefits cause employees' wages to increase, employers who offer domestic partner benefits are liable for increased payroll taxes. Payroll taxes are imposed as follows.

The first type of payroll taxes, Social Security taxes,[119] are paid by employees and employers in equal amounts. Both employees and employers pay Social Security taxes equal to 7.65 percent[120] of wages.[121] As such, the total tax liability for Social Security taxes is 15.3 percent. The second type of payroll taxes, unemployment taxes, are paid only by employers.[122] Unemployment taxes[123] are imposed on wages[124] at a rate of 6.2 percent in

---

[117] A less common payroll tax that is modified by the proposed Act is imposed pursuant to the Railroad Retirement Tax Act (RRTA). Under code section 3221, certain carrier employers are required to pay "an excise tax, with respect to having individuals in his employ, equal to the applicable percentage of compensation paid" to employees. I.R.C. § 3221 (2002). Section 3231 defines "compensation" for the purposes of RRTA taxes. I.R.C. § 3231(e) (2004). As defined by that section, "compensation" does not include amounts paid to or on behalf of an employee and its dependents "on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death." *Id.* As with respect to Social Security and unemployment taxes, domestic partner benefits fall outside this definition.

[118] Note that both employees and employers pay Social Security taxes in equal amounts.

[119] Fed. Tax Coordinator Second Series (RIA) ¶ H-4546. There are two types of Social Security taxes: (1) the Old Age, Survivors and Disability Insurance (OASDI) tax and (2) the Medicare Insurance tax.

[120] Both employees and employers pay the OASDI tax at a rate of 6.2 percent. I.R.C. § 3101(a) (employees); 3111(a) (employers). The 6.2 percent rate applies to all wages received after 1989. *Id.* § 3101(a) (employees); 3111(a) (employers). Note that in 2009 OASDI taxes do not apply to wages over $106,800, making the maximum OASDI tax liability $6,621.60. This wage ceiling is adjusted annually for inflation. Both employees and employers pay Medicare Insurance Tax at a rate of 1.45 percent. I.R.C. § 3101(b)(6) (employees); 3111(b)(6) (employers). The 1.45 percent rate applies to all wages received after 1985. *Id.* § 3101 (b)(6).

[121] Fed. Tax Coordinator Second Series (RIA) ¶ H-4646. Under 3121(a), "employer payments . . . to or on behalf of an employee or his dependents under a qualifying plan or system . . . that are made under a workers' compensation law and that are for disability that resulted from sickness or accident, are not wages for [Social Security tax purposes]." I.R.C. § 3121(a) (Westlaw 2009). Also excluded from the definition of wages are payments made on behalf of an employee or his dependents under a qualifying plan or system on account of medical or hospitalization expenses in connection with sickness or accident disability, or death. Domestic partner benefits are included in the definition of wages as they are not excluded from the definition of wages. *Id.*

[122] Internal Revenue Serv., Federal Unemployment Tax, http://www.irs.gov/businesses/small/international/article/0,,id=104985,00.html. In fact, most employers pay both a Federal and a state unemployment tax.

[123] *Id.* Unemployment taxes fund "payments of unemployment compensation to workers who have lost their jobs." Internal Revenue Service, Federal Unemployment Tax, IRS.gov,

calendar years 1988 through 2009, and at a rate of 6.0 percent in 2010 and following years.[125]

Domestic partner benefits constitute wages for the purposes of both Social Security taxes and unemployment taxes.[126] As a result, employers who offer domestic partner benefits are likely to have greater payroll tax liability than employers who do not offer domestic partner benefits. This increase in payroll taxes is not trivial. One study estimated that, on average, employers pay $248 in Social Security taxes alone for every employee who receives domestic partner benefits for his or her same-sex partner.[127] Altogether, United States employers pay "a total of $57 million per year in additional payroll taxes because of this unequal tax treatment."[128]

To illustrate the effect of inclusion of domestic partner benefits on payroll taxes, consider again the two couples from the example accompanying Table 1.[129] Recall that the first taxpayer received single plus-one benefits for his opposite-sex spouse and incurred no taxable income attributable to health benefits. Further recall that the second taxpayer received single plus-one benefits for his same-sex spouse and incurred $3,870 taxable income attributable to domestic partner benefits. The amount of payroll taxes attributable to health benefits paid by the taxpayers' employers are reflected in Table 3 below.

---

http://www.irs.gov/ businesses /small/international/article/0,,id=104985,00.html (last visited Jan. 19, 2010). The federal unemployment tax is imposed by I.R.C. section 3301. Section 3301 imposes on every employer: "an excise tax, with respect to having individuals in his employ... [on] the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c))." *Id.*

[124] I.R.C. § 3306(b) (West 2009). Internal Revenue Code section 3306(b) defines wages for unemployment tax purposes. The 3306(b) definition mirrors the 3121(a) definition applicable to Social Security taxes; it excludes from the definition of "wages" amounts of payment made to "an employee or any of his dependents" under a plan or system established by the employer for its employees with respect to: sickness or disability payments made under a workers' compensation plan, medical or hospitalization expenses in connection with sickness or accident disability, or death. *See supra* note 122. Domestic partner benefits are not excluded from the definition of wages. *See* I.R.C. § 3121(a) (West 2009).

[125] *Id.* § 3301 (West 2009).

[126] *See supra* notes 122 and 124.

[127] BADGETT, *supra* note 31, at 6. Note that employees and employers pay equal amount in Social Security taxes.

[128] *Id.* at 1.

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

Table 3: Effect of Inclusion of Domestic Partner Benefits on Employers' Payroll Taxes

	Opposite-Sex Spouses	Same-Sex Spouses
Value of Health Benefits	7,988	7,988
Taxable Amount of Health Benefits	0	3,870
FICA Taxes (Social Security taxes) x 7.65%	0	296
FUTA Taxes (Unemployment taxes) x 6.2%	0	240
Payroll Taxes	0	536

The employer of the employee who receives health benefits for his same-sex spouse will pay $536 more total payroll taxes than will the employer whose employee receives health benefits for his opposite-sex spouse. This disparate tax treatment is concerning for at least two reasons. First, it is conceivable that the increased payroll tax burden on employers could encourage employers to hire a heterosexual worker over an equally or greater qualified gay or lesbian worker.[130] Second, the aggregate increase in payroll taxes is a disincentive to employers offering domestic partner benefits in the first place. Eliminating this inequity would be an important step toward ensuring equal treatment of gays and lesbians in the workplace.

Moreover, recall that Social Security taxes are paid in equal amounts by employers and employees. As a result, in addition to the $536 of payroll taxes paid by the employer, the employee will pay $296[131] in Social Security taxes. The total payroll tax imposed on the domestic partner benefits, therefore, is $832, as compared to the $0 payroll tax imposed on opposite-sex marital benefits.

Table 4 displays the total tax paid on domestic partner benefits as a result of the tax inclusion.

---

[130] Gary Fealk, *Sexual Orientation Discrimination and the Employment Non-discrimination Act*, HRHERO.COM, Jan. 9, 2009, http://www.hrhero.com/hl/010909-lead-employment_nondiscrimination _act.html (stating that no federal law outlaws employment or workplace discrimination on the basis of sexual orientation).

[131] This amount equals 7.65 percent of the $3,870 taxable value of domestic partner benefits.

Table 4: Total Taxes Paid on Domestic Partner Benefits Compared to Taxes Paid on Health Benefits Provided for an Opposite-Sex Spouse

	Opposite-Sex Spouses	Same-Sex Spouses
Income Tax Paid by Employee	0	1,084
Payroll Tax Paid by Employee	0	296
Payroll Tax Paid by Employer	0	536
Total Tax Attributable to Health Benefits Provided for Spouse	0	1,918

5. Amplifying effect of unequal filing status on tax liability for domestic partner benefits

The examples up to this point have assumed that the two taxpayers share the same marginal tax bracket. This assumption allowed us to isolate the effect of the tax treatment of health benefits on same-sex couples. It is important to recognize, however, that the unequal tax treatment of domestic partner benefits is only one of many tax inequities faced by same-sex partners. The most significant of these inequities, unequal filing status, can serve to exacerbate the problem of unequal taxation of domestic partner benefits.

The above examples assumed that two taxpayers shared a constant 28 percent tax bracket. In reality, however, individuals with same-sex and opposite-sex spouses often do not share the same tax bracket, even when they have the same combined income. The reason for the disparity is that opposite-sex spouses are permitted to file joint federal returns and use the married tax rate schedule, while same-sex spouses are each required to file as single individuals and use the single individual tax rate schedule. Since the joint married federal tax rate schedule is more favorable than the individual federal tax rate schedule, it is not uncommon for the same taxable income to be taxed at different tax rates depending on filing status.[132] The disparate tax rates can exacerbate the problem of unequally taxed benefits.

Consider once again two taxpayers, one with an opposite-sex spouse and one with a same-sex spouse. Instead of assuming a constant marginal rate, this time assume that both taxpayers hold a job with a base salary of $180,000[133] per

---

[132] *See* William P. Kratzke, *The Defense of Marriage Act (DOMA) is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399, 405-412 (2005).

[133] *See* Rev. Proc. 2008-66, 2008-45 I.R.B. 1107 (amounts to over $171,550 are taxed at the thirty-three percent marginal rate. The relatively high salary of $180,000 per year was chosen for this example because it yields a taxable income of $172,617 that lands the same-sex couple

year, while their spouses have $5,000 per year income.[134] Once again, both taxpayers receive health benefits for their spouses through single plus-one coverage. Remember that single plus-one coverage costs $7,988,[135] and the employer requires the employee to contribute $1,903, while the employer contributes $6,085.[136] Further recall that single coverage costs $4,118,[137] and the employer requires the employee to contribute $788, while the employer contributes $3,330.[138] Table 5 shows gross income of the two taxpayers.

Table 5: Effect of Section 106 on Gross Income

	Opposite-Sex Spouse	Same-Sex Spouse
Base Salary	180,000	180,000
Less Excluded Salary Reduction	(1,903)	(788)[139]
Plus Included Employer Contribution	0	2,755
Gross Income	178,097	181,967

in the 33 percent tax bracket once domestic partner benefits are taxed. Had the same-sex couple in the example been permitted to file jointly, their taxable income could have risen to $208,850 before it would have reached the 33 percent tax bracket, an amount $37,300 higher than the threshold faced by the same-sex couple under current law. The example focuses on a same-sex couple at the borderline between the 28 percent and 33 percent brackets in order to better compare the results to the outcome of previous examples that had assumed a 28 percent tax bracket for both taxpayers. It is important to note, however, that the same distortions will occur whenever an opposite-sex couple and same-sex couple occupy different tax brackets. Often, an employee with an opposite-sex spouse and an employee with a same-sex spouse can share a constant salary but occupy two different tax brackets. For example, an employee with an opposite-sex spouse with taxable income between $33,950 and $67,900 will be taxed at the 15 percent bracket if he files jointly, while an employee with a same-sex spouse who has taxable income between $33,950 and $67,900 will be taxed at the 25 percent tax bracket. Thus, although this example uses a high starting salary in order to demonstrate its point in light of prior examples, the amplifying effects of filing status will also be seen at considerably lower income levels than the one used in this example.

[134] *See* note 92 and accompanying text. The $5,000 income of the same-sex spouse is above the exemption amount and, therefore, disqualifies the spouse for dependent status.

[135] MEP Survey, Table I.E.1, *supra* note 70.

[136] MEP Survey, Table I.E.2, *supra* note 69.

[137] MEP Survey, Table I.C.1, *supra* note 95.

[138] MEP Survey, Table I.C.2, *supra* note 96.

[139] The employee with the same-sex spouse will have a $1,903 salary reduction, an amount equal to the employee contribution for single-plus one benefits. The excluded amount, however, is only the $788 reduction attributable to single coverage. The remaining $1,115 of the employee contribution constitutes taxable income.

Note that the difference in gross income of the two taxpayers is $3,870, an amount equal to the value of taxable domestic partner benefits received by the second taxpayer.[140] But the added income due to domestic partner benefits tells only the beginning of the story for these two taxpayers. Assume that it is the 2009 tax year and neither taxpayer itemizes deductions. The taxpayer with the opposite-sex spouse is married under federal law and will file a joint tax return, will take two $5,700 standard deductions,[141] will take two $3,650 personal exemptions,[142] and will pay tax at the married filing jointly tax rate.[143] In contrast, the taxpayer with the same-sex spouse will be treated as an unrelated third party to her wife: she will file a single return, take one standard deduction, take one personal exemption, and pay tax at the unmarried individual rate. Table 6 shows the taxpayers' total tax liability.

Table 6: Effect of Filing Status on Income Tax Liability (2009 Tax Year)

	Opposite-Sex Spouses	Same-Sex Spouses	
Gross Income	178,097	181,967	$5,000
Spouse's Income	5,000	0	0
Personal Exemptions	(7,300)	(3,650)[144]	(3,650)
Standard Deduction	(11,400)	(5,700)	(5,700)
Taxable Income	164,397	172,617	0
Marginal Rate	28%	33%	0
Income Tax Imposed	$33,474.25[145]	$42,106.11[146]	0

[140] *See supra* Table 1.

[141] *See* Rev. Proc. 2008-66, 2008-45 I.R.B. 1107. Note that this fact pattern assumes that the taxpayers do not itemize deductions.

[142] *See* Rev. Proc. 2008-66, 2008-45 I.R.B. 1107.

[143] *See* I.R.C. § 1(a); Rev. Proc. 2008-66, 2008-45 I.R.B. 1107.

[144] Note that the actual personal exemption available to the employee in this example will actually be less than $3,650 because the employee's $181,967 income is above the beginning phase-out level for unmarried individuals, which is $166,800. AGI. Rev. Proc. 2008-66, 2008-45 I.R.B. 1107. The opposite-sex couple, on the other hand, would benefit from the full personal exemption because their $178,097 income is below the phase-out level for joint-filing married persons, which is $250,200. *See id.* Thus, the tax disparity in the example is, in reality, greater than shown. The example disregards this added disparity, however, in order to simplify the analysis.

[145] *See* I.R.C. § 1(a) (Westlaw 2008); Rev. Proc. 2008-66, 2008-45 I.R.B. 1107. The opposite-sex couple's tax liability equals $26,637.50 plus 28 percent of the excess over $137,050. $26,637.50 + .25(164,397–137,050) = $33,474.25.

[146] *See id.* § 1(c) (West 2008); Rev. Proc. 2008-66, 2008-45 I.R.B. 1107. The same-sex couple's tax liability equals $41,754 plus 33 percent of the excess over $171,550. $41,754 + .33(172,617–171,550) = $42,106.11.

Thus, although both taxpayers had the same base salary and spouses with equal base salaries, the same-sex couple paid about $8,632 more taxes than their opposite-sex counterpart, a 25.7 percent increase in total tax liability. A large part of this difference is attributable to the opposite-sex couple's ability to file jointly.[147] Notice, however, that the filing status discrimination amplified the effect of the disparate treatment of domestic partner benefits. The opposite-sex couple's gross income was reduced by $1,903, saving the taxpayer about $533 in taxes given the 28 percent marginal rate. The same-sex couple's gross income was instead increased by $1,967, costing the taxpayer $604 in extra taxes.[148] Taking into account the different marginal rates attributable to filing status, the disparate treatment of health benefits accounted for about $1,137 difference in tax liability. This figure is $53 greater than the $1,084 estimate in the original example.[149] Thus, this example shows the potential of other

---

[147] *See generally* Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2008) (discussing that the ability of married couples to file jointly has significant tax saving advantages due in part to income-splitting.) Income splitting is when the aggregate income of a couple is divided so that both parties are taxed on one-half of the total income. *Id* at 812-19. The marital tax rates are designed to replicate the effect of income splitting; though the married couple pays tax on its combined income, the tax paid should roughly mirror what would be owed if the couple were two individuals engaging in income splitting. *Id.* The effect is either a marriage-bonus or marriage-penalty. *Id.* A marriage-bonus occurs when one spouse has a significantly higher income than the other spouse, as in the example used here. *Id.* When a couple like couple A's incomes are split, the couple essentially pays tax on the average of the two incomes; as a result, the marginal rate paid on all income is lower than if both paid as unmarried individuals. *Id.* Conversely, a marriage-penalty occurs when both spouses have roughly the same income. *Id*. When their income is aggregated, it may push the income into a higher tax bracket; as a result, the marginal rate paid on all income is higher than if both paid as unmarried individuals. *Id.* In most cases, though, joint filing and marital tax rates have a tax saving effect for married couples. *Id.* On the other hand, the unmarried individual's tax schedule is the least advantageous of all tax schedules. *Id.* Since same-sex couples—married, partnered, or otherwise—are treated as unmarried individuals for federal tax purposes, they are at a significant tax disadvantage even before considering the many deductions and exclusions that are available only to married couples. *Id.* The effect of this disparate tax treatment is illustrated in the example.

[148] The taxpayer with the same-sex spouse was pushed out of the 28 percent tax bracket and into the 33 percent tax bracket because the domestic partner benefits were taxed. As a result, $1,067 of the taxpayer's income was taxed at the 33 percent rate. Domestic partner benefits accounted for $1,967 of income. $1,067 of the domestic partner benefits were taxed at the 33 percent rate, and the remaining $900 were taxed at the 28 percent marginal rate. This results in $604 taxes.

[149] *See supra* Table 1. If both couples had remained in the 28 percent tax bracket, then the difference in tax liability would in fact have been $1,084 as in the prior example. The difference here is caused by the step-up of the same-sex couple's tax rate to the 33 percent bracket. The step-up in this case was caused entirely by the inclusion of benefits, but there are many income levels that would result in different tax rates for same-sex versus opposite-sex couples. *See supra* note 91. It should be noted that an opposite-sex married couple filing

inequities in the tax code to exacerbate the problem of unequal taxation of domestic partner benefits.

What is most striking about the above example is how clearly the tax treatment of same-sex partners violates the fundamental principal of fairness that underlies the American tax system.[150] The American tax system is a progressive tax system that is often justified by an "ability-to-pay" principal: taxpayers in lower brackets bear less of the tax burden than those with higher incomes because those with higher incomes have a greater ability to pay than those in the lower brackets.[151] Based on the ability-to-pay principal, the progressive tax system seeks to achieve both "vertical equity" and "horizontal equity."[152] Vertical equity is achieved when "taxpayers with unequal incomes . . . pay amounts of tax which are sufficiently unequal to fairly reflect the differences in their incomes."[153] Horizontal equity, by contrast, is achieved when "taxpayers with equal incomes . . . pay equal amounts of tax."[154]

As seen in the above example, the tax treatment of same-sex partnerships fails to achieve either vertical equity or horizontal equity. In the example, both the same-sex couple and the opposite sex couple began with the same $185,000 income, Yet, the same-sex couple paid almost 26 percent more taxes than the opposite sex couple. In addition, the two couples—which were both married under state law—were placed in different tax brackets; the opposite sex couple was in the 28 percent tax bracket, while the same-sex couple was taxed in the 33 percent tax bracket.

Countervailing policy reasons have been used to justify taxing married couples at a lower rate than individuals, violating horizontal equity to favor marriage.[155] Namely, marriage has traditionally been the preferred family structure for raising children, and married couples are assumed to spend more disposable income than individuals for child care; therefore, they should be taxed a lower rate than individuals.[156] Given these assumptions, however, same-sex partnerships are more analogous to opposite-sex marriages than to unmarried individuals.

---

jointly with $172,617 taxable income will remain well within the 28 percent tax bracket.

[150] *See* J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimensions*, 27 VA. TAX REV. 437, 452 (2008).

[151] *See* Patrick E. Tolan, Jr., *The Flurry of Tax Law Changes Following the 2005 Hurricanes*, 72 BROOK. L. REV. 799, 836 (2007).

[152] *See* Fleming & Peroni, *supra* note 150, at 453.

[153] *Id.*

[154] *Id.*

[155] *See* Joel S. Hollingsworth, *Save the Cleavers: Taxation of the Traditional Family*, 13 REGENT U. L. REV. 29, 44 (2000-01).

[156] *Id.* at 29.

As of the 2000 census, 27 percent of same-sex couples had a child of their own under age 18 living in their home.[157] A more recent study concluded that more than one in three lesbians has given birth, and one in six gay men has fathered or adopted a child.[158] By contrast, "the percentage of households that were [opposite-sex] married-couple families with children under 18 decreased from 23.5 percent in 2000 to 21.6 percent in 2006."[159]

Any argument, then, that same-sex couples should be taxed at the individual rate because they are less likely to have families to support should fail. Moreover, care for dependents is covered by the dependent exemption.

The ability-to-pay principal requires that same-sex partnerships be taxed at the same rates as opposite-sex marriages. Assume that both married couples in the example have one child living in the home. There is no reason to assume that the same-sex couple would have any greater financial ability to care for its child while paying a higher tax rate; rather, both couples have an equal ability to pay.

The policy goals that justify the progressive tax system require the equal tax treatment of same-sex partnerships. Eliminating inequities with respect to domestic partner benefits will be much needed progress toward ensuring that similarly situated same-sex and opposite-sex couples are taxed equally. This correction, however, does not address significant discrimination in other areas of the tax code that continues to violate equity and ability-to-pay principals. Thus, although legislation like the proposed Act that seeks to eliminate unequal taxation of health benefits represents an important step toward equal tax treatment for same-sex partners, it is only a first step.

---

[157] Gary J. Gales, et al., The Williams Institute, The Urban Institute, Adoption and Foster Care by Gay and Lesbian Parents in the United States (Mar. 2007), http://adoption.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=adoption&cdn=parenting&tm=23&f=20&tt=12&bt=0&bts=1&zu=http%3A//www.urban.org/publications/411437.html.

[158] *Id.*

[159] Press Release, U.S. Census Bureau, New Census Bureau Data Reveal More Older Workers, Homeowners, Non-English Speakers, http://www.census.gov/Press-Release/www/releases/archives/american _community_survey_acs/010601.html (last visited Jan. 19, 2010). Note that of unmarried opposite-sex couples who live in the same home, about 41 percent have children under age 18 who live with them. Karen S. Peterson, *Unmarried With Children: For Better or Worse?*, USATODAY.COM, Sept. 17, 2003, http://www.usatoday.com/life/2003-09-17-cohab-cover_x.htm (last visited Jan. 19, 2010). This fact may cut in favor of extending equal tax treatment of benefits to unmarried opposite-sex couples. *See infra* Part IV.B.1c.

B. State Tax Treatment and the Complexity Caused by Federal Discrimination

State tax laws tend to be derivative of federal tax laws because most states begin with income figures imported from federal returns.[160] For this reason, when an employee's federal gross income is increased due to domestic partner benefits received, in most states there will be a corresponding increase in the employee's state tax liability.

In the few states where same-sex spouses or partners are permitted to file jointly, a "dummy" return process is intended to prevent the federal treatment of these couples from influencing tax liability at the state level.[161] The theory behind the "dummy" return is that a same-sex couple can replicate a "married" tax return if the couple simply prepares a fake federal joint tax return as if the couple were married.[162] But under the current system, it is not clear whether the dummy return process alone will eliminate inequities at the state level with respect to domestic partner benefits.[163] Since opposite-sex marital benefits are covered by the sections 106 and 105 exclusions, no additional deduction is needed or available in the Internal Revenue Code to cover these amounts. Domestic partner benefits, however, are reported as wages on employees' W-2 earnings summary,[164] so the only way to avoid taxing these amounts is to deduct the value of domestic partner benefits from reported wages.

This leaves members of same-sex partnerships in a dilemma when preparing "dummy" returns: are they required to use the figures shown on their W-2 earnings summary, or can they adjust their reported income to treat amounts attributable to domestic partner benefits as if they had been excluded from income? If they use the figure reported on their W-2, there is no way for them to actually reach their hypothetical "married" income because no deduction is available to offset the included income, which would have been excluded if they had been married. To avoid this problem, the same sex partners can adjust their reported income to treat amounts representing the value of health care as if they had been excluded. Since the dummy forms are never filed, and thus would never be subject to audit, this may be a viable option as long as accurate records of the salary reductions are kept.

---

[160] State Personal Income Taxes: Federal Starting Points, FEDERATION OF TAX ADMINISTRATORS, Jan. 1, 2008, http://www.taxadmin.org /fta/rate/inc_stp.html.

[161] *See* Eva Rosenberg, *Singular Tax Status: Same-Sex Couples Face Complex Decisions When Doing Their Taxes*, MARKETWATCH, Feb. 9, 2007, http://www.marketwatch.com/story/same-sex-couples-face-complex-questions-when-doing-their-taxes?dist=rss.

[162] *See id.*

[163] IOWA TAX TREATMENT OF SAME-SEX MARRIAGES, *supra* note 44.

[164] *See supra* note 80.

Thus, in the absence of affirmative state action, same-sex partners are faced with an unresolved procedural dilemma. Several states have, however, taken steps to address the issue. There are two main approaches, which this paper will refer to as the "California approach" and the "Massachusetts approach." The California approach solves the problem by providing a state-level deduction for domestic partner benefits. The California deduction is based on California Revenue & Tax Code section 17021.7, which states:

> [f]or purposes of this part, the domestic partner of the taxpayer shall be treated as the spouse of the taxpayer for purposes of applying only Sections 105(b), 106(a), 162(*l*), 162(n), and 213(a) of the Internal Revenue Code and for purposes of determining whether an individual is the taxpayer's "dependent" or "member of their family" as these terms are used in those sections.[165]

Through this provision, California offers a deduction for amounts attributable to the enumerated health benefits.[166] Importantly, domestic partner benefits are only excluded under California law for domestic partners registered with the state; unregistered domestic partners must pay California state tax on any domestic partner benefits received.[167]

Under the Massachusetts approach, by contrast, domestic partner benefits are excluded by requiring employers to perform two sets of calculations when they determine employees' taxable income.[168] Massachusetts employers report

---

[165] CAL. REV. & TAX CODE § 17021.7 (West 2007); *see also* California Franchise Tax Board, What If I'm a Domestic Partner?, http://www.ftb.ca.gov/ individuals /faq/dompart.shtml (last visited Jan. 19, 2010) [hereinafter Domestic Partner Answers]. Note that, rather than setting forth a blanket rule that domestic partners shall be treated as spouses for all purposes, the California Revenue and Tax Code enumerates certain I.R.C. provisions with respect to which domestic partners shall be treated as spouses. This may reflect a policy decision that the blanket rule, which would implicate up to 81 I.R.C. provisions, would be too burdensome to administer.

[166] Cal. Franchise Tax Board, Claiming Income, Exemptions, and Deductions, http://www.ftb.ca.gov/individuals /Same_sex_marriage /TaxRtn_claims_faq.shtml (last visited Jan. 19, 2010) (explaining that "[f]ederal tax law does *not* allow the same treatment of these [domestic partner] benefits for same-sex married couples. These deductions are taken as an adjustment on the Schedule CA (540) or Schedule CA (540NR).").

[167] *See* Domestic Partner Answers, *supra* note 165.

[168] Dep't of Revenue, TIR 04-17: Massachusetts Tax Issues Associated with Same Sex Marriages, http://www.mass.gov/ ?pageID=dorhomepage&L=1&L0=Home&sid=Ador (follow "For Businesses" link; follow "Help & Resources" link; follow "Legal Library" link; follow "Technical Information Releases" link; follow "TIRs – By Year(s)" link; follow "2004 Releases" link; follow "TIR 04-17" link) (last visited Jan. 19, 2010) [hereinafter Massachusetts TIR 04-17]; MARTIN J. BENISON, COMPTROLLER, TAXABILITY OF SAME SEX SPOUSE'S HEALTH INSURANCE 1-2 (2006), http://www.mass.gov/Aosc/docs/policies_procedures/payroll_ lcm/po_pr_samesex_spouse_health_ins.pdf; MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO LLC, MASSACHUSETTS DEPARTMENT OF REVENUE ISSUES (ITS FIRST) SAME SEX MARRIAGE GUIDANCE: ASSESSING THE IMPACT OF EMPLOYEE BENEFITS PLANS 2 (2004), http://www.mintz.com/media/upload/docs/dyn/publications/ -Advisory-804.pdf [hereinafter

income to the state and withhold taxes on income that is taxable under Massachusetts law.[169] The value of domestic partner benefits is not taxable under Massachusetts law, so amounts attributable to domestic partner benefits are not reported or withheld for state tax purposes.[170] Massachusetts employers must include domestic partner benefits in wages reported for federal tax purposes.[171]

Affirmative steps like those made in California and Massachusetts are necessary for any state that recognizes same-sex marriages to avoid duplicating the inequity at the state level. Of the remaining states that legally recognize some form of same-sex relationship, the state tax treatment of domestic partner benefits is as follows: Connecticut,[172] New Jersey,[173] Vermont,[174] Oregon,[175] and the District of Columbia all follow the Massachusetts approach to exclude domestic partner benefits; New Hampshire and Washington[176] do not levy any income tax on state residents and, therefore, do not tax domestic partner benefits; Iowa seems to follow the California approach;[177] Hawaii[178] currently taxes domestic partner benefits. In addition to these states, Rhode Island, which does not recognize any form of same-sex partnership performed in-state,[179] does not tax domestic partner benefits.[180]

MINTZ ADVISORY].

[169] MINTZ ADVISORY, *supra* note 168 at 2; Massachusetts TIR 04-17, *supra* note 169.

[170] *Id.*

[171] Benison, *supra* note 168, at 1.

[172] CONN. DEP'T OF REVENUE SERV., CONNECTICUT EMPLOYER'S TAX GUIDE: CIRCULAR CT 6 (2009).

[173] N.J. DIVISION OF PENSIONS & BENEFITS, FACT SHEET #71: BENEFITS UNDER THE DOMESTIC PARTNER ACT 4 (2008), http://www.state.nj.us/treasury/ pensions /epbam/exhibits/factsheets/ fact71.pdf. Note that New Jersey does not tax domestic partner benefits received by members of legal civil unions, but the state does tax domestic partner benefits received by same-sex couples who are not in a civil union.

[174] Vt. Dep't of Banking, Sec. & Health Care Admin., Guide for Civil Union Partners in Vermont, http://www.bishca.state.vt.us/ Civilunion/civiluguideweb.htm; D.C. CODE § 47-1803.02(a)(2)(W) (2009).

[175] Or. Dep't of Revenue, Domestic Partner Benefits, https://secure.dor.state.or.us/piti/ index.cfm? action=topic&id=0083 (last visited Jan. 19, 2010) (note that Oregon followed the California approach until February, 2008).

[176] FTA State Taxes, *supra* note 51; HUMAN RIGHTS CAMPAIGN, GROSSING UP PROPOSAL 2 (2008), http://www.hrc.org/documents/Human_Rights_ Campaign_Foundation_-_2008-01-22_-_Proposal_for_Grossing_Up.pdf [hereinafter GROSSING UP PROPOSAL].

[177] IOWA TAX TREATMENT OF SAME-SEX MARRIAGES, *supra* note 44 (providing guidance for married same-sex couples that suggests that the state will follow the California approach by allowing taxpayers to deduct the value of domestic partner benefits).

[178] MERCER HUMAN RES. CONSULTING, DON'T NEED TO OFFER DOMESTIC PARTNER BENEFITS? ARE YOU SURE? 2 (2007), http://us.select. mercer.com /search/article/20076561/ (Maine and Hawaii tax domestic partner benefits).

[179] *See* Katie Zezima, *Rhode Island Steps Toward Recognizing Same-Sex Marriage*, N.Y.

Note that Iowa taxes net income, which is federal adjusted gross income before the net operating loss deduction plus certain state-level adjustments.[181] As such, in order for newly married same-sex couples in Iowa to receive equal state tax treatment, Iowa needed to take steps to exclude the value of domestic partner benefits for state wages purposes or to add a deduction for the imputed value of domestic partner benefits. Though it is not entirely clear what procedure Iowa has adopted, the state did recently issue guidance to same-sex spouses that explained that, since the state and federal definitions of marriage differ, "[s]ame-sex spouses may need to perform special calculations to ensure they report the correct amounts on their Iowa tax returns."[182] Among the disparities specifically addressed in the memorandum were employer-provided health benefits, which will now be tax-exempt under Iowa law.[183] The treatment of domestic partner benefits as tax-exempt under Iowa state law, combined with the suggestion that same-sex spouses perform "special calculations" to determine their state tax liability, suggests that same-sex couples in Iowa will be permitted to deduct the value of domestic partner benefits. This procedure roughly follows the California approach.

IV. THE SOLUTION: TAX EQUITY FOR HEALTH PLAN BENEFICIARIES ACT OF 2009

In response to the unequal taxation of domestic partner benefits, the HRC and other organizations have recommended that employers "gross-up" the salaries of employees who receive domestic partner benefits in order to eliminate the unfair taxation.[184] For example, the same-sex employee in the last example paid an additional $1,433 in taxes ($1,137 extra income taxes due to domestic partner benefits[185] and $296 extra Social Security taxes[186]). In order to "refund" the tax and eliminate the inequity, the employer can gross-up the employee's salary by giving the employee $1,906 cash ($1,433 to refund the extra tax incurred, and $473 to pay for the 33 percent tax on the $1,433 refund).[187] In this way, the employer effectively pays the extra taxes for the employee.

TIMES, Feb. 22, 2007, at A19, *available at* 2007 WLNR 3450989. Rhode Island may, however, recognize same-sex marriages performed out-of-state.

[180] GLAD, Family Law in Rhode Island, http://www.glad.org/rights/rhodeisland/c/family-law-in-rhode-island/ (last visited Jan. 19, 2010).

[181] IOWA CODE § 422.7 (Lexis 2009).

[182] IOWA TAX TREATMENT OF SAME-SEX MARRIAGES, *supra* note 44.

[183] *Id.*

[184] GROSSING UP PROPOSAL, *supra* note 176 at 1.

[185] *See supra* note 149.

[186] *See supra* note 120.

[187] *See* GROSSING UP PROPOSAL, *supra* note 176 at 2.

Although the gross-up approach has been adopted by at least some sympathetic employers,[188] there are problems with this approach. When the employer in the example above grossed-up the employee's salary by $1,906, the employer's payroll tax burden increased. Instead of paying extra payroll taxes on $3,870 extra income attributable to domestic partner benefits, the employer must pay extra payroll taxes on $5,776 extra income. At the 13.85 percent payroll tax rate,[189] the employer will pay $800 extra payroll taxes for the employee who receives domestic partner benefits.

In sum, the employer that grossed-up the salary must pay $2,706 more for the employee receiving domestic partner benefits than for the employee who received benefits for his opposite-sex spouse. Meanwhile, grossing-up does not eliminate the tax inequity; it merely shifts the tax incidence to the employer that provided domestic partner benefits. Consequently, the gross-up solution is an inadequate response to the unequal tax treatment of domestic partner benefits. Instead, Congress should act to eliminate the inequity at its source by amending the Internal Revenue Code. Passing the Tax Equity for Health Plan Beneficiaries Act of 2009 would accomplish this goal.

The earliest version of the proposed Act was introduced on February 26, 2003, by Representative Jim McDermott of Washington.[190] The Tax Equity for Health Plan Beneficiaries Act of 2003, which stalled in committee, would have added a subsection to Internal Revenue Code section 106 that read:

> Coverage Provided for Eligible Beneficiaries of Employees.—In the case of employer-provided coverage under an accident or health plan for an eligible beneficiary (other than a spouse or child) of an employee, such coverage shall be treated for purposes of this section in the same manner as such coverage for the spouse of an employee is treated.[191]

This early version of the bill, then, would have extended the section 106 exclusion of health benefits to domestic partner benefits, but it would not have extended the section 105 exclusions of medical care reimbursements or dismemberment payments to domestic partners, nor would it have addressed any other health-benefit related inequities. Moreover, it would not have adjusted code definitions of "wages" to reflect the new treatment of domestic partner benefits and, thus, may have introduced ambiguities to the Internal Revenue Code with respect to payroll taxes.[192]

---

[188] *Id.* at n.6 (citing United States Department of Labor, Advisory Opinion 2001-05A, http://www.dol. gov/ebsa/regs/aos/ao2001-05a.html).

[189] *See supra* notes 121, 122 (In 2009, payroll tax rates equal 7.65 percent Social Security taxes, 6.2 percent unemployment taxes).

[190] H.R. 935, 108th Cong. (2003).

[191] *Id.*

[192] *See id.; see also supra* Part III.A.4.

Representative McDermott reintroduced the Tax Equity for Health Plan Beneficiaries Act in the House on March 29, 2007.[193] The proposed Tax Equity for Health Plan Beneficiaries Act of 2007 addressed many of the limitations of the previous 2003 version by including, among other amendments, amendments to section 105 and to sections defining "wages" for payroll tax purposes.[194] The proposed Tax Equity for Health Plan Beneficiaries Act of 2007 broadly extended the exclusion to an undefined "qualifying beneficiary" and "any qualifying child who is a dependent of the eligible beneficiary."[195]

In contrast, the proposed Tax Equity for Health Plan Beneficiaries Act of 2009 expressly defines "qualifying beneficiary" but declines to extend the exclusion to "any qualifying child who is a dependent of the eligible beneficiary." Thus Part IV will analyze the Tax Equity for Health Plan Beneficiaries Act of 2009 to determine the scope and effect of the bill, to evaluate the effectiveness of the strategy employed by the proposed legislation, and to recommend that Congress revise and pass the proposed Act.

A. Scope and effect of the tax equity for health plan beneficiaries act of 2009

1. Extending the 106 and 105(b) exclusion to certain domestic partner benefits provided to "qualifying *beneficiaries"*

The proposed Act would extend both the section 106 exclusion for employer-provided health benefits and the section 105(b) exclusion for medical care reimbursements to include coverage provided to any "eligible beneficiary" of the employee.[196] "Eligible beneficiary" is defined by the proposed Act as "any individual who is eligible to receive benefits or coverage under an accident or health plan."[197] As such, the proposed Act would extend the section 106 exclusion of employer-provided health care benefits and the 105(b) exclusion for medical reimbursements to exclude benefits provided to a new class of individuals: eligible beneficiaries of employer accident and health plans.

Because the meaning of "eligible beneficiary," derives from how employers define eligible beneficiaries under their plans, the language of the proposed Act is not expressly limited to domestic partner benefits. Rather, the language

---

[193] H.R. 1820, 110th Cong. (2007).
[194] H.R. 1820 § 2(a)-(c).
[195] *Id.*
[196] H.R. 2625, 111th Cong. § 2(a)-(b) (2009).
[197] *Id.*

extends the tax exclusion to any beneficiaries of employer health benefits that an employer designates in its health plan. Interestingly, 58 percent of large employers that offer domestic partner benefits also offer health coverage to opposite-sex unmarried partners of employees.[198] The language of the proposed Act appears on its face to extend the exclusion to benefits provided to these unmarried opposite-sex couples. Thus, the scope of the proposed Act in this area is broad, encompassing both same-sex domestic partner benefits and benefits provided to unmarried opposite-sex partners.

It is less clear, however, whether the proposed Act includes any implied limitation on what kind of relationship an individual must have to the taxpayer in order to be included as "an eligible beneficiary." It is not enough to merely state that "an eligible beneficiary" may include either same-sex partners or opposite-sex unmarried couples. Cases may arise when an employer-provided health plan permits individuals to be included in the plan who are neither dependents of the taxpayer nor in a romantic relationship with the taxpayer. Though it seems unlikely that an employer would permit coverage of the friends of a taxpayer, one can easily imagine an employer-provided health plan that permits employees to elect coverage for a non-dependent child. In such a case, it seems likely that the phrase "eligible beneficiary" would extend the exclusion to coverage provided to the non-dependent child. If this result is not intended, then additional defining language in the Internal Revenue Code may be necessary to prevent this result.

2. Eliminating the payroll tax on domestic partner benefits

The proposed Act also amends the definitions of "wages" for the purposes of withholding requirements, the Social Security tax, and the unemployment tax.[199] The amendments, which are all relatively similar, exempt "eligible beneficiaries" from the definitions of wages for payroll tax and withholding purposes. This series of amendments has the effect of eliminating payroll taxes on domestic partner benefits.

---

[198] HUMAN RIGHTS CAMPAIGN, THE STATE OF THE WORKPLACE FOR GAY, LESBIAN, & TRANSGENDER AMERICANS 14 (2008-2009), http://www.hrc.org/documents/State_of_the_Workplace.pdf.

[199] H.R. 2625, 111th Cong. § 2(c)(2) (2009). Note that the proposed Act also amends the section 3231 definition of "compensation" for RRTA tax purposes. Currently, section 3231 exempts from the definition of "compensation" amounts paid under a plan or system to an employee and his dependents "on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death." I.R.C. § 3231(e) (West, Westlaw through P.L. 111-64). The proposed Act amends this language to extend the exemption to benefits provided to an employee's "eligible beneficiary." In this way, the proposed Act amends the code to eliminate unequal tax treatment of domestic partner benefits with respect to RRTA taxes. *See supra note* 118.

First, the proposed Act would amend section 3401(a) (definition of "wages") so that benefits provided to an "eligible beneficiary" would no longer be treated as wages for the purposes of withholdings.[200] Second, sections 3121(a)(2) (Social Security taxes) and 3306(b)(2) (unemployment taxes) would be amended to exempt from the payroll tax benefits provided to the employee's "eligible beneficiary."[201] Thus, the proposed Act would amend the code to eliminate the unequal tax treatment of domestic partner benefits with respect to payroll taxes.

3. Extending the exclusion to self-employed individuals

In addition to amending Internal Revenue Code sections 105 and 106, the proposed Act amends section 162 trade and business expenses deduction rules in order to make the exclusion for domestic partner benefits available to self-employed individuals. Because self-employed individuals do not receive benefits through a health-plan, the "eligible beneficiary" language used to amend sections 105 and 106 is inapplicable in this context. Instead, the proposed Act amends the current rules that allow self-employed individuals to deduct payments for health benefits provided for spouses and dependents.[202] The proposed Act modifies this section to additionally allow a deduction for health benefits purchased for an individual who meets certain modified dependency requirements.[203] The modified dependency requirements are broad enough to include a same-sex (or opposite sex) adult partner of the taxpayer.[204] Thus, the proposed Act would make the exclusion for domestic partner benefits available to self-employed individuals.

---

[200] H.R. 2625, 111th Cong. § 2(c)(4) (2009). Employers are required to collect taxes from employees by withholding taxes from the employee's wages when paid, either actually or constructively. Treas. Reg. § 31.3402(a)-1(b). "Wages" for withholding purposes is defined by I.R.C. section 3401 and "means all remuneration for services performed by an employee for his employer, except for . . . specifically excluded types of remuneration." Wages Defined for Income Tax Withholding Purposes (RIA) ¶ H-4326; I.R.C. § 3401. "Wages" under section 3401 generally includes the cash value of benefits, but certain benefits are exempt from the definition. Most notable for the purposes of this article, section 3401(a)(20) exempts excludible benefits "under a self-insured medical reimbursement plan." I.R.C. § 3401(a)(20). Since domestic partner benefits are not excludible, they would not qualify for the section 3401(a)(20) withholding exemption. The act of withholding does not itself create economic inequities.

[201] H.R. 2625 §§ 2(c)(1), 2(c)(3).

[202] H.R. 2625 § 3(a).

[203] The proposed Act would allow a deduction for benefits purchased for one individual who is over 18 years old who has the same principal place of abode as the taxpayer. H.R. 2625 § 3(a); I.R.C. § 152.

[204] *Id.*

4. Adjusting the rules governing flexible spending arrangements, health reimbursement arrangements, and health savings accounts to permit payments to same-sex partners

With respect to both flexible spending arrangements (FSAs) and health reimbursement arrangements (HRAs), the proposed Act would instruct the Secretary of the Treasury to issue guidance of general applicability providing that medical expenses that otherwise qualify for reimbursement under either arrangement may be reimbursed regardless of whether the expenses are attributable to a person who is not a spouse or dependent but who is otherwise an eligible beneficiary.[205] In addition, the proposed Act would amend the rules for Health Savings Accounts (HSAs) to permit purchase of health insurance for a "qualified beneficiary" from HSA funds.[206]

B. *Evaluation of the Proposed Act: Strategy and Effectiveness*

As recently as March, 2009, married same-sex couples in Massachusetts have filed suit to challenge the constitutionality of DOMA.[207] But in light of the prevalence of constitutional amendments banning same-sex marriage[208] and the conservative makeup of the Supreme Court, it seems unlikely that DOMA will be judicially overturned in the near future.[209] If and when DOMA is repealed or successfully challenged, the tax inequities addressed by the proposed Act will fall away and the battle for equal recognition of same-sex couples will be removed to the state level. At that time, there may be added pressure on states to move toward same-sex marriage in order to avoid harming their own citizens relative to gay and lesbian residents of other states.

Until DOMA is eliminated, however, DOMA prevents same-sex couples who achieve marriage-equality on the state level from receiving the same federal tax benefits as their opposite-sex married counterparts. The proposed Act can be viewed as an attempt to achieve tax equality for gay and lesbian couples by neutralizing the effects of DOMA with respect to health benefits.

---

[205] H.R. 2625 § 5.

[206] H.R. 2625 § 6.

[207] Gill v. Office of Pers. Mgm't, 1:09-cv-10309, filed Mar. 23, 2009 (D. Mass. 2009) *available at* http://www.glad.org/uploads/docs/ cases/gill-complaint-03-03-09.pdf.

[208] *Id.* As of June 2009, 29 state constitutions prohibited same-sex marriage and 11 states had statutes restricting marriage to one man and one woman. HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITION (2009), http://www.hrc.org/documents/ marriage_prohibitions_2009.pdf.

[209] *See generally* HRC Marriage Prohibition, *supra* note 209. President Obama has spoken of the need to repeal DOMA, but he has been largely silent on the issue since his January 2009 inauguration.

This section analyzes the strategy employed by the proposed Act and assesses its effectiveness as a step toward equal tax treatment of same-sex couples.

1. Analysis of the strategy employed by the proposed act

The proposed Act leaves the DOMA-mandated definition of "spouse" untouched but nevertheless extends to same-sex partners the favorable tax treatment of employer-provided health benefits. First, the proposed Act would make available to same-sex partners the section 106 exclusion of employer-provided health benefits, the section 105 exclusion for medical reimbursements, and the use of health FSAs.[210] These amendments also bring domestic partner benefits within the scope of section 125 cafeteria plan rules in order to eliminate tax on salary reductions for domestic partner benefits.[211] Second, the proposed Act would amend section 162 to permit self-employed workers to deduct the cost of health insurance purchased for domestic partners, and it begins to adjust the rules for HRAs, and HSAs.[212]

To achieve its goal of providing equal treatment for domestic partner benefits, the proposed Act extends the tax treatment currently available to opposite-sex spouses to a new class of health plan beneficiaries. In most cases, the beneficiary class is the "eligible beneficiary,"[213] but in other cases—with respect to the section 162*(l)* amendments—the new class results from broadening the code's existing definition of "dependent."[214] Whatever the approach, the result is the same: the proposed Act would create a class so broadly defined that it could include almost anyone to whom an employer extends health benefits pursuant to a plan, regardless of the relationship between the health plan beneficiary and the employee.[215] In taking this approach, the proposed Act relies on employers to act reasonably when defining their health plan eligibility.

It seems likely that employers will impose reasonable limitations on eligibility for health benefits; in theory, the proposed Act could become quite costly to the Treasury if access to employer-provided health benefits is

---

[210] H.R. 2625, §§ 2(a)-(b), 5.

[211] *See* I.R.C. § 125(f).

[212] H.R. 2625, §§ 3, 6.

[213] H.R. 2625, § 2(a)-(b).

[214] H.R. 2625 § 3(a).

[215] *See supra* Part IV. Note, however, that the proposed Act does include some limiting language. For example, the modified dependency requirements in the section 162*(l)* amendment would limit the availability of dependency status to "one individual" who satisfies the requirements. H.R. 2625 § 3(a). Presumably, then, if an employer health plan allowed an employee to receive benefits for multiple adults, only one of these adults would be eligible for the modified dependency treatment. Other proposed amendments speak of "any individual," without any apparent limitation. *See, e.g.*, H.R. 2625 § 2(a).

overbroad. On the other hand, if employers exclude domestic partners from coverage, discrimination between opposite-sex and same-sex couples will continue in some companies since the proposed Act would not mandate extension of domestic partner benefits by employers.

From a gay-rights perspective, it is imperative to identify the circumstances under which the benefits of the proposed Act would best reach the gay and lesbian community. Any benefits under the proposed Acts are dependent on the availability of domestic partner benefits offered by employers. When an employer offers domestic partner benefits, it must define "domestic partner" for the purposes of the plan. To define "domestic partner," employers "can either define their own requirements or rely on existing legal documentation such as a domestic partner registration, civil union, or marriage."[216] The HRC recommends that employers that require proof of eligibility allow employees to submit a partnership affidavit in lieu of a government-issued document like a marriage license because "allowing only a state marriage license in a state that does not offer marriage would be unnecessarily restrictive."[217] A partnership affidavit is a declaration signed by the employee and filed with a public or private employer to certify that the employee is in a domestic partnership as defined by the employer.[218] Partnership affidavits typically require confirmation that the employee and the employee's partner are over 18 years of age, are not related to each other, live together, are not currently in a legally recognized relationship with a person other than that partner, that the individuals are fiscally and legally responsible for each other, and that they have been in an intimate relationship for a specified time period.[219] It should be noted that several of these common requirements—such as the cohabitation, mutual responsibility, and durational requirements—are rarely if ever required of an opposite-sex married couple seeking benefits for a spouse.[220]

Employers, therefore, may choose (1) not to offer domestic partner benefits; (2) to limit domestic partner benefits to same-sex domestic partners (defined either with or without reference to legal marriage, registered domestic partnerships, or civil unions); or (3) to offer partner benefits to employees'

---

[216] Human Rights Campaign, Domestic Partner Benefit Eligibility: Defining Domestic Partner and Dependents, http://www.hrc.org/issues/ workplace/benefits/4826.htm (last visited Jan. 19, 2010) [hereinafter HRC Defining Domestic Partner].

[217] *Id.*

[218] *Id.*; Partners Task Force for Gay & Lesbian Couples, Anatomy of a Domestic Partnership Affidavit: The Good, The Ugly, and The Bad, http://www.buddybuddy.com/d-p-affi.html (last visited Jan. 19, 2010) [hereinafter Anatomy of a Domestic Partner Affidavit].

[219] HRC Defining Domestic Partner, *supra* note 217. *See, e.g.*, STATE OF ILLINOIS GROUP INSURANCE PROGRAM DOMESTIC PARTNERSHIP AFFIDAVIT, http:// www.state.il.us/cms/download/ pdfs_benefits/DomesticPartnerAffidavit.pdf; ANTHEM AFFIDAVIT OF DOMESTIC PARTNERSHIP, http://www.maine.edu/pdf/ DPForm.pdf.

[220] Anatomy of a Domestic Partner Affidavit, *supra* note 219.

unmarried partners, whether same-sex or opposite-sex. The proposed Act must be evaluated with respect to each of these alternatives.

a. The proposed act and employers that do not currently offer domestic partner benefits

Because the proposed Act only offers a tax benefit to same-sex partners when domestic partner benefits are received, any benefit to the gay and lesbian community from employers that do not offer domestic partner benefits must be indirect. However, the proposed Act has the potential to increase the number of employers offering domestic partner benefits by eliminating a major complexity and the tax costs to employers that offer domestic partner benefits. As more employers offer domestic partner benefits, increasing numbers of gays and lesbians will have access to employer-provided health benefits that will receive favorable tax treatment.

Employers are not legally obligated to provide health insurance to their employees, and they offer health benefits to employees at least in part because of the tax exclusion.[221] The Congressional Research Services states: "It is uncertain how much employers gain from the exclusion [for employer-provided health benefits] except from reductions in employment taxes, but even if they gained nothing directly, they would likely provide coverage in order to give their workers tax savings. In a competitive labor market, workers' tax saving on one form of compensation might allow employers to reduce other forms."[222] By extending the tax exclusion to domestic partner benefits, the proposed Act provides an incentive for employers to offer domestic partner benefits to employees.

Moreover, support for the proposed Act among businesses suggests that businesses are cognizant of the proposed Act's potential to reduce costs to employers. As of April 2009, 56 companies had joined the HRC's Business Coalition for Benefits Tax Equity, which is "a group of leading U.S. employers that support legislative efforts to end the taxation of health insurance benefits for domestic partners and treat them the same as health benefits for federally-recognized spouses and dependents."[223] Among the members of the Business Coalition for Benefits Tax Equity are large employers such as Citigroup Inc., General Mills Inc., PG&E Corp., J.P. Morgan Chase & Co., and Microsoft

---

[221] CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS, THE TAX EXCLUSION FOR EMPLOYER-PROVIDED HEALTH INSURANCE: POLICY ISSUES REGARDING THE REPEAL DEBATE 10 (2008), http://www.allhealth.org/BriefingMaterials/RL34767-1359.pdf [hereinafter CRS REPORT].

[222] *Id.* at 10-11.

[223] Human Rights Campaign, Business Coalition for Benefits Tax Equity, Members, http://www.hrc.org/issues/6879.htm (last visited Jan. 19, 2010).

Corp.[224] Given the awareness of the issue in the business community, if the proposed Act is passed, it is likely that at least some employers who do not currently offer domestic partner benefits may be induced to do so.

b. The proposed act and employers that offer domestic partner benefits

With respect to employers that offer domestic partner benefits, the proposed Act is broadly written and will extend the income exclusion for employer-provided health benefits to any employee who receives benefits for a domestic partner. An employer may either limit the availability of domestic partner benefits to employees with proof of a legal marriage, registered domestic partnership, or civil union, or the employer may independently define "domestic partner." In light of employers' freedom to define "domestic partner" and the proposed Act's silence on the issue, one must confront the question of whether it would be better for the proposed Act to limit the exclusion to those in legal marriages, registered domestic partnerships, or civil unions.

As a thought experiment, assume that the proposed Act did impose a requirement that domestic partnership be proven by registration with the state. An employee at Stanford University, where benefits are only available to California Registered Domestic Partners, would receive tax-free domestic partner benefits under the proposed Act.[225] Now assume that the same employee transferred to the University of Michigan (U-M) for work. U-M is prohibited under state law from providing domestic partner benefits.[226] Instead, U-M offers "benefits for adult dependents who meet the requirements of the Other Qualified Adult (OQA) category," which provides "coverage for an adult who shares a primary residence with the U-M employee" when all OQA requirements are met.[227] Assuming the employee qualifies for the OQA benefits, he can elect to receive coverage for his partner. But will the benefits be excluded under the proposed Act?

In the example given, it is unclear whether the employee who relocates to Michigan would get the tax exclusion if the proposed Act were limited to

---

[224] *Id.*

[225] Stanford Benefits Eligibility, http://benefits.stanford.edu/ cgi-bin/overview/eligibility/ (last visited Jan. 19, 2010).

[226] Gwendolyn Bradley, *Michigan Court Rules Against Domestic-Partnership Benefits*, AcademeOnline, July-Aug. 2008, http://www. aaup.org (follow "Publications & Research" hyperlink; then select "2008 Issues" under Academe heading).

[227] Univ. of Mich. Benefits Office, Domestic Partner, http://umich.edu/~benefits/events/dp.html (last visited Jan. 19, 2010). The University's OQA requirements are that the employee is eligible for benefits, does not already enroll a spouse for benefits, and that the other qualified adult has shared a residence with the employee for six continuous months in a capacity other than as an employee or tenant.

registered domestic partners. On the one hand, the employee does have a registered domestic partnership in California. On the other hand, by operation of DOMA and Michigan state law, Michigan does not recognize the California Domestic Partnership. The benefits are granted based on independent criteria that are unrelated to partnership registration. It is not clear, then, whether a limited-version of the proposed Act would be available for the relocated employee.

Furthermore, what is glaringly obvious is that many recipients of U-M's OQA benefits would be subject to taxation on the benefits if the proposed Act were so limited, because Michigan residents simply do not have the option of registering as domestic partners. U-M's OQA benefit program is a striking example of why restricting the proposed Act would be problematic: first, domestic partner benefits are often offered in states that do not permit legal domestic partnerships; and second, when domestic partner benefits are offered in a state that does not permit legal domestic partnerships, the benefits may not be called "domestic partner benefits" at all.[228]

It seems clear, then, that the proposed Act has the greatest capacity to benefit the gay and lesbian community if it is available without restricting eligibility to legal marriages, registered domestic partnerships, or civil unions. Moreover, avoiding language like "domestic partners" ensures that the exclusion is available for all benefits that are domestic partner benefits in substance, regardless of what they are named. The argument against this approach is that the failure to limit the exclusion to same-sex couples with legal documentation may extend the benefit too far. For instance, what if an employer allows employees to elect coverage for their friends, without any documentation? This question will be addressed in the next section.

c. The proposed act and employers that offer benefits to unmarried opposite-sex partners

In addition to objecting to the proposed Act's extension of the exclusion to same-sex partners, conservative groups are likely to oppose the strategy of extending the exclusion to eligible unmarried opposite-sex partners. Opponents of extending benefits to unmarried opposite-sex couples assert that heterosexual couples have the right to get married—and should get married if they want to receive spousal benefits—and extending spousal benefits to unmarried couples may discourage couples from committing to marriage.[229] On the other hand, supporters of offering benefits to unmarried opposite-sex

---

[228] *See supra* notes 219-20 and accompanying text.

[229] Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent Upon Sexual Orientation?* 33 IND. L. REV. 991, 1008-10 (2000).

partners argue that non-traditional family types are increasingly common and the law should treat these families equally.[230] Some supporters have gone so far as to argue that heterosexual couples have a "fundamental right" to choose not to marry.[231]

It seems unlikely that the proposed Act would have much affect on heterosexual marriage behavior. While it is conceivable that eliminating the tax on benefits provided to unmarried opposite-sex partners would discourage marriage, in reality very few unmarried opposite-sex partners receive employer-provided benefits even when they are offered.[232] The affected population, therefore, would be very small—and the portion of that population that is actually discouraged from marrying would be even smaller.

Social policy aside, a second concern is economic: if unmarried people—same-sex or opposite-sex—can all receive employer-provided health benefits and then exclude the income, at some point the proposed Act may become too costly. Yet, the cost to the government should not require more restrictive exclusions. First, employers themselves are likely to limit plan eligibility. While it is tempting to imagine scenarios under which employees elect to receive coverage for their five closest friends, the reality is that employers are scaling back their health plans, not expanding them to ever growing classes of beneficiaries.[233] Profit-conscious employers are unlikely to offer health coverage for broad classes of beneficiaries.

Second, even if employers do extend coverage to broad classes of eligible beneficiaries, patterns of health plan enrollment suggest that few employees would take advantage of such partner benefit plans. Currently, nine times as many same-sex couples take advantage of employer-provided partner benefits than do unmarried opposite-sex couples.[234] Since few unmarried opposite-sex couples take advantage of employer-provided health coverage, the cost of including them in the exclusion should not have much fiscal effect.

To be sure, if the current unfavorable tax treatment of domestic partner health benefits operates as a disincentive to elect coverage, then it is possible that some unmarried opposite-sex couples do not take advantage of employer-provided health coverage because it is tax disadvantageous to do so. At the margin some employees may decline health coverage for their opposite-sex unmarried partners because they will be fully taxed on the value of the benefits. Given historic enrollment in these plans, however, it seems unlikely that

---

[230] *Id.* at 1010-12.

[231] *Id.*

[232] *See* Ash & Badgett, *supra* note 91, at 588.

[233] Phred Dvorak & Scott Thurm, *Slump Prods Firms to Seek New Compact with Workers*, WALL STREET J., Oct. 20, 2009, at A14.

[234] Ash & Badgett, *supra* note 91.

enrollment would increase enough to significantly affect the cost of the proposed Act.

Moreover, even if the number of unmarried opposite-sex partners electing for employer-provided health benefits increases—thereby increasing the cost to the government—this should not be viewed as a strike against the proposed Act. Rather, given the nation's current interest in providing every American with some form of health coverage,[235] it may be useful to extend favorable tax treatment to unmarried opposite-sex partners in order to encourage people to seek health coverage from private employers. Health coverage from private employers is especially needed in cases where a person is ineligible for private health insurance coverage, as is the case for individuals with a history of cancer or other preexisting conditions.[236]

2. *The tax equity for health plan beneficiaries act of 2009 as a step toward equal tax treatment of same-sex couples*

Although the proposed Act is likely to draw some criticism that it would legitimize same-sex marriage, the proposed Act may be acceptable to some would-be opponents. First, because the proposed Act is broadly written to extend the exclusion to certain unmarried opposite-sex partners, the Act may be viewed as an effort to offer favorable tax treatment of health benefits available to a greater number of Americans. Second, even some opponents of same-sex marriage may be receptive to the argument that same-sex couples and their families are entitled to equal treatment with respect to health benefits.[237]

The most important question to the gay and lesbian community, however, is whether the proposed Act is well-drafted to eliminate tax inequalities in the area of employer-provided health benefits. Generally speaking, this question should be answered in the affirmative. The benefits to the gay and lesbian community are twofold. First, the proposed Act's strategy of amending the payroll tax is reasonably likely to encourage a greater number of employers to offer domestic partner benefits, making domestic partner benefits available to a larger portion of the gay and lesbian community. Second, the proposed Act's strategy of extending benefits to a broad, undefined class of eligible beneficiaries ensures that gays and lesbians in states that do not legally recognize their partnerships will nevertheless be able to receive tax-free benefits when partner benefits are available.

---

[235] *See* Elizabeth Cohen, *What You Need to Know About Health Care Reform*, CNN.COM, June 18, 2009, http://www.cnn.com/2009/HEALTH /06/18/ep.health.reform.basics/.

[236] *See* Amanda Gardner, Cancer Patients Often Stranded in Health Insurance Nightmares, HEALTHDAY, Feb. 5, 2009, http://www.healthday.com /Article.asp?AID=623825.

[237] *See* David Blankenhorn & Jonathan Rauch, Op-Ed., *A Reconciliation on Gay Marriage*, *op. ed.*, N.Y. TIMES, Feb. 22, at WK11.

Interestingly, it is possible that the proposed Act may be especially valuable to gays and lesbians whose partnerships have no legal recognition. First, consider the claim that the proposed Act will increase access to domestic partner benefits. Same-sex spouses in states that permit same-sex marriage should already have full access to benefits through employer's spousal benefit plans; the proposed Act is needed in these states to correct tax inequities, but it is not needed to ensure that same-sex spouses have access to benefits.[238] In contrast, in states that do not recognize same-sex marriages, employers must affirmatively offer domestic partner benefits before same-sex partners will have access to benefits. The proposed Act will encourage expansion of domestic partner benefits in the 45 states that do not allow same-sex marriage.

Tax benefits of the proposed Act are also likely to fall mostly on gays and lesbians who are not in marriages, registered domestic partnerships, or civil unions. Only ten states and the District of Columbia recognize some form of same-sex marriages, domestic partnerships, or civil unions. Yet, the proposed Act is broadly written to cover domestic partner benefits received in states that do not permit domestic partnerships—even if the domestic partner benefits are received under a plan that does not call itself a domestic partner benefits plan.[239] This feature of the proposed Act is significant because employer-provided domestic partner benefits are often available in states that do not recognize any form of same-sex relationships. Consider, for example, the 49 members of Forbes 200 Largest Private Companies that offer domestic partner benefits.[240] Of those 49 companies, 37—or 77 percent—are located in states that do not allow same-sex marriage, registered domestic partnerships, or civil unions.[241] As large companies continue to add domestic partner benefits as a way to recruit talent,[242] the availability of domestic partner benefits in states that do not recognize same-sex relationships will continue to rise.

In sum, gays and lesbians whose relationships are not legally sanctioned will be important recipients of the proposed Act's tax benefits. Given the restrictions imposed by DOMA and the turbulent political climate with respect

---

[238] Cheryl Wetzstein, *Massachusetts Firms Drop Domestic-Partner Benefits*, WASH. TIMES, Dec. 9, 2004, at A1. Note, however, the argument that firms should offer domestic partner benefits to unmarried same-sex partners even in states where legal same-sex marriage is permitted. If the goal is to expand the availability of domestic partner benefits regardless of whether same-sex couples are able to marry and access spousal benefits, then the proposed Act would advance this goal even in states that allow same-sex marriage.

[239] *See supra* Part IV.

[240] *See* Human Rights Campaign, Employer Database, http://www.hrc.org/issues/workplace/search.asp?form=private_quick_search.aspx (search "Employers that offer domestic partner health benefits – Forbes 200 Largest Private Companies") (last visited Jan. 19, 2010).

[241] *Id.*

[242] Vicki Smith, *Making a Good Impression: WVU Candidate's Humble Beginnings Resonate With Staff*, CHARLESTON GAZETTE & DAILY MAIL, Mar. 5, 2009, at 1A.

to gay and lesbian rights, gay rights advocates should be pleased with this result. A form of the proposed Act that limited its benefits to the minority of gays and lesbians who are lucky enough to reside in one of the ten locations that recognize some form of same-sex relationship—or, worse, in the five states that recognize same-sex marriage—would do little to advance the needs of the gay and lesbian community as a whole. Rather, such a limited version of the proposed Act would create disparate treatment of same-sex partners on the federal level. The federal taxation of domestic partner benefits should not depend on individual states' attitudes toward same-sex marriage.

Because the proposed Act's strategy avoids these pitfalls, it is a promising piece of legislation that would extend equal tax treatment to all gays and lesbians who receive domestic partner benefits, no matter where they reside. As an increasing number of employers are encouraged by the proposed Act to recognize same-sex partnerships, an important message will be sent about the worth of same-sex relationships. For this reason, the proposed Act should be viewed as an important step toward equality for gays and lesbians. The next section recommends a revision to the proposed Act to make it even more effective at reducing unequal treatment of same-sex couples.

C. Recommended Revision to the Proposed Act

Interestingly, the most significant challenge to the proposed Act may actually emanate from the very concept of the tax exclusion for health benefits. Health benefit exclusions have long been criticized as an inadequate subsidy for health care that disproportionately favors high income individuals.[243] The 110th congress introduced five bills that would fully eliminate the tax exclusion for employer-related health insurance, as well as two bills that would limit the exclusion to specified amounts.[244] The 111th congress is also confronting the issue, as one of the Obama Administration's major health reform proposals is to place a cap on the exclusion.[245] Among the arguments for eliminating or capping the exclusion is the criticism that the exclusion actually encourages workers to obtain greater health coverage than they otherwise would, leading

---

[243] Len Nichols, *Cost: Changing Tax Treatment of Health Benefits Could Find Bipartisan Common Ground*, THE NEW HEALTH DIALOGUE BLOG, Mar. 17, 2009, http://www.newamerica.net/blog/ new-health-dialogue/2009/cost-changing-tax-treatment-health-ibenefits-could-find-bipartisan-common-g.

[244] CRS REPORT, *supra* note 222, at n.4.

[245] Paul Fronstin, CAPPING THE TAX EXCLUSION FOR EMPLOYMENT-BASED HEALTH COVERAGE: IMPLICATIONS FOR EMPLOYERS AND WORKERS, EMPLOYEE BENEFIT RESEARCH INSTITUTE ISSUE BRIEF No.325, 1, Jan. 2009, http://www.ebri.org/pdf/ briefspdf/EBRI_IB_1-2009_TaxCap1.pdf.

workers to continue purchasing coverage even as the cost of insurance rises.[246] Alternative tax treatment, the argument goes, may provide a brake on the increasing prices of health insurance.[247] Proposed alternatives have included placing limits on the exclusion or replacing it with a capped deduction or credit.[248] In its November 2008 report on the issue, the Congressional Research Service concluded:

> A principal policy decision appears to be whether to maintain and possibly strengthen the employment-based system of health care. If that is the goal, then maintaining the exclusion might be appropriate since it is unclear what the effects of termination would be over time. If instead the goal were to move towards individual market insurance or an expansion of public coverage, then ending the exclusion should be given greater consideration.[249]

The question of whether America should abandon the exclusion altogether and move toward individual market insurance or an expansion of public coverage is an important policy question that is beyond the scope of this article.[250] Under the current system, employers are the principal source of health insurance for non-elderly Americans, providing coverage to about 158 million people.[251] For this reason, this article recommends alignment with the former goal of strengthening the employment-based system of health care. In furtherance of this goal, this article recommends the passage of the proposed Act.

Unlike its predecessors, the Tax Equity for Health Plan Beneficiaries Act of 2009 is significantly comprehensive and responds to a range of inequities

---

[246] CRS REPORT, *supra* note 222, at 14.

[247] *Id.*

[248] *Id.*

[249] *Id.* at 21-22.

[250] The tax exclusion for employer-provided health benefits was debated during the 2008 Presidential campaigns of then-Senator Barack Obama and Senator John McCain, and both candidates' plans had tax implications. Senator McCain wanted to eliminate the tax exclusion for employer-provided health care benefits and replace it with a credit. Jackie Calmes & Robert Pear, *Administration is Open to Taxing Health Benefits*, N.Y. TIMES, Mar. 15, 2009, at A1. At the time, then-Senator Obama charged that Senator McCain's plan would erode companies' health benefits plans and leave employees uninsured. Adam Nagourney & Jeff Zeleny, *Economic Unrest Shifts Electoral Battlegrounds*, N.Y. TIMES, Oct. 5, 2008, at A1. However, now the Obama administration has begun to compromise its position, saying that although President Obama "will not propose changing the tax-free status of employee health benefits, neither will he oppose it if Congress does so." Jackie Calmes & Robert Pear, *Administration is Open to Taxing Health Benefits*, N.Y. TIMES, Mar. 15, 2009, at A1. Several bills before Congress would, if passed, eliminate or limit the tax exclusion for employer-provided health benefits. *See supra* note 222 and accompanying text. The Democrats who control Congress are unenthusiastic about the idea of taxing benefits, however. *Id.*

[251] Kaiser Survey, *supra* note 65, at 1.

arising from sections 106, 105(b), 162(*l*), 501(c)(9), and 125, while also addressing corresponding effects on employers' payroll taxes. A notable omission, however, is the proposed Act's continuing failure to address section 105(c) dismemberment benefit inequities. Currently, section 105(c) excludes amounts that "constitute payment for the permanent loss or loss of use of a member or function of the body, or the permanent disfigurement, of the taxpayer, his spouse, or a dependent" as long as such amounts "are computed with reference to the nature of the injury without regard to the period the employee is absent from work."[252] The existing rules do not extend the exclusion of dismemberment benefits to domestic partner benefits, and the proposed Act does not change these results.

Given the wide reach of the proposed Act, the failure to address the 105(c) inequity may reflect a drafting oversight. In light of the proposed Act's comprehensiveness, there is no clear policy reason to single out and refuse to extend the 105(c) exclusion to domestic partner benefits. Moreover, the number of workers who claim dismemberment benefits for a domestic partner would be very low, making the cost of extending the exclusion to domestic partners minimal. In 2008, for example, the exclusion of premiums for accident and disability insurance cost the government only 0.19 percent of the amount attributable to the exclusion for employer-provided health insurance and medical care.[253]

Though the tax exemption for dismemberment benefits is only a modest government expenditure, the added tax burden on the small number of affected individuals can be significant. Dismemberment insurance policies typically provide coverage ranging from $100,000 to $500,000.[254] An individual in the 28% marginal tax bracket whose domestic partner receives a $100,000 payout from employer-provided Accidental Death and Dismemberment (AD&D) insurance will owe up to $28,000 more in taxes than an opposite-sex spouse receiving the same benefits. Thus, extending the exclusion of dismemberment benefits to domestic partner benefits would greatly benefit affected individuals without costing the government much in lost revenue.

---

[252] I.R.C. § 105(c) (2008).

[253] ANALYTICAL PERSPECTIVES: THE BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 2008 289 (2007), http://www.whitehouse.gov/omb/budget/fy2008/pdf/ spec.pdf. The exclusion of premiums for accident and disability insurance cost the government $310 million, as compared to the $160,190 million attributable to the exclusion for employer-provided health insurance and medical care.

[254] *See* Discover Fin. Serv., AD&D Insurance FAQs, http://www.discovercard.com/ insurance_center/faqs/add_insurance_faq.shtml (last visited Jan. 19, 2010). *See, e.g.*, University of Southern California, Accidental Death & Dismemberment Insurance Enrollment, http://ais-ss.usc.edu/ helpdoc/WebEM/WebEMBeneEnrollAD.html (last visited Jan. 19, 2010); NORTHWESTERN UNIV., ACCIDENTAL DEATH & DISMEMBERMENT PLAN 10 (Jan. 2009), http://www.northwestern.edu/hr/benefits/plans/add/pdf/spd-add.pdf.

The symbolic value of fully eliminating tax inequities in the area of health care would also be significant. The proposed Act represents a small but important step toward equal tax treatment for gays and lesbians, and the exclusion for dismemberment benefits is well within the scope of the proposed Act. The final approved version should amend section 105(c).

CONCLUSION

The treatment of same-sex couples under federal tax law is dictated by DOMA's definition of marriage as a legal union between one man and one woman. As a result, same-sex couples who marry under state law or who enter into domestic partnerships or civil unions are treated as unrelated third parties for federal tax purposes and are, therefore, ineligible for any tax benefit conferred upon spouses. Among the most significant of these benefits are the exclusions for employer-provided health benefits and medical care reimbursements. This unequal treatment results in significant tax inequities to both same-sex couples and to employers.

The proposed Tax Equity for Health Plan Beneficiaries Act of 2009, earlier versions of which were introduced in 2003 and 2007, seeks to rectify these tax inequities without running afoul of DOMA. The proposed Act leaves the definition of spouse untouched but extends these tax benefits to a newly defined class of individuals broad enough to include domestic partners. In addition, the proposed Act is expansive enough to extend the benefit to some unmarried opposite-sex couples, raising questions about appropriate social and health policy goals.

This article argues that the strategy of extending the exclusion to both same-sex partners and some unmarried opposite-sex partners is appropriate because it will encourage employers to provide coverage to a greater number of individuals. First, the proposed Act would not only represent a step towards equal treatment and recognition of same-sex couples, but it would also encourage more employers to offer domestic partner benefits.

Second, the proposed Act would likely expand the number of people eligible for employer-provided health coverage generally. Since employers are the primary source of health insurance in America, and since private health insurance is expensive and often has prohibitive eligibility requirements, it represents sound policy to extend eligibility to greater numbers of people. For these reasons, this article recommends the passage of the Tax Equity for Health Plan Beneficiaries Act of 2009 with only slight modification—the final version of the proposed Act should include an amendment to section 105(c) extending the exclusion for dismemberment benefits to domestic partners.

A Macabre Fixation: Is Plastination Copyrightable?

Kirill Ershov*

I. INTRODUCTION

Dr. Gunther von Hagens invented plastination as a process to preserve anatomical specimens.[1] Plastination replaces water and fats in anatomical tissues with plastic polymers, allowing for indefinite preservation, ease of handling, and storage of the plastinated "objects."[2] Beginning in the 1990s, von Hagens developed Body Worlds, a lucrative traveling exhibition composed mostly of plastinated cadavers in various degrees of dissection and often-provocative poses. Immensely successful and controversial, Body Worlds has been continuously touring the world in multiple installments. Various competing shows have sprung up, with von Hagens's biggest competitor, Premier Inc., also becoming a successful player in the worldwide plastinated cadaver market.[3]

In 2005, von Hagens filed a federal lawsuit against Premier.[4] Von Hagens claimed that his cadavers are unique in their manner of dissection and positioning and are entitled to copyright protection as original expressions of ideas fixed in tangible media, and that Premier infringed on those expressions with its own Bodies Revealed exhibition. The suit was eventually settled out of court.[5]

This paper examines whether there is original expression in the type of plastinated exhibits presented by von Hagens, exploring in detail whether there is protected expression in the manner of dissection and the positioning of

---

* Esq., Clerk, Capital Habeas Unit, Federal Public Defender, Los Angeles, California, J.D. UCLA School of Law, 2009, B.A. Univ. of California Berkeley, 2001.

[1] For a biography of von Hagens and a description of the creation of Body Worlds, see Gunther von Hagens: A Life in Science, Body Worlds, http://www.bodyworlds.com/en/gunther_von_hagens/life_ in_science.html (last visited Jan. 10, 2010).

[2] For a detailed description of the plastination process, see Gunther von Hagens et al., Review Article, *The Current Potential of Plastination*, ANAT EMBRYOL (1987) 175:411.

[3] *See* CorpseShow.info, Homepage, http://www.corpseshow.info/body_worlds_4_industry.html (last visited Jan. 10, 2010).

[4] Plastination Co. Inc., v. Premier Exhibitions, Inc., No. 1:05-cv-0594, 2005 WL 516253 (N.D. Ohio Feb. 16, 2005).

[5] R. Robin McDonald, *Bodies Draw Suits on Contracts, Copyrights: Atlanta Exhibitor's Case Illustrates Fierce International Competition*, FULTON COUNTY DAILY REP., Apr. 20, 2006, at 1.

plastinated bodies. Von Hagens's work is put to an originality analysis in the first section of the paper. Von Hagens's exhibits, as well as those of his competitors, are examined to see if a copyright infringement claim can be sustained against appropriation in competing exhibits. Doctrines of merger and scenes a faire play a recurring role in this analysis, as both the medium and the subject matter restrict the scope of protected original expression in these exhibits. These doctrines require a stricter, thin copyright standard of comparison to determine substantial similarity as applied to most of the aspects of plastinated exhibits. This paper concludes that an appropriately stricter, thin copyright standard makes a copyright infringement claim more difficult, but does not rule it out.[6]

II. ORIGINALITY IN PLASTINATED CADAVERS

A plastinated cadaver falls under the protection of the Copyright Act as a three dimensional work composed of plastic that can be considered to be created for scientific or educational use.[7] The originality requirement dictated by the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*[8] is minimal—only a "modicum of creativity" is required for a work to be protected by a copyright[9]—however, not all aspects of a work may be considered when determining originality, ideas, methods, and facts, and scenes a faire[10] are not protected.[11]

A. Uncopyrightable Elements

The texture of a plastinated cadaver will not be considered in an originality analysis. The *Feist* standard can be appreciated by contrasting it with an earlier and since rejected "sweat of the brow" standard, which saw protection as a reward for an author's effort in creating the work.[12] Under the old standard any work qualified as an original as long as labor was expended in its creation, regardless of the amount of creativity, if any, involved in its creation.[13] For

---

[6] Fair use is not considered in this paper.

[7] 17 U.S.C. § 102(a)(5) (2009); *id.* § 101 (referring to "Pictorial, graphic, and sculptural works"). A plastinated cadaver will not be considered to be a "useful article," because its primary function is to convey visual information. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[B][3] (2009).

[8] 499 U.S. 340 (1991).

[9] *Id.* at 346.

[10] Scenes a faire refers to a work's elements that are necessary for expression of the work's ideas in its genre. *See* 4 NIMMER & NIMMER, *supra* note 7, at § 13.03[B][4]; *see also* Part II.B.

[11] 17 U.S.C. § 102(b); *Feist*, 499 U.S. at 356.

[12] *Feist*, 499 U.S. at 352.

[13] *Id.* at 352-53.

example, works consisting of facts in the public domain such as a census compilation would be protected as long as labor went into their preparation.[14] Under the current standard, a work will not be protected unless it is original to the author.[15] The originality requirement as defined in *Feist* mandates that the work be independently created by the author and that it possess at least a minimal level of creativity.[16] If only particular elements of a work can be considered original then only those elements will be protected by copyright.[17]

The plastinated texture of a cadaver is not a product of creativity, it is created through a mechanical process. This process requires a vacuum, strict temperature control, and a sequential alteration of liquids that submerge the cadaver; but, alas, no creativity whatsoever.[18] The labor expended into this aspect of the cadaver therefore will not be protected by current United States copyright law.

Other features of plasticized cadavers can also be excluded as unoriginal. First, along with a cadaver's general dimensions (such as size, shape, and measurements), the dimensions and appearance of tissues exposed through dissection will not be considered to be original to the author. Throughout the plastination process these tissues remain unaltered, retaining their physical appearance and dimensions as created through natural processes.[19] Second, the process of exposing and isolating particular tissues is similarly unprotected. This process is akin to the one performed by a paleontologist when removing fossilized bone tissue from the matrix of the mineral in which it is embedded.[20] As products of discovery, these features may have been protected under the "sweat of the brow" doctrine, but they will not be considered as sufficiently original under *Feist*.[21]

B. Filtering Out Unprotectable Features

When determining originality, courts filter out the work's unprotected elements.[22] These include features that cannot be attributed to the author,[23]

---

[14] *See id.* at 347.

[15] *Id.* at 345.

[16] *Id.*

[17] *Id.* at 348.

[18] *See supra* note 2.

[19] *Id.*

[20] 4 NIMMER & NIMMER, *supra* note 7, at 2.03[E] ("The 'discoverer' of a scientific fact as to the nature of the physical world, [an] historical fact, a contemporary news event, or any other 'fact,' may not claim to be the 'author' of that fact.").

[21] *See Feist*, 499 U.S. at 345.

[22] *See id.* at 348 ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the sine qua non of copyright; accordingly, copyright protection may extend only to those components of a work that are

elements of a work's expression that merge with the underlying idea,[24] and elements that are considered scenes a faire (standard elements).[25]

Merger comes into play when there is only one or a limited number of ways that an idea can be expressed, i.e., when features of an expression are equivalent to the features of the idea underlying that expression.[26] This doctrine is often invoked in cases that deal with realistic depictions of natural phenomena.[27] Courts consider such features to belong to the idea from which they stem—the phenomenon's appearance in nature—rather than from the author of the particular expression.[28] Consequently, courts ignore these features when determining either the extent of original expression in a work or when determining whether two works are substantially similar.[29] In the *Hart v. Dan Chase Taxidermy* line of cases,[30] the appearance of the sway of a fish

---

original to the author.").

[23] *Id.* at 349 ("[N]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking. . . . [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas.").

[24] 4 NIMMER & NIMMER, *supra* note 7, at § 13.03[B][3] ("In some circumstances, however, there is a 'merger' of idea and expression, such that a given idea is inseparably tied to a particular expression. In such instances, rigorously protecting the expression would confer a monopoly over the idea itself, in contravention of the statutory command.").

[25] *Id.* at § 13.03[B][4].

> It is sometimes said that scenes a faire refer to "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." To give a practical illustration, one court commented that "the public domain would have a scant selection if stock settings such as the movie theatre, the kitchen, Las Vegas, a church picnic or a club were subject to copyright protection."

Id. (internal citations omitted).

[26] *Id.* at § 13.03[B][3].

[27] *See, e.g.*, Hart v. Dan Chase Taxidermy Supply Co., 86 F.3d 320 (2d Cir. 1996) (involving fish taxidermy); Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62 (3d Cir. 1978) (involving a water color painting of cardinals).

[28] *See* 4 NIMMER & NIMMER, *supra* note 7, at § 13.03[B][3].

[29] *See id.* at § 13.03[B][3] & nn.163.12-168.

> It is not always clear whether the merger doctrine is deemed a bar to copyright protection itself, rather than simply a defense to the charge of infringement via substantial similarity. Although the subject of much confusion, the better view construes it as the latter, evaluating the inseparability of idea and expression in the context of a particular dispute, rather than attempting to disqualify certain expressions from protection. Thus construed, similarity of expression, whether literal or nonliteral, which necessarily results from the fact that the common idea is only capable of expression, in more or less stereotyped form, will preclude a finding of actionable similarity.

Id.

[30] In this line of cases the district court originally found the fish mannequins to be merely utilitarian and to not contain any copyrightable features. The circuit court vacated this decision finding that the mannequins were indeed copyrightable sculptural works. On remand the district

mannequin's tail was found to merge with the way fish's tails sway in the water, and as a result, this feature was not attributable to the mannequin's creator.[31]

Scenes a faire is a related doctrine, often used in realms of performing arts and literature.[32] Under this doctrine, the work's settings, themes, and genres have features—scenes a faire or standard elements—that are necessary for particular expression of the ideas.[33] Since these elements are essential for a proper expression of an idea, as with merger, courts ignore them when determining either the extent of original expression or when determining whether two works are substantially similar.[34] Judge Learned Hand's opinion in *Nichols v. Universal Pictures Corp.*[35] is a classic example of the doctrine. *Nichols* involved recurring theme elements: a seemingly irreconcilable conflict between two feuding families, love between the families' children, followed by marriage and eventual reconciliation.[36] Judge Learned Hand found all of the above to be stock elements common not only to the plays in question, but also classics such as *Romeo and Juliet*.[37]

The interrelatedness of the doctrines of merger and scenes a faire is illustrated by the Ninth Circuit Court of Appeals' approach in *Satava v. Lowry*,[38] a case dealing with realistic glass-in-glass sculptural portrayals of jellyfish.[39] The court admitted that it could have decided the case on the merger doctrine, but instead applied the scenes a faire doctrine:

> Our analysis above suggests that the "merger doctrine" might apply in this case. Under the merger doctrine, courts will not protect a copyrighted work from infringement if the idea underlying the copyrighted work can be expressed in only one way, lest there be a monopoly on the underlying idea. In light of our holding that Satava cannot prevent other artists from using the standard and

---

court found that the copyrightable features of the mannequins merged with their underlying idea—the fish's appearance in nature. The circuit court then affirmed this reasoning. *Hart v. Dan Chase Taxidermy Supply Co.*, 884 F. Supp. 71 (N.D.N.Y. 1995) (regarding mannequins used to mount animal carcasses), *vacated*, 86 F.3d 320 (2d Cir. 1996), *remanded to* 967 F. Supp. 70 (N.D.N.Y. 1997), *aff'd*, 152 F.3d 918 (2d Cir. 1998).

[31] *Id.*

[32] *See* 4 NIMMER & NIMMER, *supra* note 7, at § 13.03[B][4].

[33] *Id.*

[34] *See* Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1082 (9th Cir. 2000) (citing 4 NIMMER & NIMMER, *supra* note 7, at § 13.03[B][3]).

[35] 45 F.2d 119 (2d Cir. 1930). The doctrine of "scenes a faire" was not known as such at the time of this opinion.

[36] *Id.*

[37] *Id.* at 122.

[38] 323 F.3d 805 (9th Cir. 2003).

[39] *Id.*

> stereotyped elements in his sculptures, or the combination of those elements, we find it unnecessary to consider the application of the merger doctrine.[40]

The court held that elements stemming from a jellyfish's appearance in nature, such as the selection of tendril-like tentacles, rounded bells, and bright colors, were standard elements necessary to portray a realistic jellyfish in a glass-in-glass sculpture.[41]

As noted, some courts have considered the doctrines of merger and scenes a faire as part of the originality analysis while others have instead chosen to view them as defenses to infringement.[42] The application of the doctrines during an originality analysis will result in a finding of uncopyrightability if merged or standard elements are found.[43] This finding opens the door to any and all copying of these aspects of an author's work because these are not considered a part of the author's original expression. On the other hand, a finding of merger or scenes a faire in the context of a defense to infringement will preclude a finding of infringement under the considered circumstances only, but will not necessarily preclude all possible infringement of the merged or standard elements.[44] Courts that have utilized these doctrines, in the context of a defense, have been reluctant to rule elements as per se uncopyrightable.[45] Viewing the issues as empirical matters, courts examine merger in terms of an author's ability to portray an element without it being substantially similar to a plaintiff's portrayal, and scenes a faire as similarities that emerge from duplication of ideas rather than expression.[46]

While it is tempting to think of the appearance and dimensions of plastinated tissues as elements that are either merging or standard, careful analysis will demonstrate that these features do not fit under either doctrine because they will not be considered to be a part of the author's original expression.

Neither *Dan Chase* nor *Satava* are directly analogous to this issue. In those cases, the features ruled as uncopyrightable under merger and scenes a faire were found as such in deference to copyright policy. These courts were

---

[40] *Id.* at 812 n.5 (internal citation omitted).

[41] *Id.* at 811.

[42] *See* 4 NIMMER & NIMMER, *supra* note 7, at § 13.03[B][3] & nn.163.12-168.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] 4 NIMMER & NIMMER, *supra* note 7, at § 13.03[B][3] & nn.180-82.

> As was remarked above concerning merger, this doctrine does not limit the subject matter of copyright; instead, it defines the contours of infringing conduct. Labeling certain stock elements as "scenes a faire" does not imply that they are uncopyrightable; it merely states that similarity between plaintiff's and defendant's works that are limited to hackneyed elements cannot furnish the basis for finding substantial similarity.

Id.

reluctant to give the author a monopoly over these features.[47] Nevertheless, the courts viewed the features as products of the author's original expression that may have been protected against direct copying through photography.[48]

Unlike the empirical policy-based determination in *Dan Chase* and *Satava*, determining whether appearance and dimensions of plastinated tissues can be considered as original is strictly conceptual. The answer depends on whether the appearance of plastinated tissues are attributed to the author or to the natural processes that created them.[49] Since these features were created by nature and cannot be credited to the author, they should not be considered a part of the author's original expression and should be filtered out at the originality stage of the analysis.[50]

C. Originality in the Selection of the Plastinated Tissues

While an author of a plastinated cadaver cannot lay claim to the appearance of the organs and tissues that are revealed through dissection, an author may argue for ownership over the resulting arrangement and selection of the revealed tissues.

In Body Worlds almost all of the cadavers are presented with the epidermal layer removed, revealing the musculature underneath. Some cadavers have their skullcaps partially severed and held open, akin to a lid on a tin jar, to reveal the brain within while others expose the brain by complete removal of the skullcap. Some cadavers incorporate cross-sectional cuts of the body illustrating the inner tissue layers. A cadaver of a pregnant female reveals the fetus inside through a left lateral abdominal cut that removes the top layer of the musculature to expose the womb. Another cadaver illustrates sub-sections of muscle groups by separating and fanning out each individual muscle tissue. Finally, one cadaver's facial and abdominal musculature are fanned out intending to resemble a flasher's open trench coat.

Feist governs the originality analysis of these arrangements. In *Feist*, the Supreme Court determined whether the arrangement of uncopyrightable facts

---

[47] *Id.*

[48] *See, e.g.*, *Satava*, 323 F.3d at 812 ("[*Satava*] has made some copyrightable contributions: the distinctive curls of particular tendrils; the arrangement of certain hues; the unique shape of jellyfishes' bells. To the extent that these and other artistic choices were not governed by jellyfish physiology or the glass-in-glass medium, they are original elements that Satava theoretically may protect through copyright law."); Hart v. Dan Chase Taxidermy Supply Co., 967 F. Supp. 70, 73 (N.D.N.Y. 1997) ("Both these models are similar in proportion, appearance, and tail [sway] to both the Plaintiffs' and the Defendant's model. The Chandler model, however, has a slight back-curve to the tail and a less pronounced pectoral fin butt.").

[49] The *Feist* standard requires that copyrightable features be original to the author. *See supra* Part I.A.

[50] Such features will be considered as products of discovery. *See supra* Part I.A.

could be copyrighted. The case concerned compilations, specifically a directory of names in a phone book.[51] The Supreme Court held that such compilation may be copyrightable, reasoning that: "[C]hoices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws."[52]

While the *Feist* Court held that the requisite degree of creativity required for an arrangement to be considered original is minimal, it nevertheless emphasized that the arrangement of unprotected elements "cannot be so mechanical or routine as to require no creativity whatsoever."[53] The Court stated that garden variety or routine selections lack the required creativity and held that an alphabetized directory of names in a phonebook is uncopyrightable.[54]

Matthew Bender & Co. v. West Publishing Co.,[55] decided by the Second Circuit Court of Appeals, provides more guidance for determining whether a particular arrangement can be considered sufficiently creative. *Matthew Bender* concerned a dispute as to whether the Copyright Act protected a publisher's particular layout of public information in a reporter of judicial opinions.[56] The court found that the manner the publisher chose to present information regarding the parties or procedural developments was insufficiently creative and therefore uncopyrightable.[57] The court considered selection choices to be unprotected if guided by industry conventions instead of subjective judgments based on taste and value.[58] The court concluded by outlining the determinative factors to a selection's originality under *Feist*: "In sum, creativity in selection and arrangement therefore is a function of (i) the total number of options available, (ii) external factors that limit the viability of certain options and render others non-creative, and (iii) prior uses that render certain selections garden variety."[59]

The *Matthew Bender* test captures the constraints by which an industry's conventions limit an author's selection choices. Applying the test, the court viewed the original publisher's choices on how to present legal information regarding preceding and subsequent case history as severely limited to binary

---

[51] *Feist*, 499 U.S. at 342.
[52] *Id.* at 348.
[53] *Id.* at 362.
[54] *Id.*
[55] 158 F.3d 674 (2d Cir. 1998).
[56] *Id.*
[57] *Id.* at 682.
[58] *Id.* at 689.
[59] *Id.* at 682-83 (internal quotation marks omitted).

options under alternative citation rules.[60] Choices of which procedural facts to include, such as choices to present information in regards to the parties, venues, dates, and arguments of decisions were found to be guided by the functional importance of that information and not the publisher's creativity.[61] Finally, the court saw the original publisher's decision to include information on the parties' attorneys in its publication as one limited "by prior uses that render certain selections garden variety."[62]

While a dissected cadaver is in no way a factual compilation, the above reasoning is nevertheless applicable to its display because the plastinated cadaver's author makes choices about which section of tissue to remove and the repositioning of the remaining tissues.

In *Satava v. Lowry*,[63] the Ninth Circuit relied on *Feist* when analyzing glass-in-glass jellyfish sculptures as arrangements of unprotectable elements taken from jellyfishes' real life appearance in nature.[64] The same analogy can also be applied to the resulting arrangement of exposed tissues on a plastinated cadaver. Similar to a standard element in a jellyfish sculpture, the appearance of an exposed section of tissue is not by itself copyrightable, but the arrangement of the remaining tissues may be copyrightable if sufficiently creative.

After applying the *Feist* standard, the *Satava* court echoed the reasoning in *Matthew Bender* to determine that the arrangement of the standardized elements in a jellyfish sculpture was not original enough to warrant protection:

> The combination of unprotectable elements in Satava's sculpture falls short of this standard. The selection of the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form, considered together, lacks the quantum of originality needed to merit copyright protection. These elements are so commonplace in glass-in-glass sculpture and so typical of jellyfish physiology that to recognize copyright protection in their combination effectively would give Satava a monopoly on lifelike glass-in-glass sculptures of single jellyfish with vertical tentacles.[65]

The glass-in-glass industry standards, combined with jellyfish physiology, guided Satava's arrangement rather than his own creativity.

In some respects, von Hagens is similarly constrained by human physiology and anatomy practice. He concedes that scientific principles take precedent over his artistic inclinations:

---

[60] *Id.* at 685.

[61] *Id.* at 683-86.

[62] While there were other publications that did not include this information, the ones that did did so in only one of two ways. *Id.* at 683-84 (internal quotation marks omitted).

[63] 323 F.3d 805 (9th Cir. 2003).

[64] *Satava*, 323 F.3d at 811-12.

[65] *Id.* (internal citation omitted).

> I am a scientist who embraces art, but not an artist who embraces science. "Body Worlds" stands at the intersection of science and art. If pressed to define it, I would call it anatomical art—the aesthetic presentation of the body interior. I do not view the body as an art form, but as an anatomical specimen of great wonder.[66]

Von Hagens's most popular selection conforms to anatomical standards—it presents the human body from a "skin-deep" perspective, where the epidermal layer is removed to reveal the interconnected muscular tissues. On the other hand, in a minority of exhibits, von Hagens lets go of anatomical convention and is instead guided by aspects of his own personality, such as a tacky romanticism in the heart-shaped lovers exhibit[67] and a rather perverse sense of humor in "The Flasher."[68] The range of von Hagens's expression rules out an all-encompassing characterization of an exhibit of his as either meeting the *Feist* originality standard or not.

After applying the *Matthew Bender* factors, it is clear that there are some aspects of von Hagens's selections that are insufficiently creative, while others go above and beyond the minimal standards of creativity. It is also apparent, that a significant portion of von Hagens's exhibits do not strictly fit into a *Matthew Bender*-like paradigm. The exhibits contain selections that are undoubtedly guided by anatomical conventions, but should not be considered insufficiently creative. Such selections should be treated in accordance with the scenes a faire doctrine and considered original, but filtered out during the substantial similarity analysis.

When portraying physiological systems in their entirety, the choices available to von Hagens are indeed severely limited. For example, there are only two ways to present the entire muscular system, by removing the epidermal layer to present the muscular tissues supported by the skeleton or by removing both the overlaying skin and the underlying skeleton to isolate the tissues and present the muscular system independently of the body. Similar constraints apply to other physiological systems presented in their entirety. In one exhibit, von Hagens removes the skin and the musculature to contrast the nervous system against the skeleton; and in another, he presents the circulatory system as shaped by, but without, the underlying human form. These limitations conform to the constraints put forth in the *Matthew Bender* test, as analogous to a

---

[66] Colin St. John, *Dr. Gunther von Hagens, Body Worlds/Museum of Science and Industry, Chicago, IL*, NEW YORK ARTS MAGAZINE, Jan./Feb. 2006, http://www.nyartsmagazine.com/index.php?option=com_content&task=view&id=3627&Itemid=25.

[67] In this exhibit two cadavers are positioned as embracing each other so that their bodies form the outline of a heart.

[68] In this exhibit a cadaver's musculature is separated from the skeleton and fanned out to resemble the opened raincoat of a man who is indecently exposing himself.

publisher's choice between two standards of citation. As such, these selections lack the minimal degree of originality required for protection.

The majority of dissection choices utilized by von Hagens fail to strictly conform to a *Matthew Bender* analysis. Anatomical practice has been evolving since the days of Leonardo da Vinci, with its methods perfected by generations of practitioners in order to present anatomical information in a succinct way that reflects fundamental physiological principles. Conventions of dissecting the body have developed in accordance with fundamental principles, such as the fact that most of the structures of the human body are mirror image reflections of each other when viewed across the vertical plane that separates the body into left and right halves. This plane is known as the sagittal plane. There are other divisions such as the coronal plane, which divides the body into anterior and posterior halves (front and back), and the transverse plane, which divides the body into the top and bottom. Another convention divides the tissues into systems in accordance with their functions, such as respiratory, digestive, muscular, and nervous systems. In a sense, these conventions are "garden variety" because they present information in a stereotyped or typical manner in accordance with a long practice of usage;[69] nevertheless, anatomical constraints do not limit their use as severely as industry constraints limited publishers in *Matthew Bender*.

In "Reclining Pregnant Woman," a pregnant woman's womb and fetus are revealed through the removal of the left anterior mediolateral tissues of the abdomen. Circumstances do not condition this particular selection, as the womb and fetus could have been instead revealed in a number of alternate ways: through removal of right mediolateral tissues, through removal of abdominal tissues along a transverse rather than sagittal plane, through removal of the anterior abdominal tissues in their entirety, or in another manner. Furthermore, unlike the publishers in *Matthew Bender*, von Hagens selected the particular application of the anatomical convention via subjective judgments based on individual taste and value.[70] He personally decided to expose the fetus by removing the left mediolateral tissues rather than those on the right side.[71] Consequently, von Hagens's selection of tissues in accordance with anatomical conventions cannot be considered insufficiently creative.

Even though anatomical conventions are not to be considered "garden variety" under *Matthew Bender*,[72] that court's policy concerns nevertheless apply: "If both of these arrangements were protected, publishers of judicial

---

[69] *See* Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 674, 682-83 (2d Cir. 1998).

[70] *See id.* at 689.

[71] This is an assumption based on von Hagens claiming personal authorship of all of his exhibits. Gunther von Hagens Body Worlds, http://www.bodyworlds.com/en/prelude/human_saga.html (last visited Jan. 10, 2010).

[72] *Id.* at 683.

opinions would effectively be prevented from providing any useful arrangement of attorney information for Supreme Court decisions that is not substantially similar to a copyrighted arrangement."[73] Von Hagens makes most of his selections in accordance with anatomical conventions. Viewing particular anatomical conventions as von Hagens's original expression would not only constrain his competitors in the plastinated-cadaver market, but also restrict the ability of others to convey anatomical information in other mediums such as illustrations, three-dimensional computer renderings, models, and embalmed cadavers.

One common-sense solution to this dilemma entails a conception of anatomical conventions as scenes a faire. Under this approach, selections made in accordance with these conventions would be viewed as motivated by an author's discretion, but at the same time be appropriately filtered out in a substantial similarity analysis.[74]

The selection and positioning of tissues in exhibits such as "The Flasher," however, in which a cadaver's abdominal musculature is fanned out to resemble an exhibitionist's trench coat, cannot be attributed solely to anatomical convention. Consequently, such arrangements should be seen as original to the author.

D. Originality in the Positioning of Exhibits

Another avenue for claiming original expression is an argument based on the positioning of cadavers. In both the Second Circuit District Court's *Hart v. Dan Chase Taxidermy*[75] and the Ninth Circuit's *Satava v. Lowry*,[76] the courts allowed for original expression in the positioning of the sculptural works: "Part of each mannequin is the artists' conception of what the animal is doing and how that animal would appear while doing that activity. Thus the gestures, pose, attitude, . . . all represent the artists' expression of the particular animal,"[77] and "[Satava] has made some copyrightable contributions: the distinctive curls of particular tendrils [and] . . . the unique shape of jellyfishes' bells. To the extent that these and other artistic choices were not governed by jellyfish physiology or the glass-in-glass medium, they are original elements that Satava theoretically may protect through copyright law."[78]

---

[73] *Id.* at 684.

[74] 4 NIMMER & NIMMER, *supra* note 7, at § 13.03[B][4].

[75] 884 F. Supp. 71 (N.D.N.Y. 1995).

[76] Satava v. Lowry, 323 F.3d 805 (9th Cir. 2003).

[77] *Hart v. Dan Chase Taxidermy Supply Co.*, 884 F. Supp. 71, 75 (N.D.N.Y. 1995), *vacated on other grounds*, 86 F.3d 320 (2d Cir. 1996).

[78] *Satava*, 323 F.3d at 812.

Similarly, the positioning of von Hagens's exhibits will be protected (barring expression that will be considered as unoriginal or that will be ignored in a substantial similarity analysis due to policy reasons). Ownership of ideas runs contrary to fundamental principles of copyright. Just as the idea of depicting a jellyfish swimming in its natural surroundings is part of the public domain,[79] so too is an idea to portray a cadaver engaged in a particular human activity. Von Hagens portrays cadavers engaging in athletics, embracing each other, posing for an invisible artist, and indecently exposing themselves to a stranger. Von Hagens is unable to use copyright to preclude others from portraying these ideas.[80]

In addition, some aspects of his portrayal of these ideas will not be considered in a substantial similarity analysis in accordance with merger and scenes a faire doctrines. Aspects that will be considered as necessary for a portrayal of a particular idea—such as limb positioning corresponding to a hurdler clearing a hurdle—are not protected as standard elements required for such a portrayal. In *Satava*, the vertical orientation of jellyfish in the glass-in-glass sculptures was so considered because jellyfish swim vertically.[81] In *Reece v. Island Treasures Art Gallery, Inc.*,[82] a district court in the Ninth Circuit considered whether a stained glass image infringed on a photographer's depiction of a native Hawaiian hula dancer.[83] The Ninth Circuit district court held that positioning of the dancer's limbs was not protected because it constituted a standard hula dance movement.[84]

The same features can be filtered out of a substantial similarity via merger. Merger analysis is empirical; it determines whether it is possible to portray an idea in various ways so that particular features will not be substantially similar to one another among various portrayals. If such similarity is unavoidable, then these features merge with the underlying idea. In the *Dan Chase* line of cases,[85] the courts found the sway of the taxidermic fish's tails to be the only distinguishing feature of the underlying mannequins used to mount them.[86] Upon remand of its initial decision, the district court examined a range of specimens in order to determine merger.[87] While the court found minor

---

[79] *See id.* at 811.

[80] *See* Reece v. Island Treasures Art Gallery, Inc., 468 F. Supp. 2d 1197, 1206 (D. Haw. 2006) (holding that the idea to portray a woman in a particular dance position is not protected).

[81] *See Satava*, 323 F.3d at 811.

[82] 468 F. Supp. 2d 1197 (D. Haw. 2006).

[83] *Id.*

[84] *Id.* at 1206-07.

[85] Hart v. Dan Chase Taxidermy Supply Co., 884 F. Supp. 71 (N.D.N.Y. 1995), *vacated on other grounds*, 86 F.3d 320 (2d Cir. 1996), *remanded to* 967 F. Supp. 70 (N.D.N.Y. 1997), *aff'd*, 152 F.3d 918 (2d Cir. 1998).

[86] 967 F. Supp. 70 (N.D.N.Y. 1997).

[87] *Id.*

differences in the sway of the fish's tails, it nevertheless determined that it was impossible to produce a realistic sway without it being similar to a sway found in other specimens.[88] The circuit court affirmed this reasoning.[89]

Similar analysis can be performed on the "The Hurdler"[90] exhibit. The issue is this: In terms of limb positioning, is it possible to produce a range of hurdling cadavers without their limb positioning being substantially similar to one another? The analysis must be done within a particular stage of a runner clearing a hurdle. Even though limb positions differ significantly across the various stages, it would be poor public policy to allow an author to copyright a depiction of a particular hurdling stage. Portrayals of any stage of the motion will be substantially similar to one another; the angle of the body in relation to the ground and the angles between the legs and the arms will all be alike. As in *Dan Chase*, there will be some differentiation—the various angles will not be perfectly aligned and the positioning of feet or wrists may be different—but these variations will not be significant enough to cut against substantial similarity.[91] These details, however, may be protected against direct copying through a medium such as photography.[92]

The scenes a faire and merger doctrines are interchangeable in some, but not all contexts. Some features that will be considered to merge are nevertheless too unique to be considered standard elements. A good example of this is "The Runner," an exhibit in which a running cadaver's muscles are detached from the limbs and positioned to resemble a rooster's puffed out feathers. Such positioning can only be considered as standard on a rooster and only when it comes to its feathers. This positioning would nevertheless be considered to merge because there are only two ways to achieve such an effect: to detach the muscles at their connections to the top parts of the limb bones as it is done on "The Runner," or alternatively to detach them at their connections to the bottom parts of the limb bones.

---

[88] Hart v. Dan Chase Taxidermy Supply Co., 86 F.3d 320 (2d Cir. 1996), *remanded to* 967 F. Supp. 70 (N.D.N.Y. 1997), *aff'd*, 152 F.3d 918 (2d Cir. 1998).

[89] 152 F.3d 918 (2d Cir. 1998).

[90] Here a cadaver is positioned in the shape of a hurdler clearing a barrier.

[91] *See Dan Chase Taxidermy Supply Co.*, 967 F. Supp. at 73 ("A comparison of the Plaintiffs' and the Defendant's fish forms reveals that while not exactly the same, the forms are similar in general appearance, proportion, and cant of the tail.").

[92] Nimmer points out that just because original copyrighted features can be considered as, standard, it does not mean that they can be freely copied. "Rather, permissible copying is limited to that similarity which necessarily results from the replication of an idea." *See* 4 NIMMER & NIMMER, *supra* note 7, at § 13.03[B][3].

E. Assessment of the Idea and Expression Dichotomy

Apart from filtering out individual aspects, such as athletic positions and dance movements, applying the idea and expression dichotomy to filter out unprotectable elements becomes almost untenable when dealing with complex exhibits in their entirety. Merger and scenes a faire become functions of the generality of the idea being portrayed.[93]

If we view "The Relay Runner" exhibit as expressing the idea of a cadaver's skeleton handing off a relay baton to its "muscle man"[94] then we have no choice but to consider most of the aspects of the exhibit as merging with the underlying idea. This idea cannot be expressed without positioning the skeleton behind the "muscle man" and one of the skeleton's limbs extended forward to hand off the baton to the "muscle man," who has one of his arms extended backwards. Consequently, a competing exhibit incorporating these features will not be considered to be infringing.

Yet if the idea is captured more generally, such as "an athletic interaction between two independently supported tissue layers of the same cadaver," then almost none of the features can be considered as merging, and any set of positions between a skeleton and a "muscle man" portraying a relay may be considered as infringing.

Judge Learned Hand addressed a similar concern in *Nichols v. Universal Pictures Corp.*, the case that rooted the scenes a faire doctrine:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what

---

[93] In *Mannion v. Coors*, the court arrives at the above proposition through a discussion of *Kaplan v. Stock Market Photo Agency, Inc.*, 133 F. Supp. 2d 317 (S.D.N.Y. 2001):

> in which two remarkably similar photographs of a businessman's shoes and lower legs, taken from the top of a tall building looking down on a street below . . . were held to be not substantially similar as a matter of law because all of the similarities flowed only from an unprotected idea rather than from the expression of that idea. But what is the "idea" of Kaplan's photograph? Is it (1) a businessman contemplating suicide by jumping from a building, (2) a businessman contemplating suicide by jumping from a building, seen from the vantage point of the businessman, with his shoes set against the street far below, or perhaps something more general, such as (3) a sense of desperation produced by urban professional life? If the "idea" is (1) or, for that matter, (3), then the similarities between the two photographs flow from something much more than that idea, for it have would been possible to convey (1) (and (3)) in any number of ways that bear no obvious similarities to Kaplan's photograph. (Examples are a businessman atop a building seen from below, or the entire figure of the businessman, rather than just his shoes or pants, seen from above.) If, on the other hand, the "idea" is (2), then the two works could be said to owe much of their similarity to a shared idea.

Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 456 (S.D.N.Y. 2005).

[94] In this paper this term refers to the independently supported muscle layer.

> the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.[95]

This passage is often cited to convey the arbitrariness implicit in the line drawing required by the idea and expression dichotomy.[96] Nevertheless, Judge Hand saw such arbitrariness as implicit to law in general and did not see it as a reason to not distinguish between idea and expression.[97]

The problem in the context of "The Relay Runner," however, is not the arbitrariness of choosing which level of generalization describes the author's idea expressed in the exhibit; it is the arbitrariness of the formulations of the ideas themselves. Both the idea and expression dichotomy and Judge Hand's abstraction discussion are rooted in the originality analysis of literary works and cannot be successfully applied to visual art.[98]

For literary works, the abstractions are a useful tool because (1) they mirror the writing process, moving from the general to the specifics of an abstract plot, and (2) it is likely that most people would agree on the descriptions of each level of generality. It is also likely that most would agree that *Romeo and Juliet* is (a) most generally, a tragedy, (b) more narrowly, a play about the circumstances of individuals' lives determined by surrounding events that are out of their control, and (c) even more specifically, about the doomed love of two young people on opposite sides of a violent family feud. The narrower formulations, such as those found under (c), are still considered ideas in the public domain because there are still an infinite number of ways in which they can be brought to life. It is likely that people are accustomed to abstracting such generalizations from the details of specific plays or novels in order to compare different works or to see how one work may have influenced another one.

Such generalizations do not carry over to visual art as easily. In visual art there may be no agreement over the idea expressed even in seemingly straightforward works such as the "The Relay Runner." One cannot be sure if, when composing this exhibit, von Hagens was conscious of interactions between different layers of a person's body or if his conception specifically involved an athletic skeleton. Consequently, an infringement analysis centered on the idea and expression dichotomy, examining whether a competing exhibit borrowed von Hagens's abstract ideas or his specific expression of them, is as

---

[95] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (internal citation omitted).

[96] *See, e.g., Coors Brewing Co.*, 377 F. Supp. 2d at 457.

[97] *Id.*

[98] *See id.* at 458.

likely to be determined on formulations of ideas that have never crossed von Hagens's mind as on those that have. Furthermore, when it comes to visual art it is also difficult to separate the work from the idea that it is intended to portray: "an artist's idea, among other things, is to depict a particular subject in a particular way."[99]

Some courts have followed the above reasoning to conclude that the idea and expression dichotomy is not useful or relevant when applied to visual art.[100] Such courts translate discussions of ideas behind visual works as concerning discussion of those works' subject matter.[101] This approach provides the ground work for an infringement analysis—"description of the subject at a level of generality sufficient to avoid implicating copyright protection"[102] without guessing about the nature of the ideas that the author intended to depict. If the two works can be said to depict the same subject matter then the analysis can be advanced by determining if the defendant's work infringed by portraying the subject matter in a substantially similar way to the plaintiff's.[103]

In *Mannion v. Coors Brewing Co.*, the subject matter of the plaintiff's photograph depicted a black man in a white T-shirt, wearing an extensive amount of jewelry around his neck and on his hands, with his hands held together in front, resting at the top of his pants, photographed against a cloudy sky background. The court described the portrayed subject matter as "a young African American man wearing a white T-shirt and a large amount of jewelry."[104] The court found the cloudy sky, the subject's pose, and the white T-shirt to be standard elements that are not copyrightable in and of themselves. However, when these features are present and are arranged in a specific manner, the court found that they contribute to the plaintiff's original way of depicting the subject matter and may be copyrightable.[105]

In accordance with the reasoning above, the conception of the subject matter portrayed in "The Relay Runner" should be a description general enough to be depicted in another exhibit without necessarily infringing on the original. One must also be mindful that, when it comes to the subjects of plastination exhibits, an author's creativity is limited by the application of the merger and scenes a faire doctrine to the dissection of individual cadavers. Thus, if the originality of the author's choice is to be protected by the description at the subject level (i.e., the level of an individual cadaver), the description should be general enough so that the dissection choices would not be interpreted as

---

[99] *Coors Brewing Co.*, 377 F. Supp. 2d 444, 458 (S.D.N.Y. 2005).

[100] *See, e.g., id.* at 457-58.

[101] *See, e.g., id.*

[102] *Id.* at 458.

[103] *Id.* at 460-61.

[104] *Id.* at 460.

[105] *Id.* at 462.

standard elements. Otherwise, with the subject matter described as "a skeleton and a 'muscle man' of the same cadaver engaged in a relay race," a competitor's dissection choices become so constrained that public policy would require the original author to lose protection over his selections. Both the skeleton and the "muscle man" become standard elements, and the originality analysis focuses on the positioning of the subjects rather than on the subjects themselves.

Such an approach, however, would be contrary to the principles of plastination. In plastination exhibits, the anatomy of the cadavers is equally, if not more, important than the positioning. Von Hagens uses the positioning to bring attention to the specific anatomical concepts he wishes to present to the public. He explained to a reporter: "It has always been my intention to share this treasure with those outside the medical world. As an educator, I always knew that for an anatomical exhibit to resonate with the public, I had to use a heightened sense of aesthetics to capture the viewer's imagination."[106]

Consequently, the formulation of the subject matter should protect the originality of a dissection selection as well as the choice of positioning. A formulation like "two tissue layers of a cadaver engaged in a relay race" would allow another author to use the positioning of a relay runner to alternatively comment on the anatomy of the cadaver. For example, an author could use such positioning to contrast the anatomies of the nervous and circulatory systems without infringing on the original expression in "The Relay Runner." On the other hand, another author who, like von Hagens, wanted to contrast the musculature with the skeleton beneath it could safely do so by utilizing a different position.[107]

This approach to the level of generality does not award the original author an exclusive right to use certain dissection choices in specific positions. Rather, it prevents these dissection choices from being filtered out as standard elements, enabling a court to utilize them in a substantial similarity analysis. For example, a substantial similarity analysis between two exhibits of "a cadaver playing chess" will consider the fact that in both exhibits the brain is exposed. This would not be the case with a narrower formulation of the subject matter portrayed in the exhibits, such as "a cadaver with its brain exposed playing chess."

Such a formulation would also serve to protect some of von Hagens's most original exhibits. In "The Flasher," a cadaver's musculature is separated from the skeleton and fanned out to resemble the opened raincoat of a man who is

---

[106] Colin St. John, NY ARTS MAGAZINE, *Dr. Gunther von Hagens, Body Worlds/Museum of Science and Industry, Chicago*, http://www.nyartsmagazine.com/index.php?option=com_content&task=view&id=3627&Itemid=25 (last visited Jan. 10, 2010).

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

indecently exposing himself. The musculature of the skull is split along the sagittal plane from the frontal top of the skull to the base at the neck. It is then separated from the skull and fanned out parallel to the coronal plane and attached only to the back of the head, resembling the "popped-open" collar of a raincoat. The front of the opened raincoat is mimicked by splitting the lower back muscles along the spine and fanning them out parallel to the coronal plane while also fanning out some of the upper arm musculature in a similar fashion.

If the subject matter is formulated as "a cadaver's musculature fanned out to resemble a flasher's coat," then von Hagens's twisted but ingenious expression of this idea would almost necessarily be seen as merging. There is a limited number of ways to use the musculature to produce such an effect. If, on the other hand, a more general formulation is used, such as "a cadaver positioned in such a way as to resemble a flasher exposing himself," then there is a wide range of possible expressions.

III. INFRINGEMENT IN CONTEXT

This section considers infringement issues in the context of analyzing similarly dissected and positioned plastination exhibits from competing shows. This article compares cadavers created by von Hagens exhibited at a Body Worlds exhibition with cadavers created by Premier Exhibitions Inc., a competitor in the plastinated cadaver market. For the purpose of this analysis, von Hagens's exhibits are assumed to be the original work and Premier's to be the potentially infringing work.

The question in each instance is whether an author would be successful in establishing infringement in a potential copyright suit. Fair use will not be considered. Analysis will center on a plaintiff's ability to prove the copying of original elements of copyrighted work. Issues such as originality, copyrightability and substantial similarity will be considered, with sub-issues, such as an original author's compliance with statutory formalities and access of the potential infringer being assumed as established.[108]

Appropriation is actionable only if it rises to the level of substantial similarity. In other words, if a work is not substantially similar then it is not infringment. Federal circuits take slightly different approaches to this matter, many of which utilize some form of the "ordinary observer test."[109] This test

---

[108] *See generally Feist*, 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.").

[109] Morgan M. Stoddard, *Mother Nature as Muse: Copyright Protection For Works of Art and Photographs Inspired by, Based on, or Depicting Nature*, 86 N.C. L. REV. 572, 585 (2008) ("The First, Second, Third, and Fifth Circuits all apply the "ordinary observer test." (citing ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW

filters out unprotected expression prior to determining if "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them and regard [the works'] aesthetic appeal as the same."[110] The following sections analyze substantial similarity under this formulation.[111]

A. The Relay Runner

This article has previously discussed von Hagens's "The Relay Runner" exhibit and has argued that the subject matter of this exhibit should be formulated as "two tissue levels of a cadaver engaged in a relay race" to protect the author's dissection choices from being filtered out under a narrow formulation.[112] "Bodies Revealed," a plastination show run by Premier Inc., fields a similar exhibit utilizing a separately positioned skeleton and "muscle man" from the same cadaver, connected at the fingertips, as if the two forms are spinning around each other.

Unquestionably, Premier's exhibit contains elements that are similar to "The Relay Runner;" both exhibits contain a cadaver's skeleton and "muscle man" interacting with each other. Premier's contrast between the anatomy of a cadaver's skeleton with its "muscle man," portrayed as a physical interaction between the two, may be viewed as an element taken from "The Relay Runner" exhibit. While von Hagens does not have a monopoly over the dissection choice to remove all of a cadaver's tissues to reveal a skeleton or the dissection choice to isolate the muscle tissue as a "muscle man," his use of these two standard elements can be protected if sufficiently original. Both Second and Ninth Circuit Courts have protected such compilations.[113]

Unfortunately for von Hagens, Premier's appropriation of this contrast will not be viewed as infringement. If approached in terms of the idea and expression dichotomy, Premier can be seen as appropriating von Hagens's idea to contrast a cadaver's inner tissue levels but not its expression. Premier is expressing the idea of the contrast differently. In both, a skeleton and a "muscle man" are interacting, but these interactions are not enough alike to rise

---

§§ 3:1 to 3:1.4 (2007))).

[110] *Id.* at 585 (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)) (articulating the Second Circuit's "ordinary observer" test).

[111] The nuances of the circuits are not addressed in this article unless particularly relevant.

[112] *See supra* Part II.E.

[113] *See* R. GORMAN, J. GINSBURG, COPYRIGHT, CASES AND MATERIALS 555 (7th ed. 2006) (discussing Second Circuit cases and stating: "In effect, such an analysis treats the selection and sequencing of these elements, perhaps unprotectable in isolation, as though they were a copyrightable compilation."); Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. 2002) ("[I]nfringement can be 'based on original selection and arrangement of unprotected elements.'") (quoting Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1446 (9th Cir. 1994)).

to the level of substantial similarity; one involves athletics and the other looks like an exercise of affection or play. Courts often point out that the existence of differences between two works will not protect a plagiarist who appropriated another's expression.[114] Yet, when determining whether a reasonable observer will find the two works substantially similar, courts often resort to compiling laundry lists of appropriately weighted[115] differences and similarities between the two works.[116] Because Premier expresses the idea of von Hagens's work in a different way, the differences in expressions will overwhelm any similarities. A court would be able to point to differences in the positioning of the cadavers, the presence of other objects (i.e., the baton), and the mood evoked by the two exhibits (i.e., competition in one and affection in the other) to find that the two are not substantially similar.

Alternatively, if the idea and expression dichotomy is rejected and the analysis is performed in terms of subject matter, as advocated for in *Coors Brewing Co.*, the differences in the subject matters portrayed in the two works—"two tissue levels of a cadaver engaged in a relay" and "two tissue levels of a cadaver displaying affection through physical interaction"—will preclude a substantial similarity finding.[117]

B. The Chess Player

A more intriguing comparison can be made between von Hagens's "The Chess Player" and Premier's "The Thinker."[118] The subject matter of both exhibits can be formulated as "a cadaver playing chess." "The Chess Player" involves a seated, skinned cadaver, with its arms on a table about to move a chess piece on a board in front of him. The cadaver's brain and spinal cord are

---

[114] *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936) ("[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate.").

[115] *See supra* Part II.A. Elements that can be considered as standard or merging are given weaker protection known as "thin copyright." Stoddard, supra note 109, at 585 ("Highly realistic natural works are said to have only a thin copyright because such works supposedly copy what already appears in nature.") (citing to (among others) *Satava*, 323 F.3d at 812). Because these elements are seen as necesssitated by the idea they are expressing, their comparison is done via a virtual identity standard; similarities caused by the underlying idea are ignored, with only identities caused by direct copying being considered. *Satava*, 323 F.3d at 812 ("When the range of protectable expression is narrow, the appropriate standard for illicit copying is virtual identity.") (quoting *Apple Computer, Inc.*, 35 F.3d at 1446).

[116] *See* Reece v. Island Treasures Art Gallery, Inc., 468 F. Supp. 2d 1197 (D. Haw. 2006); Funky Films, Inc., v. Time Warner Entm't Co., 462 F.3d 1072, 1077 (9th Cir. 2006).

[117] As per analysis presented here and in *Coors Brewing Co.*, infringing similarities occur when two works depict the same subject matter in a similar manner. *See supra* Part II.E.

[118] "The Thinker" has been exhibited both independently and next to a chessboard. To make the case for substantial similarity most persuasive, "The Thinker" will be analyzed as exhibited with the chessboard.

exposed, along with the left parietal lobe of the brain; nerve fibers are visible that run from the spine into the skull and from the base of the spine into the pelvis. "The Thinker" involves a skinned cadaver, positioned in the pose of contemplation à la Rodin's classic of the same name.[119] Its brain is exposed and dissected to display the two sides, and the spinal column is also exposed with nerve fibers running from the spine into the skull.

"The Chess Player" and "The Thinker" have multiple similarities. Both cadavers are seated and positioned crouching forward in front of a chess board; both brains are exposed via a removal of the skull cap above the orbital ridge; both have had the muscle tissues of the back removed in a similar manner, exposing the spinal column in its entirety; and both exhibits show nerve fibers running from the spinal column to the brain through the skull.

When considering such similarities, courts give standard or merging elements weaker protection known as "thin copyright."[120] Because these common elements are necessitated by the idea they are expressing, their comparison is done via a virtual identity standard: similarities caused by the underlying idea are ignored, and only identities caused by direct copying are considered. Because the appearance of the cadavers will be seen as composed of standard dissection choices, such as complete removal of the skin to reveal the entire musculature, removal of the skull cap above the orbital ridge to expose the brain, and removal of back musculature to reveal the spine, courts will likely focus on the differences between these dissections and ignore the similarities.

In *Reece*, when comparing the similarities between a plaintiff's photograph of a Hawaiian hula dancer and a defendant's stained-glass window portraying a hula dancer in the same position, the courts filtered out the majority of the similarities through a "thin copyright" approach, viewing them as necessitated by decisions to portray similar underlying ideas.[121] Looking for virtual identity, the court emphasized the minute differences in the dress, hair length, and the angle of the positioning of the hula dancers' bodies as evidence that the similarities were not caused by direct copying.[122] Similarly, the differences between the "The Chess Player" and "The Thinker" will likely be emphasized over the similarities. In "The Chess Player," the left parietal lobe of the brain is revealed through the left side of the skull musculature that is flapped open with the underlying bone removed. In "The Thinker," the skin below the skull and

---

[119] Both works portray a seated man, crouching in a contemplative pose with his right elbow resting on his right knee, with the right hand supporting his chin and with the left arm resting on the left knee.

[120] *See supra* Part II.B. (discussing the courts' consideration of merger during a substantial similarity analysis).

[121] *Reece*, 468 F. Supp. 2d at 1206-07.

[122] *Id.* at 1207-09.

the musculature below the orbital ridge are left intact; instead, incisions are made into the exposed brain on both sides, displaying deep brain tissue. There are also differences in the way the spinal columns are revealed. To expose the spine on "The Thinker," a smaller area of muscular tissue is removed than on "The Chess Player." "The Chess Player" exhibits more of the spine at its juncture with the pelvis, with nerve fibers exposed in this area, whereas in "The Thinker," they are not. In terms of the positioning of the cadavers, courts will likely emphasize that the two cadavers are positioned differently because "The Chess Player" reaches toward a chess board on the table and "The Thinker" contemplates the board from a distance with its hands on the chin and the knee. Any similarities between the two positions will be seen as caused by human dynamics and gravity and are unlikely to be considered.

Von Hagens's strongest claim for infringement will be to argue that his combination of the standard elements in "The Chess Player" should be entitled to protection. Specifically, that it is a skinned cadaver, seated and crouching near a chess board with its brain exposed by a separation of the skull above the orbital ridge and its spinal column with the nerve fibers exposed, running from the spinal column to the brain through the skull. In "The Thinker," the same elements are combined in a similar fashion.

Courts have previously entertained such arguments. In *Sheldon v. Metro-Goldwyn Pictures Corp.*,[123] Judge Learned Hand, of the Second Circuit Court of Appeals, approached a playwright's combination of unprotectable stock elements as a protectable compilation.[124] More recently, as discussed in Part II.E, this approach was applied to photography in the Second Circuit Court's *Coors Brewing Co.*: "Other elements arguably in the public domain—such as the existence of a cloudy sky, Garnett's pose, his white T-shirt, and his specific jewelry—may not be copyrightable in and of themselves, but their existence and arrangement in this photograph indisputably contribute to its originality."[125] The case did not address the thin copyright/virtual identity standard as the defendant's depiction of the elements would not have risen to that standard. Ultimately, the defendant's photograph was found to be substantially similar.[126] One may conclude that copying a selection of standard elements can be sufficient for a finding of substantial similarity even if the similarity between the standard elements does not rise to the virtual identity standard.

The Ninth Circuit has taken a similar approach to viewing the selection of standard elements as a copyrightable if the compilation is sufficiently original. In *Funky Films, Inc. v. Time Warner Entertainment Co.*,[127] concerning the

---

[123] 81 F.2d 49 (2d Cir. 1936).

[124] *Id.*

[125] *Coors Brewing Co.*, 377 F. Supp. 2d at 462.

[126] *Id.*

[127] 462 F.3d 1072 (9th Cir. 2006).

potential appropriation of a script's characters and plot elements, the Ninth Circuit stated, "At a very high level of generality, both works share certain plot similarities . . . . But '[g]eneral plot ideas are not protected by copyright law . . . .'"[128] On the other hand, in *Metcalf v. Bochco*,[129] the court reached the opposite conclusion and found: "[T]he presence of so many generic similarities and the common patterns in which they arise do help the [plaintiffs]."[130] In *Reece*, the court acknowledged that the defendant's stained-glass window was similar to the plaintiff's photograph in capturing a Native Hawaiian woman on the beach performing a hula movement in traditional garb, similarly oriented and presented from the same angle, but chose to ignore these elements when determining substantial similarity.[131] In *Satava*, the court found the subject matter and the medium chosen by the plaintiff, the glass-in-glass jellyfish sculptures, to be so restrictive as to deny the plaintiff originality in his combination of unprotectable elements.[132]

There is no systematic approach to determining when similarity in an arrangement is sufficient for substantial similarity in the work as a whole. Such sufficiency seems to exist when the arrangement pattern of the infringing work so closely approximates that of the original as to convince a reasonable viewer that aesthetic appeal of the two works is the same. The pervasiveness of the similarities in the main characters, plot developments, theme, and setting were decisive in *Metcalf*.[133] Similarly, in *Coors Brewing Co.*, the court was persuaded by the similarities in almost every dimension that a photograph could be original, including the appearance and positioning of the subject, lighting, camera angle, and setting.[134] Such pervasiveness is also present in *Reece*, yet it had no impact on the analysis; the court simply acknowledged it and then moved on:

> Each captures a woman performing hula on the beach, kneeling in the sand in the midst of an 'ike movement, with the right arm outstretched and an open left hand

---

[128] *Id.* at 1081 (quoting Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985)).

[129] 294 F.3d 1069 (9th Cir. 2002).

[130] *Id.* at 1074. It is notable that access was an important aspect of the *Metcalf* ruling. Plaintiff originally gave his script to an actor who ended up starring in defendant's allegedly infringing series. *Id.* at 1075. Although beyond the scope of this paper, the access issue may play a role in any litigation between von Hagens's Body Worlds and Premier. It was reported that Dr. Sui Hongjin, the sole supplier of Premier's cadavers, was a former manager of von Hagens's project when it was based in China. *Worth £250 million*, CORPSESHOW.INFO, http://www.corpseshow.info/body_worlds_4_industry.html; *see also Corpse Show Stages to Provoke, to Educate?*, CHINA DAILY.COM.CN, http://www.chinadaily.com.cn/english/doc/2004-04/09/content_322006.htm (last visited Jan. 10, 2010).

[131] *See Reece*, 468 F. Supp. 2d at 1204.

[132] *See Satava*, 323 F.3d at 812.

[133] 294 F.3d 1069 (9th Cir. 2002).

[134] *Coors Brewing Co.*, 377 F. Supp. 2d at 462-63.

> against the face. The women are each adorned in the traditional hula kahiko fashion and their long dark hair flows behind them. And each image presents the woman from the same angle and orientation, from a perspective that is facing the left side of her body, as if in profile. Yet aside from these similarities, the court cannot say that these two images are "substantially similar" under established legal principles.[135]

It is likely that, as in *Satava,* the court found the arrangement as a whole to be standard, dictated by the subject matter, and to be ignored in a substantial similarity analysis.

Most works portraying traditional Hawaiian hula dancers are likely to involve traditional garb and movements, as well as the beach, the surf, and the ocean. Consequently, a generalization can be elicited from the above comparisons that a compilation of standard elements can figure into a substantial similarity analysis. The compilation itself, however, must not be viewed as standard or as merging with the subject matter or the medium it is portrayed in.

The combination of the chessboard and a cadaver in a sitting position will either be seen as too abstract to warrant protection, as in *Funky Films,* or as standard, as in *Reece* and *Satava.* In regards to the similarities in the dissections of the cadavers, the limited number of dissection choices utilized in the original exhibit makes it unlikely for a court to view the choice to use those particular dissections and not others as an original compilation. If a cadaver's dissection involved a higher number of dissection choices, resulting in a more intricate arrangement then it would be more likely that the appropriation of a large number of these dissection choices would result in a finding of pervasive similarities, as in *Metcalf.* In the case at hand, the similarity of choosing to expose both the brain and spinal columns in a similar manner may contribute to a reasonable observer finding the same aesthetic appeal, but this alone would not be determinative.

As for the comparison of the individual elements—such as the positioning of the sitting cadavers' bodies, the dissection choices of removing the cadavers' skin, and exposing the brain and spinal column—each comparison requires a thin copyright/virtual identity analysis because all of the elements can be considered standard. Since none of these elements are virtually identical to each other, no substantial similarity will be found.

C. The Star Warrior

"The Star Warrior" is an exhibit comprised of a male cadaver positioned standing up, slightly bending forward with his hands on his hips. His tissues

---

[135] *Reece,* 468 F. Supp. 2d at 1204.

are dissected into ring-like segments and are separated along transverse planes throughout the body. Some segments consist of skin with all the tissues underneath; other segments have only the skin removed; and still others have both the skin and the muscle layers removed to reveal bone and inner organs. Premier presents a remarkably similar exhibit in its "Bodies Revealed" show. The tissue segmentation on both cadavers is nearly identical: three rings of skin positioned in identical places on each cadaver's head, with tissues between the skin rings similarly dissected and the same layer of tissue removed in corresponding segments of the cadavers' heads. The pattern is repeated on the rest of the cadavers' bodies, with each cadaver being divided into nearly identical segments. The exposed flesh presents another similarity: the skin is sagging and wrinkled, while the exposed muscles are thin and atrophied, so it appears that both exhibits are comprised of bodies of elderly men. The positioning of the cadavers is slightly different, with the arms of Premier's hanging loosely and slightly in front of the body while von Hagens's "Star Warrior" has his hands on his hips. The left eye of "The Star Warrior" is closed while the right eye looks wide open because its eyelids have been removed. Premier's exhibit incorporates the same effect but slightly differently; the left eyelid is left intact in the open position while the right eyelid is completely removed.

These exhibits are peculiar because, unlike the majority of the exhibits, their most distinctive feature is their dissection pattern rather than their positioning of the cadaver. Accordingly, the formulation of the subject matter portrayed should concern the dissection rather than the positioning. Any description akin to "a cadaver with its tissues segmented into rings" would be appropriate.

The individual ring segments should be conceived of as standard elements. A court seems unlikely to give protection to this particular form of dissection. When looking at the cadavers as a whole, the pattern of alternating a skin segment with segments that reveal muscle and bone, or only bone, should be viewed as merging with the idea to segment the body into alternating skin, flesh, and bone. Consequently, the similarity between the corresponding segments will be considered under the thin copyright standard.

The similarity between the ring segments is striking. Each part of the body on both cadavers is broken into the same number of segments, with each corresponding segment revealing the same tissue layer. Also, the relative width of the individual segments appears to be nearly identical. Another striking similarity is between the dangling kneecaps hanging from the upper part of each cadaver's tibia. With respect to the appearance of the corresponding tissue segments, the two cadavers are virtually identical, with the similarity being pervasive throughout the two cadavers. Consequently, Premier's cadaver may be viewed as substantially similar to "The Star Warrior" as a matter of law, meaning a reasonable observer will think of the two exhibits as having the same

aesthetic appeal. Differences between the two exhibits exist, but are minor. "The Star Warrior" has all of the abdominal organs removed while they are exposed in Premier's exhibit. In addition, the right eye of "The Star Warrior" is closed while the right eye on the Premier exhibit is open. These dissimilarities are irrelevant since "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."[136]

IV. CONCLUSION

Both the medium and the subject matter restrict the scope of protected original expression in plastinated exhibits. Because the dimensions and appearance of the dissected tissues will be considered uncopyrightable products of discovery, original expression will only extend to an author's dissection choices and to the positioning of the cadavers. The doctrines of merger and scenes a faire further restrict the scope of copyrightable subject matter with many of an author's dissection and positioning choices being filtered out during a substantial similarity analysis. This makes it difficult to sustain an infringement suit by a plastinated exhibit author against a competing exhibition. Infringement can still be found, however, if the original dissection or positioning choices such as in "The Flasher" and in "Heart Shaped Lovers" are appropriated. Furthermore, a claim can be based on appropriation of an original arrangement of standard elements as long as this arrangement is not on its own seen as standard like that in "The Chess Player." It must also be noted that even if choices or arrangements are seen as standard, infringement can still be found if similarity between exhibits reaches the "virtual identity standard" as between "The Star Warrior" and its Premier counterpart.

---

[136] Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936).

Electronic Discovery: A Call for a New Rules Regime for the Hawai'i Courts

Brandon M. Kimura* and Eric K. Yamamoto**

I. OVERVIEW: THE NEW AGE OF ELECTRONIC DISCOVERY 154
II. THE PROBLEMS AND PROMISE OF ELECTRONIC DISCOVERY 161
A. Electronically Stored Information and the Transformation of Discovery 161
B. E-Discovery Trouble 163
C. Overview of Federal E-Discovery Rules Amendments 166
III. ADOPTING THE FEDERAL E-DISCOVERY RULES REGIME 168
A. Twenty-Three Other States' Adoption of the Federal Regime 168
B. Hawai'i State Courts: Adopting the Federal Regime 169
C. The Federal E-Discovery Rules Regime 171
1. Early attention to e-discovery issues: Rules 16(b) and 26(a) and (f) 171
2. Production format and procedure: Rules 33(d) and 34(a) and (b) 173
3. Discovery of ESI that is not reasonably accessible because of undue burden or cost: Rule 26(b)(2)(B) 174
4. Maintaining attorney–client privilege and work-product immunity despite inadvertent production: Rules 26(b)(5)(B) and 26(f)(4) 175
5. Sanctions and a safe harbor for loss of ESI: Rule 37(e) 177
IV. CLARIFYING AND SUPPLEMENTING E-DISCOVERY RULES FOR HAWAI'I PRACTICE 177
A. Early Attention for Efficient ESI Exchanges 177
B. Express Cost–Benefit Proportionality Analyses 179
1. Cost–benefit proportionality generally 180
2. Cost-shifting 184
C. Duty to Preserve ESI and Sanctions for Destruction 185
1. Attorneys' and clients' duty to preserve ESI 185
2. Sanctions for destruction of ESI 190
a. Broader context: Hawai'i court sanctions for non-e-discovery abuse 190

* Class of 2010, William S. Richardson School of Law, University of Hawai'i.
** Professor of Law, William S. Richardson School of Law, University of Hawai'i.

b. General discovery sanction rules applicable to ESI destruction 193
c. A limited safe harbor for "loss" of ESI 195
d. Crafting an affirmative sanction rule for ESI destruction 199
i. When are sanctions authorized? 199
ii. What sanctions are authorized? 199
V. CONCLUSION 201

"E[lectronic] discovery [is] profoundly changing lawyering."[1]
"What it means to be a lawyer will change rapidly in the years to come."[2]
"E-Discovery [is] a morass."[3]
"Massive sanction for e-discovery failures offers lessons for lawyers."[4]

I. OVERVIEW: THE NEW AGE OF ELECTRONIC DISCOVERY

Electronic discovery has arrived. And with a profound impact on attorneys, judges, businesses and individual litigants.[5] Electronically-stored information (ESI) is now the form for more than ninety percent[6] of all information created

---

[1] Chris Mondics, *Ediscovery Profoundly Changing Lawyering*, PHILADELPHIA INQUIRER, June 8, 2008, at D1.

[2] George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, ¶ 6 (2007).

[3] Martha Neil, *Litigation Too Costly, E-Discovery a "Morass," Trial Lawyers Say*, A.B.A. J., Sept. 11, 2008, http://www.abajournal.com/news/litigation_too_costly_e_discovery_a_morass_trial_lawyers_say/ (internal quotation marks omitted).

[4] Sylvia Hsieh, *Massive Sanction for E-Discovery Failures Offers Lessons for Lawyers*, LAWYERS USA, Feb. 25, 2008, news.

[5] *See, e.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008) (determining that defendants waived any privilege or work-product protection for 165 electronically stored documents); *In re* Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007) (imposing severe sanctions on law firms and their insurer clients); Doppes v. Bentley Motors, Inc., 94 Cal. Rptr. 3d 802 (Cal. Ct. App. 4th 2009) (holding that the trial court failed to impose a default judgment sanction for e-discovery abuse and remanding with orders to do so).

[6] *See* SHIRA SCHEINDLIN ET AL., ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS 42 (2009) ("Ninety-two percent of the new information was *stored on* magnetic media, mostly in hard disks." (emphasis added) (quoting Peter Lyman & Hal R. Varian, How Much Information? 2003 (Oct. 27, 2003), http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm)); Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, ¶ 14 (2007) (citing The Sedona Conference, The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age 1 (Jonathan M. Redgrave et al. eds., 2005), http://www.thesedona conference.org/content/miscFiles/RetGuide200409.pdf [hereinafter Sedona Conference, Best Practices]).

and stored—whether business transactions, financial arrangements or social interactions.[7] This technology revolution is generating an evolution in the legal arena.[8] Specifically, new technology has transformed modern discovery—the litigation mechanism for unearthing and sharing relevant information.[9]

Lawyers who adroitly work through the complexities of e-discovery ably serve their clients and the courts—"secur[ing] . . . just, speedy, and inexpensive" litigation.[10] Those who miss its hidden issues and nuances may alter the outcomes of their cases, simple and complex, and at times face costly sanctions.[11] Indeed, e-discovery is changing the way businesses do, or should do, their business and the way lawyers lawyer.[12] Yet, for a time, in-house counsel, private firm attorneys and businesses nationwide walked largely in the

---

[7] *See, e.g.*, Sarah Merritt, Comment, *Sex, Lies, and Myspace*, 18 ALB. L.J. SCI. & TECH. 593, 595 (2008); Dennis Kennedy, *Get the (Instant) Message, Dude!: By Phone or PC, Messaging Offers Several Advantages*, A.B.A. J., Nov. 2008, at 40; Major R. Ken Pippin, *Consumer Privacy on the Internet: It's "Surfer Beware"*, 47 A.F. L. REV. 125, 125 (1999).

[8] *See* Monica A. Fennell, *Judge William Lee: Leading By Example*, RES GESTAE, Sept. 2008, at 46 (describing United States District Judge Lee's approach to embracing the societal technological revolution with a parallel technological revolution in the courts).

[9] *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984) ("Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.").

[10] FED. R. CIV. P. 1; *see* Chris Mondics, *Firm Tracks Evidence Generated by E-Devices; Clients are Considering Suits, or Fear Being Sued*, PHILADELPHIA INQUIRER, Feb. 1, 2009, at D1 (discussing how an e-discovery vendor can help businesses avoid legal disputes, narrow the issues, more accurately value cases, and ultimately seek the truth); *see also* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007) (discussing methods of properly admitting various types of ESI into evidence).

[11] *See infra* Section II.B.; Charles S. Fax, *Inadvertent Disclosure of ESI and "Reasonable Care": A Close Look at* Victor Stanley, LITIG. NEWS, Fall 2008, at 20 ("E-discovery can be dangerous for lawyers.").

For important commentary on problems in traditional discovery, see Lawrence J. Fox et al., *Ethics: Beyond the Rules: Historical Preface*, 67 FORDHAM L. REV. 691 (1998); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989); Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787 (1980); Wayne D. Brazil, *Views From the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217 (1980); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

[12] *See, e.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) (discussing the advent of records retention policies).

dark.[13] The news headlines in the epigraph reflect the heightened anxiety about this evolving litigation landscape.[14]

In 2005 the Judicial Conference Committee on Rules of Practice and Procedure affirmed the federal judiciary's commitment to "full disclosure" during civil discovery, declaring that "potential access to [relevant] information [should be] virtually unlimited."[15] To better achieve this goal, the Rules Committee addressed the increasing complexity of discovery of ESI.[16] In 2006, with Supreme Court approval, federal rule-making bodies amended the Federal Rules of Civil Procedure[17] to create a rules regime to guide e-discovery practice.[18] Described in depth in Section III.C., that new regime generally addresses early attention to e-discovery issues, the production format and procedure for location and disclosure of ESI, the handling of ESI that is not reasonably accessible because of undue burden or expense, a mechanism for dealing with inadvertently produced ESI and a limited safe harbor for e-discovery missteps.

Most important, the new federal e-discovery rules regime sends a clear signal to attorneys and businesses: *plan ahead, assess benefits and burdens* and *watch out for sanctions*!

---

[13] *See* Deni Connor, *Study Proves E-Discovery Confusion*, NETWORK WORLD, June 12, 2008, *available at* 2008 WLNR 1131194; Deni Connor, *Half of Businesses Not Meeting Federal E-Mail Discovery, Retention Rules*, NETWORK WORLD, July 5, 2007, *available at* 2007 WLNR 12960966.

[14] *See supra* text accompanying notes 1, 3–4.

[15] *See* Summary of the September 2005 Report of the Judicial Conference Committee on Rules of Practice and Procedure [hereinafter Report of the Judicial Conference Committee] 22, http://www.uscourts.gov/ rules/Reports/ST09-2005.pdf (citing a 1999 Federal Rules Advisory Committee goal to develop "mechanisms for providing full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties"); *see also* Wakabayashi v. Hertz Corp., 66 Haw. 265, 275, 660 P.2d 1309, 1315 (1983) ("The Hawaii Rules of Civil Procedure, like the federal procedural rules, reflect a basic philosophy that a party to a civil action should be entitled to the disclosure of all relevant information in the possession of another person prior to trial, unless the information is privileged." (citations omitted)).

[16] *See infra* Sections II.C. and III.C.

[17] "Federal Rules" or "Rules."

[18] DAHLSTROM LEGAL PUBLISHING, INC., THE NEW E-DISCOVERY RULES 5 (2006). The Advisory Committee of the Federal Rules of Civil Procedure submitted proposed amendments to the Standing Committee on the Rules of Practice and Procedure, who then submitted the proposed amendments, unchanged, to the Judicial Conference. *Id.* After unanimous approval by the Judicial Conference, approval by the Supreme Court and no Congressional action to the contrary, the rules became effective on December 1, 2006. *Id.*; Letter from Chief Justice John G. Roberts, Jr. to Rep. J. Dennis Hastert and Vice-President Dick Cheney (Apr. 12, 2006), http://supremecourtus.gov/orders/courtorders/frcv06p.pdf.

The federal amendments and the series of five opinions in *Zubulake v. UBS Warburg LLC*[19] (on which the amendments were in part based), however, have not resolved all e-discovery issues.[20] Ambiguities and gaps persist. For instance, the rules are largely silent on the duties of attorneys and clients to create and implement policies that govern preservation and destruction of potentially litigation-relevant ESI.[21] They also provide only limited guidance on the allocation of sometimes oppressive costs of e-discovery and the extent of cost–benefit proportionality considerations; and, they are silent on specific criteria for sanctions.[22]

Even with these limitations, twenty-three state courts have adopted the federal e-discovery rules regime in whole or in part, including California, Alaska, Arizona, Utah and Montana.[23] Six more states are currently considering e-discovery rules amendments, including Washington and New Mexico.[24]

The Hawai'i State Judiciary has yet to speak on e-discovery issues through new rules or appellate decisions. As a consequence, Hawai'i attorneys, judges and businesses lack tailored e-discovery guidance. Practitioners must necessarily look elsewhere for direction.[25] Yet, other courts' rulings form a

---

[19] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); Zubulake v. UBS Warburg LLC, 230 F.R.D. 290 (S.D.N.Y. 2003) (*Zubulake II*); Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*). Although the *Zubulake* opinions added significantly to the e-discovery common law prior to amendment of the Federal Rules, this article discusses the *Zubulake* opinions only to the extent that they clarify or add to the discussion herein.

[20] *See* The Sedona Conference, The Sedona Principles Addressing Electronic Document Production, Second Edition iv (June 2007), http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_ 607.pdf ("The [Federal] [R]ules do not answer many of the most vexing questions judges and litigants face. They do not govern a litigant's conduct before suit is filed, nor do they provide substantive rules of law in such important areas as the duty of preservation or the waiver of attorney–client privilege."); Jason Krause, *E-Discovery Gets Real: Revisions to the Federal Rules of Civil Procedure Still Leave Many Questions About Discovery of Electronic Evidence*, A.B.A. J., Feb. 2007, at 44.

[21] *Cf.* SCHEINDLIN ET AL., *supra* note 6, at 76–77 (discussing common law and Federal Rule 37(e)'s limited and implicit guidance); *see also* David K. Isom, *Electronic Discovery Primer for Judges*, 2005 FED. CTS. L. REV. 1, 15–16 (2005) (discussing various types and sources of data for possible preservation).

[22] *See infra* Sections IV.B. and C.

[23] Kroll Ontrack, State Rules & Statutes E-Discovery and Computer Forensics, http://www.krollontrack.com/library/staterules_krollontrack_dec2009.pdf (last visited Jan. 21, 2010).

[24] *Id.*

[25] *See* Amy K. Thompson-Smith et al., *Coming to Terms with Electronic Discovery*, 9 HAW. B.J. 4 (Feb. 2005); Memorandum from Keith K. Hiraoka, Roeca, Louie & Hiraoka, LLP, to Eric

patchwork of decisions. And, as mentioned, the federal e-discovery rules regime is silent or incomplete on some key issues.

To better explore the significance of the absence of e-discovery rules guidance in litigation practice consider *Rambus, Inc. v. Infineon Technologies AG*.[26] Before federal e-discovery rule amendments the Eastern District Court of Virginia faced classic ESI destruction in *Rambus*—a patent dispute marked by e-discovery mistakes and misconduct, including misuse of the attorney–client privilege, cost-allocation disputes, spoliation of potential evidence, hidden incriminating emails, faulty document retention and destruction policies and sanctions.[27]

Rambus brought a patent infringement claim against Infineon.[28] Infineon responded with affirmative defenses and counterclaims.[29] To support its counterclaims Infineon sought to compel Rambus' production of information on the development and implementation of Rambus' program for retention and destruction of ESI.[30] Rambus maintained that its purging policy itself was attorney–client privileged.[31] In earlier motions—with evidence from internal emails—the court established that, over several "shred days," Rambus intentionally destroyed relevant non-privileged material (including ESI) under its document purging policy.[32] As a result, the court granted in part Infineon's motion to compel by applying the crime/fraud exception to the attorney–client privilege and work-product immunity doctrine because of Rambus' spoliation of potential evidence.[33]

Rambus explained that "it instituted its document [destruction] policy out of discovery-related concerns . . . [about] the legitimate purpose of reducing search and review costs."[34] The court rejected Rambus' "undue cost" explanation and announced that "destruction of documents of evidentiary value

---

K. Yamamoto, Professor of Law, William S. Richardson School of Law (Dec. 1, 2008) (on file with authors); *see also Hawaii Firm Hosts Shakacon Conference*, PAC. BUS. NEWS, 2008 WLNR 10730163 (June 6, 2008) (stating that Hawai'i is a growing market for guidance regarding e-discovery, evidenced by a conference "to inform business owners, government and military officials and information technology executives about . . . compl[iance with] stricter laws regarding . . . electronic discovery").

[26] 222 F.R.D. 280 (E.D. Va. 2004).

[27] *See id.*

[28] *Id.* at 282.

[29] *Id.*

[30] *Id.* at 284.

[31] *Id.* at 285–87.

[32] *Id.* at 286–87, 291, 297. Emails in parallel actions revealed that before Rambus filed suit in 2000, it held a 1998 "Shred Day"—deliberately destroying 20,000 pounds of documents (over two million pages), including many potentially relevant documents. *Id.* at 284, 286.

[33] *Id.* at 285–87.

[34] *Id.* at 295.

. . . is fundamentally at odds with the administration of justice."[35] The court then granted Infineon's motion to compel and further admonished Rambus for its deployment of its ESI management policy to destroy potentially relevant and incriminating information.[36] It then authorized Infineon to conduct discovery relevant to appropriate sanctions.[37] *Rambus* aptly illustrates the range of common problems of e-discovery that have prompted state judiciaries to adopt the 2006 federal amendments or similar rules.[38]

In Hawai'i, the recent saga over reportedly adult-oriented emails and racial jokes by a former CEO of the Hawai'i Tourism Authority (HTA) provides a glimpse into the potential complexity of e-discovery in even "simple" cases.[39] A state audit of the HTA CEO's business email account publicly revealed the emails.[40] Outraged residents pressed for his firing while Hawai'i leaders stood in his defense.[41] The CEO resigned, foreclosing sticky termination-related litigation.[42] If a civil suit had ensued, e-discovery might have encompassed discovery of thousands of emails over several years from backup tapes, cellular phone and text messages records, personnel records and intra-office e-memoranda—with attorneys and judges struggling each step of the way over the general scope of e-discovery, the relevance of specific requests, the timing and scope of parties' duty to preserve, the validity of e-destruction procedures and the allocation of e-discovery costs. Not to mention the looming prospect of sanctions for missteps.

Indeed, e-discovery has arrived in Hawai'i and is here to stay. The questions today, with an eye towards tomorrow, are: whether to adopt the federal e-discovery rules regime, and if so, how to tweak the rules to fit local needs. Circuit Court discovery rulings rarely reach appellate courts, so guidance from the rules themselves, their commentary and scholarly insights will be crucial.[43] The time is ripe for the Hawai'i legal community to even-handedly assess the burdens and opportunities of handling e-discovery in light of "the needs of the

---

[35] *Id.* at 298.

[36] *Id.* at 299.

[37] *Id.*

[38] *See* Sheri Qualters, *States Launching E-Discovery Rules: Costs, Confusion Spark the Trend*, 30 NAT'L L.J. 1, Oct. 8, 2007.

[39] *See* Rick Daysog, *Scandal at Tourism Authority*, HONOLULU ADVERTISER, Sept. 19, 2008, at C2.

[40] *Id.*

[41] Rick Daysog, *Key Support Evaporated for Former Tourism Chief*, HONOLULU ADVERTISER, Oct. 10, 2008, at A1.

[42] Robbie Dingeman, *Search to Begin for New Tourism Authority CEO*, HONOLULU ADVERTISER, Oct. 11, 2008, at B6.

[43] *See* Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information, vii (Richard Van Duizend ed., 2006), http://www.ncsconline.org/images/EDiscCCJ GuidelinesFinal.pdf (citation omitted).

case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, . . . the importance of the proposed discovery in resolving the issues," and potential sanctions.[44]

This article endeavors to assist the Hawai'i courts and the public and private bars in assessing the need for an e-discovery rules regime by suggesting incorporation of the federal e-discovery rules regime into the Hawai'i Rules of Civil Procedure.[45] With this prospect in mind, it also suggests ways to fill gaps in the rules and clarify ambiguities in the federal approach.[46] More specifically, in terms of clarification and gap-filling, the article addresses hidden dimensions to the mandate of *early attention* to e-discovery issues (including attorney, client and expert attention to technological intricacies in anticipating litigation and preparing discovery plans); *cost–benefit proportionality* (including infusing the proportionality principle throughout the litigation and at times shifting e-discovery costs); and *sanctions avoidance* (including assessing tricky aspects of the duty to preserve ESI, crafting retention and destruction policies, deploying litigation holds and anticipating an affirmative sanctions rule). Finally, the article aims to assist in-house counsel and businesses in planning pro-actively for e-discovery even before litigation arises.

We therefore proceed in Part II by broadly explaining the ways that e-discovery has changed the litigation landscape. In Part III we list other state judiciaries that have adopted the Federal Rule amendments. Most important, and drawing support from federal magistrate judges, we suggest that the Hawai'i state courts adopt the federal e-discovery rules regime, and we provide a detailed description of the 2006 Federal Rules amendments for adoption. In Part IV we draw upon commentary, other discovery rules and Hawai'i appellate discovery decisions to suggest ways that Hawai'i rulemakers (through

---

[44] HAW. R. CIV. P. 26(b)(2)(iii).

[45] The Hawai'i Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. Gap v. Puna Geothermal Venture, 106 Haw. 325, 341, 104 P.3d 912, 928 (2004) (quoting Gold v. Harrison, 88 Haw. 94, 105, 962 P.2d 353, 364 (1998)). Changes to the Federal Rules are often, after study, incorporated into the Hawai'i Rules of Civil Procedure.

[46] This article is not merely a practice guide for attorneys to adjust their form file to account for amended Federal Rules; there are already many of those. *See, e.g.*, Dean Gonsowski, *The Maturity of E-Discovery Reflects a Greater Need for Law Firms to Begin Building Successful, Repeatable Processes and Taking Risk Out of the Equation Whenever Possible*, 27 No. 4 LEGAL MGMT. 26 (2008); Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8 (2008); Raymond J. Peroutka, Jr., *Beyond the Quill: Best Practices in the "E-Discovery Age"*, 26-7 AM. BANKR. INST. J. 32 (2007); Sedona Conference, Best Practices, *supra* note 6; Sergio D. Kopelev & Michael R. Bandemer, *You Want Me to Do What?: A Practical Look at the Question of Proper Preservation of Electronically Stored Information in Today's Business Litigation Environment*, 14 NEV. LAW. 24 (2006).

commentary) and Hawai'i courts (through published decisions) can productively clarify ambiguities and fill important gaps in the federal regime.

II. THE PROBLEMS AND PROMISE OF ELECTRONIC DISCOVERY

Out of the ferment of the technology revolution, the e-lawyer and e-client have arisen. Emails, text messages, Google searches, online shopping, e-banking, Facebook, YouTube and Twitter, with more on the horizon and nary a piece of paper. Litigation's proverbial "smoking gun" now often inhabits the electronic ether.[47] Electronic communications are changing the way that disputes arise and are adjudicated as e-discovery dramatically alters litigation opportunities, burdens and responsibilities.[48]

A. Electronically Stored Information and the Transformation of Discovery

E-discovery is different from ordinary discovery in four major ways. First, the sheer volume of ESI is exponentially greater.[49] Social and business interactions are now recorded electronically in multiple locations and often stored—even automatically—in more than one medium.[50] These multiple media invariably store duplicates or slightly different versions that can only be located or distinguished from each other with great difficulty and expense.[51] Previously much of this information was not recorded at all.[52]

As one scholar of law and technology recently observed, "[i]n a small business, whereas formerly there was usually one four-drawer file cabinet full of paper records, now there is the equivalent of two thousand four-drawer file cabinets full of such records [stored electronically]."[53] Every month large organizations send and receive up to three hundred million email messages.[54] Most organizations, including local governments, now have the capacity to

---

[47] *E.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696, 702 n.6 (2005) (referring to destruction of ESI labeled "smoking gun"); *see* RALPH C. LOSEY, E-DISCOVERY: CURRENT TRENDS AND CASES 33 (2008) ("The smoking guns in courtrooms today are found in computers, not filing cabinets.").

[48] *See, e.g.*, Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 317 (S.D.N.Y. 2003) (*Zubulake I*) (stating that cost-shifting, which is more likely to arise in the e-discovery era, "may effectively end discovery").

[49] *See* Report of the Judicial Conference Committee, *supra* note 15, at 22.

[50] *See* Kennedy, *supra* note 7, at 40.

[51] *See* Paul & Baron, *supra* note 2, at ¶ 10; Van Duizend, *supra* note 43, at v.

[52] *See* Lynn Mclain, *The Impact of the First Year of the Federal Rules and the Adoption of the Maryland Rules: Foreword*, 37 U. BALT. L. REV. 315, 315 (2008).

[53] Paul & Baron, *supra* note 2, at ¶ 13.

[54] Report of the Judicial Conference Committee, *supra* note 15, at 22–23.

store several terabytes of information at five hundred million typewritten pages per terabyte.[55]

Of all electronic business records, eighty percent are never converted to paper.[56] Unearthing this buried ESI is complicated and costly. The problem is magnified because most companies do not have *effective* ESI retention and destruction policies (for automatic file management) or lack sufficient employee training and technical support.[57]

Second, a great deal of ESI is unintelligible.[58] Some databases and programs create and store data so that the content is only comprehensible with software that is not readily available.[59] As a result, litigants regularly face costly delays in negotiating production formats and incur expert consultant expenses in assisting judges to resolve sticky disputes.[60]

Third, ESI includes unrecorded metadata—"data about data."[61] Metadata are computers' automatic recordings of "the date [files] w[ere] created, its author, when and by whom it was edited, what edits were made, and, in the case of e-mail, the history of its transmission."[62] Prior to electronic storage, there was no other way to consistently and reliably know details of the creation, amendment and deletion of information.[63]

Fourth, ESI is both nearly indestructible and extremely fragile.[64] Deleting ESI with the click of a mouse does not destroy it.[65] The information remains on the computer hard-drive and is only permanently eliminated by physical

---

[55] *Id.*

[56] LOSEY, *supra* note 47, at 33.

[57] *Id.*; *Beyond Records Management: Leveraging Your Process to Reduce E-Discovery Costs*, INSIDE COUNSEL, Sept. 2009, at 28.

[58] *See* Report of the Judicial Conference Committee, *supra* note 15, at 23.

[59] Rachel Hytken, Note and Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 880 (2008).

[60] *See* Jason Krause, *In Search of the Perfect Search*, 95 A.B.A. J. 38 (2009) (discussing the potential insufficiency of keyword searches and need for experts); Conrad J. Jacoby, E-Discovery Update: Producing Spreadsheets in Discovery—2008, Law and Technology Resources for Legal Professionals (Sept. 4, 2008), http://www.llrx.com/columns/ediscovery spreadsheets.htm (discussing negotiations over the format of producing ESI); *see, e.g.*, United States v. O'Keefe, 537 F. Supp. 2d 14 (D.D.C. 2008); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008).

[61] Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L. 1, 4 (2007); Hytken, *supra* note 59, at 879.

[62] Ronald Hedges et al., *Taking Shape: E-Discovery Practices Under the Federal Rules*, SN085 ALI-ABA 289, 391 (June 25–28, 2008).

[63] *Id.*

[64] *See* Mazza et al., *supra* note 6, at ¶ 4.

[65] Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 337 (2000).

destruction of the hardware or overwriting by the computer system.[66] To the extent that data have been merely deleted by a computer user they are often recoverable, although usually only through costly computer forensics.[67]

Paradoxically, ESI is also extremely fragile.[68] "Deleting" information marks it for later elimination by computers' automatic process for overwriting aging files. Therefore, while "deletion" is not necessarily permanent, electronic files and accompanying metadata may be altered or destroyed by computers' routine pre-programmed operations.[69] This can result in the "deliberate" destruction of ESI—in the sense of ordinary overwriting—even though no person specifically intended to destroy the particular ESI.[70]

These four major dimensions of ESI are transforming the ways attorneys seek information and conduct discovery in a wide array of cases.

B. E-Discovery Trouble

Without clear guidance, e-discovery is a walk in the dark. It also allows some attorneys and litigants to jigger the litigation process and, at times, exploit others.[71] E-discovery issues arise prior to and during all stages of litigation, including the moment a dispute morphs into a possible legal claim; at an early conference to form a discovery plan; during discovery requests and responses; in motions for preservation, to compel production and for protective orders; and upon contemplation of sanctions.

E-discovery is often more expensive than ordinary discovery because of the large volume, hidden features and frequent need for an army of support staff and specialists.[72] Costs of preservation can be exorbitant, even prior to litigation when it is unclear if a lawsuit will be filed.[73] Cautious in-house counsel tend to advise clients to absorb the high costs of preserving wide-ranging ESI to avoid steep sanctions for improper destruction, even though neither the rules nor court pronouncements clearly delineate when the

---

[66] *See* Hytken, *supra* note 59, at 879–80.

[67] *See, e.g.*, Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 n.6 (2002).

[68] *See* Kenneth J. Withers, *"Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 378 (2008).

[69] *See* FED. R. CIV. P. 37(f) advisory committee's note (2006).

[70] *See id.*

[71] *See* Qualters, *States Launching E-Discovery Rules*, *supra* note 38 ("Lawyers are figuring out how to turn electronic discovery into a sideshow."). *See generally* Thomas C. Tew, *Electronic Discovery Misconduct in Litigation: Letting the Punishment Fit the Crime*, 61 U. MIAMI L. REV. 289 (2007).

[72] *See generally* Mazza et al., *supra* note 6.

[73] *See* Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 386–87 (2008).

preservation duty begins and what preservation actually entails.[74] Indeed, "unrestricted and undefined [ESI] preservation obligations" at times function as an unseen force that drives litigation.[75]

The high volume and complexity of ESI also expands pre-production time for attorneys who must cull sensitive and discovery immune material from massive computer files.[76] The possibility of finding damaging "hidden" ESI—that would not have been recorded by non-electronic means—invites exceedingly aggressive production requests.[77] The availability of metadata, in particular, allows discovery of information that was previously unavailable; although often at great expense through computer forensics and at a possible invasion of privacy.[78] It is common for producing parties to become frustrated by the cost and tedium of pre-production review and for requesting parties to become frustrated by what appears to be unnecessary delay.[79]

Some attribute high e-discovery costs to the adversarial nature of litigation, businesses' deficient ESI management policies or poor technology—or all three.[80] Others cite inevitable disagreements over the format of ESI production even among cooperative parties and attorneys.[81] Regardless of the causes, ordinary discovery problems are often magnified by e-discovery.[82]

---

[74] LOSEY, *supra* note 47, at 32; *see also* Grimm et al., *supra* note 73, at 385–88 (noting that Rule 26(b)(2)(C) cost–benefit factors technically do not apply before a complaint is filed, but suggesting that it should guide practices nonetheless); Paul & Baron, *supra* note 2, at ¶ 12.

[75] Hytken, *supra* note 59, at 886 (quoting Andrew M. Scherffius et al., *Conference on Electronic Discovery, Panel Four: Rules 37 and/or a New Rule 34.1: Safe Harbors for E-Document Preservation and Sanctions*, 73 FORDHAM L. REV. 71, 77 (2004)).

[76] *See id.* at 881.

[77] *See id.*

[78] *See* Favro, *supra* note 61, at 4 (stating that metadata is unique to ESI); Bradley H. Leiber, *Current Development 2007–2008: Applying Ethics Rules to Rapidly Changing Technology: The D.C. Bar's Approach to Metadata*, 21 GEO. J. LEGAL ETHICS 893, 893 n.2 (2008) ("[T]he D.C. Bar analogizes mining for metadata to looking through a briefcase that was inadvertently left in opposing counsel's office."); Lucia Cucu, Note, *The Requirement for Metadata Production Under Williams v. Sprint/United Management Co.: An Unnecessary Burden for Litigants Engaged in Electronic Discovery*, 93 CORNELL L. REV. 221, 229–32 (2007) (discussing the high cost and difficulty of producing metadata).

[79] *See* Conrad J. Jacoby, E-Discovery Update: Recognizing Hidden Logistical Bottlenecks in E-Discovery, Law and Technology Resources for Legal Professionals (Apr. 24, 2007), http://www.llrx.com/columns/fios16.htm.

[80] *See* John Bace, Gartner RAS Core Research, Cost of E-Discovery Threatens to Skew Justice System (Apr. 20, 2007), http://www.h5technologies.com/pdf/gartner0607.pdf.

[81] *See* Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 356 (2008).

[82] *See* Qualters, *States Launching E-Discovery Rules*, *supra* note 38 ("[S]maller firms are wrestling with the issue of cost, such as searching the country for experts on long-obsolete programming languages.").

E-discovery troubles also arise in the form of court imposed sanctions for e-discovery missteps. Those sanctions aim to compel compliance with e-discovery obligations, deter others from misconduct, restore prejudiced parties[83] and "plac[e] the risk of an erroneous judgment on the party who wrongfully created the risk."[84] They are often imposed when there is a lesser degree of culpability than "bad faith," including "cognizable prejudice to the injured party."[85]

Sanctions against attorneys include significant fines, public pronouncements of wrongdoing and referrals to bar association ethics commissions.[86] Attorney and party e-discovery misconduct sometimes lead to default judgments or case dismissals;[87] adverse jury instructions;[88] bars to further discovery;[89] imposed waiver of confidentiality, attorney–client privilege and work-product immunity;[90] and payment of experts' and attorneys' fees and costs.[91]

Prior to and shortly after federal e-discovery rules were amended, courts imposed e-discovery sanctions in sixty-five percent of cases where sanctions were sought.[92] E-discovery sanctions are a hot topic—they are at play in one quarter of all ESI-related cases.[93]

---

[83] Thomas Y. Allman, *Achieving an Appropriate Balance: The Use of Counsel Sanctions in Connection With the Resolution of E-Discovery Misconduct*, 15 RICH. J.L. & TECH. 9, ¶ 3 (2009).

[84] Phoenix Four, Inc. v. Strategic Res. Corp., 2006 WL 1409413, at *3 (S.D.N.Y. May 23, 2006).

[85] *Id.*

[86] *See, e.g.*, *In re* Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114 (S.D.N.Y. 2007); Wachtel v. Health Net, Inc., 239 F.R.D. 81 (D.N.J. 2006); Metro. Opera Ass'n. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003).

[87] *See, e.g.*, Grange Mut. Cas. Co. v. Mack, 270 Fed. Appx. 372 (6th Cir. Mar. 17, 2008); S. New England Tel. Co. v. Global NAPs, Inc., 2008 U.S. Dist. LEXIS 47986 (D. Conn. June 23, 2008).

[88] *See, e.g.*, Google Inc. v. Am. Blind & Wallpaper Factory, Inc., 2007 U.S. Dist. LEXIS 48309 (N.D. Cal. June 27, 2007); Anderson v. Crossroads Capital Partners, L.L.C., 2004 U.S. Dist. LEXIS 1867 (D. Minn. Feb. 10, 2004).

[89] *See, e.g.*, R & R Sails, Inc. v. Ins. Co. of the State of Pa., 251 F.R.D. 520 (S.D. Cal. 2008).

[90] *See, e.g.*, Casio v. Papst (*In re* Papst Licensing GMBH & Co. KG Litig.), 550 F. Supp. 2d 17 (D.D.C. 2008).

[91] *See, e.g.*, Keithley v. Homestore.com, Inc., 2009 U.S. Dist. LEXIS 2720 (N.D. Cal. Jan. 7, 2009).

[92] *See* Hytken, *supra* note 59, at 879 (describing events prior to 2006); Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 U.M.K.C. L. REV. 537, 561 n.98 (2009) (referring to a study of cases from 1997–2007).

[93] Sheri Qualters, *25 Percent of Reported E-Discovery Opinions in 2008 Involved Sanctions Issues*, NAT'L L.J. (Dec. 17, 2008), http://www.law.com/jsp/article.jsp?id=1202426805975&rss=newswire (reporting that twenty-five percent of the opinions issued in the first 10 months of 2008 involved sanctions for mishandling electronic discovery).

C. Overview of Federal E-Discovery Rules Amendments

The Judicial Conference Committee on Rules of Practice and Procedure conceded in 2005 that then-extant federal discovery rules provided "inadequate guidance" on the e-discovery rights and obligations of parties and attorneys.[94] The Committee concluded that Federal Rules needed to be amended to avoid a vague "patchwork" of case law, local rules and varying practices—collectively inconsistent, confusing, burdensome and even debilitating.[95] The Committee further cautioned that, "[u]nless timely action is taken to make the federal discovery rules better able to accommodate the distinctive features of electronic discovery, those rules will become increasingly removed from practice, and similarly situated litigants will continue to be treated differently depending on the federal forum."[96]

As a result, the Committee proposed rule amendments in 2005 with several main goals: to reduce costs and burdens for litigants, to increase uniformity, to instruct judges "to participate more actively in case management when appropriate" and to reduce unfair power differential among litigants of disparate resources.[97] In 2006, after careful vetting by the Judicial Conference Committee, the Supreme Court approved amendments to the e-discovery rules and Congress tacitly accepted them.[98]

A summary in thematic categories of the 2006 federal e-discovery rules amendments will be useful. The amended rules suggested for adoption by the Hawai'i state courts will be discussed in greater detail in section III.C.

Amended Federal Rules 16, 26(a) and 26(f) specifically account for "early attention" to e-discovery issues.[99] Automatic initial disclosure of documents useful to support a claim or defense, under amended Federal Rule 26(a)(1)(A),

---

[94] Report of the Judicial Conference Committee, *supra* note 15, at 23.

[95] Report of the Judicial Conference Committee, *supra* note 15, at 23.

[96] Report of the Judicial Conference Committee, *supra* note 15, at 24.

[97] Report of the Judicial Conference Committee, *supra* note 15, at 24.

[98] Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled its Promise?*, 14 RICH. J.L. & TECH. 7, Appendix (2008).

Several organizations have created formal principles and rules that detail "proper" e-discovery conduct, anticipating or supplementing the federal rules. *See* Sedona Principles Addressing Electronic Document Production, Second Edition, *supra* note 20; National Conference of Commissioners on Uniform State Laws, *Uniform Rules Relating to the Discovery of Electronically Stored Information* (2007), http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.pdf; American Bar Association, Section of Litigation, Civil Discovery Standards (Aug. 2004), http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf.

[99] FED. R. CIV. P. 16, 26(a) & 26(f); *see also* Sedona Principles Addressing Electronic Document Production, Second Edition, *supra* note 20.

specifically includes ESI.[100] Federal Rule 26(f), which covers party discovery conferences, requires parties to discuss ESI preservation, ESI production formats and issues and agreements relating to inadvertently produced attorney–client privileged and work-product immune ESI.[101] Federal Rule 16(b), which governs court scheduling orders pursuant to Rule 26(f) conferences, directs judges to include party agreements, in particular, those that relate to inadvertent disclosure of privileged and immune materials.[102]

Amended Federal Rule 26(b)(2), referring to the scope of discovery, explicitly allows a party to refuse to disclose ESI because of undue burden or cost.[103] However, if a refusing party seeks a protective order or a requesting party moves to compel the ESI, then the refusing party bears the burden of showing undue burden or cost.[104] Finally, regardless of a refusing party's showing, the amended rule appears to authorize courts to order discovery within general Rule 26(b)(2)(C) proportionality limitations.[105]

Amended Federal Rule 26(b)(5)(B) articulates what should happen when privileged or immune materials are inadvertently produced.[106] Initially, a producing party may notify all recipients and seek retrieval.[107] In these instances, recipients must immediately cease further disclosure and either return or destroy the material or produce it under seal to a court to challenge the claim of protection.[108]

Amended Federal Rule 33(d) permits a party to answer interrogatories by specifying responsive electronically stored business records.[109] Amended Federal Rule 34(a), relating to the scope and procedure of producing documents, permits general discovery of "any designated documents or electronically stored information."[110] Further, in the absence of a party agreement as to the format of production, amended Federal Rule 34(b) requires that a respondent produce ESI as it is normally maintained or in a reasonably usable form and it need not produce it in more than one form.[111]

---

[100] FED. R. CIV. P. 26(a)(1)(A) (Rule 26(a)(1)(B) was renumbered as Rule 26(a)(1)(A) as part of the 2007 Amendments to the Federal Rules of Civil Procedure and is consistently referred to as Rule 26(a)(1)(A) herein).

[101] FED. R. CIV. P. 26(f).

[102] FED. R. CIV. P. 16(b).

[103] FED. R. CIV. P. 26(b)(2); *see* LOSEY, *supra* note 47, at 86.

[104] FED. R. CIV. P. 26(b)(2).

[105] *Id.*

[106] FED. R. CIV. P. 26(b)(5)(B).

[107] *Id.*

[108] *Id.*

[109] FED. R. CIV. P. 33(d).

[110] FED. R. CIV. P. 34(a)(1)(A).

[111] FED. R. CIV. P. 34(b)(2)(E)(ii)–(iii).

Finally, amended Federal Rule 37(e) provides a safe harbor from sanctions for the destruction of ESI where a party's "routine, good-faith" system of ESI management destroyed otherwise discoverable ESI.[112]

The next two parts of this article address the Hawai'i courts' adoption of the federal e-discovery rules regime and offer suggestions for clarification and to fill gaps in that regime.

III. ADOPTING THE FEDERAL E-DISCOVERY RULES REGIME

A. Twenty-Three Other States' Adoption of the Federal Regime

To date, twenty-three states have adopted the federal e-discovery rules regime in whole or in part, including the western states of California, Alaska, Arizona, Utah and Montana.[113] In addition, several states that have not yet adopted new rules themselves are closely watching those states that have.[114]

Shortly after the federal amendments took effect in December 2006, the Montana Supreme Court adopted the federal e-discovery rules regime in 2007 "to provide more specific guidance [for discovery of ESI]."[115] After eighteen months of observation of the Federal Rules and adoption of rules by dozens of

---

[112] FED. R. CIV. P. 37(e) (Rule 37(f) was renumbered as Rule 37(e) as part of the 2007 Amendments to the Federal Rules of Civil Procedure and is consistently referred to as Rule 37(e) herein).

[113] Kroll Ontrack, *supra* note 23 (containing a color-coded map of the United States and identifying twenty-three states that have adopted at least the basics of the federal e-discovery rules regime as of October 2009). In 2007 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Rules Relating to the Discovery of Electronically Stored Information for state courts. *See* National Conference of Commissioners on Uniform State Laws, *supra* note 98. The "uniform rules" follow almost verbatim the Federal Rule amendments. Substantively, they are the same. Some of the relatively minor differences include a 21 day meet and confer requirement for counsel and an attempted definition, somewhat ambiguous, of "electronic discovery." *See id.*; LOSEY, *supra* note 47, at 108-09. The state courts that have adopted a new e-discovery regime generally appear to be following the Federal Rule amendments, with minor tweaking, rather than the uniform rules. *See* Kroll Ontrack, *supra* note 23. One apparent reason is that the Federal Rule amendments are now supported by a growing body of interpretive federal court decisions. Especially because Hawai'i state courts rely upon federal court decisions interpreting Hawai'i rules that are modeled after corresponding federal rules, *see, e.g.*, Moyle v. Y & Y Hyup Shin, Corp., 118 Haw. 385, 403 n.14, 191 P.3d 1062, 1080 n.14 (quoting Harada v. Burns, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968)), we suggest adoption of the federal rules regime.

[114] Thomas Y. Allman, Annotated List of State Rules of Civil Procedure: State by State Summary of E-Discovery Efforts, http://www.discoveryresources.org/library/case-law-and-rules/state-rules/annotated-list-of-state-rules-of-civil-procedure/ (last visited Oct. 11, 2009).

[115] *In re* Proposed Revisions to the Montana Rules of Civil Procedure With Respect to Discovery of Electronic Information, No. AF 07-0157 (Mont. Feb. 28, 2007) (adopting new civil rules for e-discovery).

other states, California adopted rules that closely track the federal regime, with minor tweaks to add greater detail (likely due to its codified procedural system).[116]

Some Arizona attorneys are calling for clarification and gap-filling by courts and their state rules committee after adopting the federal regime in 2008.[117] Other practitioners look both to the federal e-discovery rules regime and other sources for guidance in state courts.[118]

A sense of urgency is compelling states in every region to seriously consider amending their rules to address e-discovery.[119] They are doing so with the recognition that rule amendments are only the beginning. What remains is judicial clarification and pronouncements on key issues and cooperation among courts, attorneys and businesses in developing workable best practices tailored to local needs. It is now Hawaii's turn.

B. Hawai'i State Courts: Adopting the Federal Regime

Hawai'i courts lack a rules regime and developed case law to enable litigants and attorneys to prophesize about e-discovery disputes and shape their practices to avoid or at least productively handle them.[120] Judges, too, need a system of rules to guide their otherwise piecemeal determinations. The initial question,

---

[116] Assem. B. 5, 2009 Leg. (Ca. 2009); *e.g.*, CAL. CODE CIV. P. § 1985.8(*l*)(1) ("Absent exceptional circumstances, the court shall not impose sanctions . . . for failure to provide [ESI] that has been *lost, damaged, altered, or overwritten* as a result of the routine, good-faith operation of an electronic information system." (emphasis added)); *cf.* FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions . . . for failing to provide [ESI] *lost* as a result of the routine, good-faith operation of an electronic information system." (emphasis added)).

[117] *See* Robert G. Schaffer & Anthony Austin, *New Arizona E-Discovery Rules*, 44 AZ Attorney 24, 26 (Feb. 2008) (discussing the failure of rules to mandate particular practices for handling e-discovery early in litigation).

[118] *E.g.*, Jeffrey S. Follett, *The Chief Justices' E-Discovery Guidelines: Worth A Look*, 51 B.B.J. 9 (May/June 2007) (citing Van Duizend, *supra* note 43).

[119] *See* Kroll Ontrack, *supra* note 23.

[120] Federal Magistrate Judges Kurren and Chang recently observed that while e-discovery is important, it has not yet been the basis of major disputes in the cases at the United States District Court for the District of Hawai'i. Interview with The Honorable Kevin S.C. Chang, Magistrate Judge of the District of Hawai'i, Haw. (Sept. 24, 2009) [hereinafter Magistrate Chang Interview]; Interview with The Honorable Barry Kurren, Magistrate Judge of the District of Hawai'i, Haw. (Sept. 24, 2009) [hereinafter Magistrate Kurren Interview]. One possible reason is the new federal e-discovery rules regime. *See* Magistrate Chang Interview; Magistrate Kurren Interview; *cf. In re* Hawaiian Airlines, Inc. v. Mesa Air Group, 2007 WL 3172642 (Bankr. D. Haw. Oct. 30, 2007) (involving destruction of ESI in breach of a duty to preserve).

therefore, is: should the Hawai'i courts adopt the federal e-discovery rules regime?[121]

Empirical assessment of the impacts of the federal e-discovery rules amendments is unfinished.[122] And federal and state court litigation differ in the types of cases processed and, on the federal side, in the significant usage of magistrate judges for discovery management.

Nevertheless, the amendments to the 2006 federal e-discovery rules provide a solid foundation for handling evolving e-discovery issues. There are three broad indicators that point to the overall importance of the federal e-discovery rules regime for state courts, including Hawaii's. First, as mentioned, many state courts are incorporating the federal regime into their rules of civil procedure with apparently salutary initial results. Second, the somewhat sparse terrain of published federal court opinions interpreting and applying the federal e-discovery rules do not reveal significant problems with the rules themselves—although they do reveal certain ambiguities and gaps that we address in the following section.[123]

Finally, informal interviews with federal magistrate judges in Hawai'i[124] and California[125] highlight the importance of the e-discovery rules on the front-lines of federal litigation. For United States Magistrate Judge Edward Chen, of the District Court of the Northern District of California,

> E-discovery presents unique problems as well as opportunities in the context of pretrial discovery. Issues such as the need to balance the costs of disrupting normal business operations against the need to preserve evidence, the ability through search technology to run efficient searches of digital documents, and other issues warrant specific rules.[126]

Magistrate Judge Barry Kurren of the District Court of Hawai'i encourages Hawai'i and other states to adopt the federal e-discovery rules regime.[127] He anticipates that the lack of uniform state and federal court practices could

---

[121] As of this writing, the Hawai'i Supreme Court has convened a special committee of judges, attorneys and law professors to consider adoption of new e-discovery rules.

[122] *See, e.g.*, Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321 (2008).

[123] *See, e.g.*, United States v. O'Keefe, 537 F. Supp. 2d 14 (D.D.C. 2008) (interpreting Federal Rules 34(b) and 37(e) and commenting on the difficulty of production without parties' earlier discussion and agreements).

[124] Magistrate Chang Interview, *supra* note 120; Magistrate Kurren Interview, *supra* note 120.

[125] E-mail from The Honorable Edward M. Chen, Magistrate Judge of the Northern District of California (Sept. 14, 2009, 08:21:00 HST) (on file with authors); *id.* ("E-discovery is the new future of civil discovery. Carefully crafted rules, knowledgeable attorneys and parties, and hands-on judges are essential.").

[126] *Id.*

[127] Magistrate Kurren Interview, *supra* note 120.

become problematic, especially because the rules' disparity is large.[128] Magistrate Judge Kevin S.C. Chang, also of the District Court of Hawai'i, agrees about the importance of uniformity and adds that clear guidance is crucial for state courts because of those courts' heavy caseload.[129] Magistrates Kurren and Chang also note that the federal regime has made Hawai'i attorneys and businesses more cognizant of e-discovery issues and facilitated more cooperative ESI-related litigation.[130]

The impending e-discovery litigation challenges, the largely salutary impact of the Federal Rule amendments and the insights of federal magistrate judges collectively argue for Hawai'i courts' adoption of the federal e-discovery rules regime—with an important caveat. Adoption of the package of the federal e-discovery rules marks the beginning. The Hawai'i courts' clarification of ambiguities and filling of gaps in the new rules—potentially along the lines we suggest—is what will likely be needed to productively shape e-discovery practice in Hawai'i. We therefore suggest that Hawai'i courts adopt the 2006 amendments to the federal e-discovery rules summarized in detail below. And we also carefully consider ways that commentary and court rulings might clarify ambiguities and fill the important rules regime gaps delineated in Part IV.

C. The Federal E-Discovery Rules Regime

1. Early attention to e-discovery issues: Rules 16(b) and 26(a) and (f)

In the federal e-discovery rules regime, early attention to e-discovery issues by all litigation players is required through the combination of Rule 26(f) (party and counsel discovery conferences) and Rule 16(b) (scheduling orders).[131] This early attention requirement encourages attorneys to facilitate agreements for cost-effective production and avoid inadvertent waiver of attorney–client privilege and work-product immunity.[132] After a Rule 26(f) conference and party-submitted discovery plans, courts' scheduling orders often incorporate

---

[128] Magistrate Kurren Interview, *supra* note 120.

[129] Magistrate Chang Interview, *supra* note 120.

[130] Magistrate Chang Interview, *supra* note 120; Magistrate Kurren Interview, *supra* note 120.

[131] *See* FED. R. CIV. P. 16(b) and 26(f); *see also* FED. R. CIV. P. 26(a) advisory committee's note (2006) (stating that Rule 26 was amended to clarify that ESI must be included in initial disclosures).

[132] Report from Lee H. Rosenthal, Chair, Advisory Committee on the Federal Rules of Civil Procedure, to David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure [hereinafter Advisory Committee Report] 24–25, 36 (May 27, 2005), http://www.uscourts.gov/rules/Reports/CV05-2005.pdf; *see also* FED. R. CIV. P. 16 advisory committee's note (2006); FED. R. CIV. P. 26 advisory committee's note (2006).

agreements regarding ESI production issues and prevention of inadvertent waiver of privilege or immunity.[133]

For the purposes of developing a proposed discovery plan and increasing "possibilities for promptly settling or resolving the case," Rule 26(f) meetings are now to encompass discussion of ESI preservation, ESI production (including file format), prospects of cost-shifting and maintaining privileges or immunities in the event of inadvertent ESI production.[134] Furthermore, amendments to Rule 16(b)(5) and Form 35 encourage parties to detail proposed e-discovery plans to the court.[135]

Federal Rule 16(b) was "[re-]designed to alert the court to the possible need to address the handling of discovery of [ESI] early in the litigation if such discovery is expected to occur."[136] Paralleling Rule 26(f), federal e-discovery scheduling orders now may also "provide for disclosure or discovery of [ESI]" and any party agreements regarding claims of privilege or immunity that may arise after inadvertent production.[137] In its notes to Rule 26(f), the Advisory Committee directed that *ex parte* preservation orders should only be entered in exceptional circumstances because doing so might interrupt the balance of competing needs to preserve ESI and allow litigants to continue business operations.[138]

The current Hawai'i rules do not specify the timing of any discovery conference and the dates for generation of a discovery plan.[139] Assuming that the Hawai'i procedural rules will not be amended to match the precise scheduling conference and discovery conference and plan requirements of the Federal Rules, then the simpler proposal of the Uniform Law Commission makes sense: within 21 days after all parties' appearance, the parties' counsel are to confer and, if ESI is likely to be sought, to submit to the court an e-discovery plan within 14 days after conferring.[140]

---

[133] *See* FED. R. CIV. P. 16(b).

[134] FED. R. CIV. P. 26(f)(2).

[135] Advisory Committee Report, *supra* note 132, at 24.

[136] FED. R. CIV. P. 16(b) advisory committee's note (2006).

[137] FED. R. CIV. P. 16(b)(3)(B)(iii); *see also* FED. R. CIV. P. 16(b) advisory committee's note (2006) (suggesting that parties make various agreements regarding this issue); FED. R. CIV. P. 26 advisory committee's note (2006).

[138] FED. R. CIV. P. 26(f) advisory committee's note (2006).

[139] *See* HAW. R. CIV. P. 16 & 26 (no specification of discovery conference or plan deadlines); *see also* HAW. CIR. CT. R. (no specification of discovery conference or plan deadlines).

[140] Rule 3. Conference, Plan, and Report to the Court.

(a) Unless the parties otherwise agree or the court otherwise orders, not later than [21] days after each responding party first appears in a civil proceeding, all parties that have appeared in the proceeding shall confer concerning whether discovery of electronically stored information is reasonably likely to be sought in the proceeding, and if so the parties at the conference shall discuss:

2. Production format and procedure: Rules 33(d) and 34(a) and (b)

Prior to the 2006 amendments to the federal e-discovery rules, many courts encountered difficulty in stretching Rule 34 to encompass ESI as a "document," especially ESI that is unintelligible when separated from the database that it is stored on.[141] All types of ESI now fall within the ambit of amended Rule 34(a).[142] Amended Federal Rule 34(a)(1) pertains to the production of documents and things, permitting discovery requests to "test[] or sample . . . [ESI] . . . stored in any medium" and be translated, if necessary, by the respondent.[143] Federal Rule 26(f) now directs attorneys to discuss the "forms in which [ESI] should be produced" prior to requesting court assistance.[144] Paragraph (b) of Rule 34 permits requesting parties to "specify the form" of production and authorizes responding parties to object to those specifications and describe the form it intends to employ.[145] If a party does not request a specific format for ESI and there is no controlling court order or party agreement, then the respondent "must produce [ESI] in . . . forms in which it is ordinarily maintained or [forms that are] . . . reasonably usable . . . ."[146]

Federal Rule 33(d) now authorizes parties to respond to interrogatories by producing business records in electronic form.[147] The responding party, however, "must ensure that the interrogating party can locate and identify it 'as readily as can the party served,' and that the responding party . . . give the interrogating party a 'reasonable opportunity to examine, audit, or inspect' the information."[148]

. . . .

(b) If discovery of electronically stored information is reasonably likely to be sought in the proceeding, the parties shall:

(1) develop a proposed plan relating to discovery of the information; and

(2) not later than [14] days after the conference under the subsection (a), submit to the court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

National Conference of Commissioners on Uniform State Laws, *supra* note 98.

[141] FED. R. CIV. P. 34(a) advisory committee's note (2006).

[142] *Id.*

[143] FED. R. CIV. P. 34(a); *see also* FED. R. CIV. P. 34(b) advisory committee's note (2006) (stating that, upon objection, "parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before . . . a motion to compel" is filed).

[144] FED. R. CIV. P. 26(f)(3).

[145] FED. R. CIV. P. 34(b).

[146] FED. R. CIV. P. 34(b)(2)(E)(ii).

[147] FED. R. CIV. P. 33(d); *see also* Conrad J. Jacoby, E-Discovery Update: Pushing Back Against Hardcopy ESI Productions, Law and Technology Resources for Legal Professionals (Oct. 29, 2008), http://www.llrx.com/columns/hardcopyesi.htm (suggesting that production of ESI in hard-copy format is becoming less appropriate and less desired among attorneys).

[148] FED. R. CIV. P. 33(d) advisory committee's note (2006).

3. Discovery of ESI that is not reasonably accessible because of undue burden or cost: Rule 26(b)(2)(B)

The addition of subsection (b)(2)(B) to Federal Rule 26 responds to a major difference between e-discovery and ordinary discovery. While many computer systems make ESI more accessible and less costly, others do the exact opposite—user-friendly properties do not always carry over for easy preservation and production.[149] Simply put, "[a] party may have a large amount of information on sources or in forms that may be responsive to discovery requests, but would require [substantial burden or cost for] recovery, restoration, or translation before it could be located, retrieved, reviewed, or produced."[150] These burdensome sources include:

> back-up tapes . . . that are often not indexed, organized, or susceptible to electronic searching; legacy data that remains from obsolete systems and is unintelligible on the successor systems; data that was "deleted" but remains in fragmented form, requiring a modern version of forensics to restore and retrieve; and databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information.[151]

Accordingly, amended Federal Rule 26(b)(2)(B) now allows a respondent to avoid the hardship of production if requested ESI is "not reasonably accessible because of undue burden or cost."[152] The Advisory Committee Notes to Rule 26(b)(2) are instructive, although the rule itself is unclear about the process for designating material "not reasonably accessible." The Advisory Committee Notes outline a two-tier process for ESI production[153]—first "reasonably accessible" ESI and second (only if necessary), "not reasonably accessible" ESI.[154]

As to the second tier, a respondent must "identify, by category or type, the sources" that it claims are "not reasonably accessible" with "enough detail to

---

[149] *See* Report of the Judicial Conference Committee, *supra* note 15, at 31.

[150] Advisory Committee Report, *supra* note 132, at 42. Producing parties are often able to locate sources that may contain responsive information but are unable to "produce" them "without incurring substantial burden or cost." Advisory Committee Report, *supra* note 132, at 42.

[151] Advisory Committee Report, *supra* note 132, at 42.

[152] FED. R. CIV. P. 26(b)(2)(B).

[153] Advisory Committee Report, *supra* note 132, at 42–43. Some argue that the two-tier system deters proper production of ESI by allowing parties to "self-designate" what is not reasonably accessible. Advisory Committee Report, *supra* note 132, at 44. Others argue that the two-tier system encourages storage of ESI in a way that is not reasonably accessible to avoid production in the event of litigation. Advisory Committee Report, *supra* note 132, at 44.

[154] FED. R. CIV. P. 26(b)(2) advisory committee's note (2006); *see* Hytken, *supra* note 59, at 890 (stating that first-tier materials are presumed to be discoverable).

enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources."[155] Designated "second-tier" materials are presumed "not reasonably accessible."[156] Without more, this is the end of the process.

If a requesting party challenges the "second-tier" designation with a motion to compel (or a respondent moves for a protective order), then the respondent bears the burden of showing that the materials sought are indeed unduly burdensome or costly.[157] The requesting party may refute this showing by proving "good cause" for production.[158] A court may then order production in entirety or with conditions, considering Rule 26(b)(2)(C) cost–benefit factors.[159] As to the latter assessment, the Advisory Committee Notes to Federal Rule 26 instruct courts to independently evaluate whether burdens and costs can be "justified [by] the circumstances of the case."[160] The Advisory Committee Notes list seven "appropriate considerations":

> (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.[161]

The two-tier system does not diminish any preservation obligation.[162] It only addresses the *production* of preserved information.

4. *Maintaining attorney–client privilege and work-product immunity despite inadvertent production: Rules 26(b)(5)(B) and 26(f)(4)*

Federal rulemakers intended for Rule 26(f) conferences to encourage e-discovery agreements.[163] They also designed Rule 26(f) to encourage parties to avoid inadvertent waiver of attorney–client privilege and work-product

---

[155] FED. R. CIV. P. 26(b)(2) advisory committee's note (2006).

[156] Hytken, *supra* note 59, at 890.

[157] FED. R. CIV. P. 26(b)(2) advisory committee's note (2006).

[158] Hytken, *supra* note 59, at 890; *see* FED. R. CIV. P. 26(b)(2).

[159] FED. R. CIV. P. 26(b)(2)(B); *see* LOSEY, *supra* note 47, at 110.

[160] FED. R. CIV. P. 26(b)(2) advisory committee's note (2006).

[161] *Id.*

[162] Advisory Committee Report, *supra* note 132, at 44.

[163] FED. R. CIV. P. 26(f) advisory committee's note (2006); *see* LOSEY, *supra* note 47, at 82 (citing ADAM COHEN & DAVID LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE (Supp. 2007)).

immunity—particularly because the "volume and dynamic nature" of ESI may make it difficult to identify privileged and immune material before production.[164]

Under amended Federal Rule 26(f), party agreements to prevent waiver of privileged and immune material often include "quick peeks" or "clawbacks."[165] "Quick-peek" agreements allow a requesting party a "quick peek" at a broad range of the opposing party's ESI.[166] Requests are then tailored to relevant and desired ESI without a producing party's waiver of privilege or immunity.[167] "Clawback" agreements involve a producing party's liberal disclosure of ESI and authorization for the producing party to "claw" ESI back as it becomes noticeably attorney–client privileged or work-product immune.[168] The Committee encouraged party agreements in anticipation of this issue, acknowledged that federal courts cannot order quick peeks or clawbacks without a party agreement and declared that courts should only enter an *ex parte* order in exceptional circumstances.[169]

Federal Rule 26(b)(5)(B) provides a procedure for parties who claim privilege or immunity after inadvertent production.[170] A party that inadvertently produced privileged or immune materials may notify any party that received the information and the basis for its protection.[171] Then the notified party "must promptly return, sequester, or destroy the specified information and any copies it has [and] must not use or disclose the information until the claim [for protection] is resolved . . . ."[172] The Federal Rule does not address whether production waives protection, but only provides an avenue for claiming after-the-fact protection.[173] Rule 26(b)(5)(B) is intended to work with the new Rule 26(f), which encourages party agreements on these issues.[174]

---

[164] FED. R. CIV. P. 26(f) advisory committee's note (2006).

[165] *Id.*; *see* Colonel John Siemietkowski, *Note From the Field: E-Discovery Amendments to Federal Rules of Civil Procedure Celebrate First Anniversary*, 2007 ARMY LAW. 77, 80 (2007).

[166] Advisory Committee Report, *supra* note 132, at 36.

[167] Advisory Committee Report, *supra* note 132, at 36.

[168] Advisory Committee Report, *supra* note 132, at 36.

[169] FED R. CIV. P. 16 advisory committee's note (2006); FED R. CIV. P. 26(f) advisory committee's note (2006).

[170] FED R. CIV. P. 26(b)(5)(B).

[171] *Id.*

[172] *Id.*

[173] FED R. CIV. P. 26(b)(5) advisory committee's note (2006).

[174] *Id.* ("Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) *may be considered* when a court determines whether a waiver has occurred." (emphasis added)).

5. Sanctions and a safe harbor for loss of ESI: Rule 37(e)

Federal Rule 37(e)[175] provides a safe harbor from sanctions for ESI "lost" as a "result of the *routine, good-faith* operation of an electronic information system."[176] Responding parties who satisfy the safe harbor requirement of routine, good-faith loss cannot be sanctioned "[a]bsent exceptional circumstances."[177] Rule 37(e) is highly unusual. It is the only federal rule that expressly prohibits imposition of sanctions.

IV. CLARIFYING AND SUPPLEMENTING E-DISCOVERY RULES FOR HAWAI'I PRACTICE

Adoption of the federal e-discovery rules regime will provide helpful guidance to Hawaii's attorneys, judges and businesses. As mentioned, however, the amended federal e-discovery rules are ambiguous on some issues and leave significant gaps in others. We now analyze three major potentially problematic areas of e-discovery and offer rulemakers, judges and attorneys suggestions for clarification and gap-filling. More specifically, we address hidden dimensions to the mandate of *early attention* to e-discovery issues (including attorney, client and expert attention to technological intricacies in anticipating litigation and preparing discovery plans); *cost–benefit proportionality* (including infusing the proportionality principle throughout the litigation and shifting e-discovery costs); and *sanctions avoidance* (including assessing tricky aspects of the duty to preserve ESI, crafting ESI retention and destruction policies, deploying litigation holds and anticipating an affirmative sanctions rule). Our suggestions by no means exhaust the field of possibilities, but do reflect our best assessment to date.

A. Early Attention for Efficient ESI Exchanges

Federal courts,[178] state courts,[179] practitioners[180] and procedural scholars[181] widely agree that "front-loading" the handling of e-discovery issues prevents or

---

[175] *See supra* note 112 (noting that Rule 37(f) was renumbered as Rule 37(e) as part of the 2007 Amendments to the Federal Rules of Civil Procedure and is consistently referred to as Rule 37(e) herein).

[176] FED. R. CIV. P. 37(e) (emphasis added).

[177] *Id.*; *cf.* FED. R. CIV. P. 37(f) advisory committee's note (2006) (stating that the rule "does not affect other sources of authority to impose sanctions or rules of professional responsibility").

[178] Report of the Judicial Conference Committee, *supra* note 15, at 26.

[179] *See, e.g.*, ALASKA R. CIV. P. 26–37; *see also* Uniform State Laws, *supra* note 98, at 4–6.

[180] *See, e.g.*, LOSEY, *supra* note 47, at 7–8.

[181] *See, e.g.*, Withers, *supra* note 68, at 378 (stating that an early discovery conference is essential for e-discovery, especially concerning time-sensitive data).

diffuses later e-discovery disputes.[182] Litigation costs may decline and case valuation may become more predictable as attorneys organize and present their positions on e-discovery issues early to opposing parties and the court.[183] While there may be unnecessary anticipatory expenses, we agree generally with these views and emphasize the importance of early attention to e-discovery by Hawaii's judges, attorneys and businesses.

The early attention framework of amended Federal Rules 16 and 26(a) and (f) is designed to avoid wasteful e-discovery and concomitant disputes.[184] The federal regime, however, does not particularize what kind of "early attention" is required or even desirable *prior to* the Rule 26(f) discovery conference and Rule 16 scheduling conference. With an eye on long-term costs and benefits, we highlight three practices that Hawai'i attorneys and litigants would likely find productive at the outset of litigation.

First, based on recent federal court e-discovery experience, businesses' early creation of detailed ESI management policies is crucial. Generally, the greater the detail of parties' ESI preservation protocols (i.e. specifying the individuals and computer systems involved), the more productive the Rule 26(f) discovery conference (or in Hawai'i courts, the discretionary discovery conferences) and the fewer the e-discovery problems later.[185]

Second, federal court experience also indicates that productive discovery conferences require attorneys' familiarity with their clients' ESI systems. Computer specialists are essential. They help attorneys assess and represent whether their clients' ESI is accessible and calculate costs for review, formatting and production.[186] Attorneys' early preparation might also focus on knowledge of: (1) the physical location of duplicates and back-up ESI; (2) the difficulty and cost of accessing particular ESI (and in what formats); (3) the ESI's sensitivity to overwriting or deletion; (4) the method their client uses to employ a litigation hold on scheduled ESI destruction; and (5) the use of data sampling to prepare a discovery plan.[187] Early cooperation and understanding

---

[182] LOSEY, *supra* note 47, at 82–84 (citations omitted).

[183] *See* Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in E-Discovery*, 60 MERCER L. REV. 983, 998–99 (2009) (encouraging early and cooperative e-discovery conferences).

[184] Report of the Judicial Conference Committee, *supra* note 15, at 26–27.

[185] *See* Michael D. Berman, *Avoiding Discovery into Discovery: ESI Lessons Learned*, LITIGATION NEWS, Fall 2008, at 22; Correy E. Stephenson, *Clients Take Reins in E-Discovery*, MO. LAW. WKLY., Oct. 13, 2008 ("Companies are trying to be as efficient as possible . . . . In a perfect world, the attorneys will be involved even before litigation occurs."); Isom, *supra* note 21, at 5.

[186] *See* Berman, *supra* note 185, at 22.

[187] *See, e.g.*, Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432–36 (S.D.N.Y. 2004) (*Zubulake V*). *See generally* Sedona Conference, Best Practices, *supra* note 6 *passim* (discussing best practices).

is also likely to promote parties' willingness to follow their attorneys' sometimes seemingly burdensome advice and help avoid later sanctions—in the immediate case and, even better, in future cases as well.[188]

Finally, based on federal court e-discovery experience, attorneys and parties are encouraged to devote early attention to the risk of inadvertently producing attorney–client privileged or work-product immune ESI. Prior to the surge of e-discovery, courts variously and inconsistently interpreted the waiver-effect of "inadvertent production"—all disclosures were waivers, only some disclosures were waivers, and no disclosures were waivers.[189] Amended Federal Rule 26(b)(5)(B), addressing inadvertent production, does not determine the extent to which inadvertent production constitutes waiver. It only sets up a procedure for raising and responding to the issue.[190] The Hawai'i circuit courts will likely need to fill this gap by resorting to the Hawai'i Supreme Court's waiver rulings or federal court practices on inadvertent production in ordinary discovery.[191]

B. Express Cost–Benefit Proportionality Analyses

Early attention is helpful for evaluating benefits and burdens of e-discovery in a particular case. But early attention alone does not resolve how to allocate costs in a way that both is consistent with the purposes of discovery and accounts for e-discovery's often heavy financial toll and business disruption. The established proportionality principle for ordinary discovery provides apt guidance on this question.

---

[188] *See* Marcus, *E-Discovery Beyond the Federal Rules*, *supra* note 122, at 331.

[189] *See* Elkton Care Ctr. Assocs. Ltd. P'shp v. Quality Care Mgmt., 805 A.2d 1177, 1183–85 (Md. Ct. Spec. App. 2002).

[190] FED. R. CIV. P. 26(b)(5) advisory committee's note (2006).

[191] *See* Save Sunset Beach Coal. v. City & County of Honolulu, 102 Haw. 465, 486, 78 P.3d 1, 23 (2003) (quoting Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993)). In determining whether inadvertent production constitutes waiver, the Hawai'i Supreme Court has held that "consideration is given to all of the circumstances surrounding the disclosure." *Id.* at 486, 78 P.3d at 22 (quoting *Alldread*, 988 F.2d at 1434). The court identified five key factors: "(1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness." *Id.* (quoting *Alldread*, 988 F.2d at 1434). Federal courts employ the same approach to determine waiver of inadvertently produced e-discovery. *See, e.g.*, Victor Stanley, Inc., v. Creative Pipe, Inc., 250 F.R.D. 251, 259 (D. Md. 2008) (citing McCafferty's, Inc., v. Bank of Glen Burie, 179 F.R.D. 163, 167 (D. Md. 1998)).

As discussed, early attention to waiver may take the form of "clawback" or "quick peek" agreements. Although, in federal courts, these agreements sometimes result in disputes themselves. Magistrate Chang Interview, *supra* note 120; *see also* Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228, 235 (D. Md. 2005) (suggesting that non-waiver agreements may be ineffective for third-parties).

1. Cost–benefit proportionality generally

E-discovery's potential for distorting substantive outcomes because of exorbitant costs highlights the salience of the principle of proportionality for e-discovery—that is, assessing probable long-range costs and benefits as a guide to discovery conduct.[192] The shift toward electronic transmittal and storage of information exacerbates imbalances of litigation power among individual, business and government litigants and sometimes affects case outcomes.[193] The federal e-discovery rules regime, however, is ambiguous on the crucial issue of cost–benefit proportionality. Some attorneys and judges look elsewhere for general rules that "superimpose the concept of proportionality on all behavior in the discovery arena."[194] Others tend to overlook proportionality considerations altogether. At best, federal courts inconsistently employ the general proportionality principle for e-discovery.[195] With this in mind, we suggest that the Hawai'i courts expressly embrace cost–benefit proportionality as a key guiding principle for Hawai'i e-discovery practice.

Hawai'i Rule 26(b)(2) and its federal counterpart instruct judges and attorneys in ordinary cases to make proportionality determinations when creating an overarching discovery plan.[196] The rule *requires* that courts limit discovery at the outset of litigation according to the following criteria:

---

[192] *See* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 357–58 (D. Md. 2008) ("[C]ompliance with the 'spirit and purposes' of these discovery rules requires [attorneys to] cooperat[e] . . . [and] avoid seeking discovery the cost and burden of which is disproportionally large to what is at stake in the litigation.").

[193] *See* Salvatore Joseph Bauccio, Comment, *E-Discovery: Why and How E-Mail is Changing the Way Trials are Won and Lost*, 45 DUQ. L. REV. 269, 270–71 (2007) (discussing the differences between e-discovery and traditional discovery, especially the amount of resources needed for proper e-discovery and the increase of settled cases due to high costs).

[194] Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 256–57 (2001) (quoting *In re* Convergent Tech. Sec. Litig., 108 F.R.D. 328, 331 (N.D. Cal. 1985)).

[195] *See* Withers, *supra* note 68, at 377 ("[C]ourts have not expressly applied proportionality considerations analogous to Rules 26(b)(2)(C) and 26(c) of the [FRCP] to the context of preservation . . . .").

[196] HAW. R. CIV. P. 26(b)(2):

> The frequency or extent of use of the discovery methods otherwise permitted under these rules *shall be limited by the court* if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) *the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.*

(emphasis added); *accord* FED. R. CIV. P. 26(b)(2)(C).

"[whether] the burden or expense . . . outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[197] The rule contemplates active judicial management and a comprehensive cost–benefit proportional discovery plan to guide information location and production and to minimize later disputes over burdens and costs.[198]

In practice, judges, attorneys and scholars regularly overlook Rule 26(b)'s broad proportionality mandate—an important oversight. Instead, many apparently choose to consider proportionality narrowly under Rule 26(c), which authorizes protective orders to limit specific discovery for reason of "annoyance, embarrassment, oppression . . . undue burden or expense" or unfair competitive advantage.[199] Rule 26(c) provides some guidance because it is, in part, concerned with burden and expense.[200] But the protective order rule addresses the handling of individual discovery disputes (e.g., objections to a request for specific documents) and not overarching discovery plans.[201] Even an "umbrella protective order" in a complex case simply allows parties early on to designate materials "confidential" without engaging in proportionality analyses.[202]

As mentioned, Hawai'i Rule 26(b)(2)(iii) and Federal Rule 26(b)(2)(C)(iii) command in ordinary discovery a separate and early proportionality analysis. While arguments for *active* deployment of proportionality analysis in *all* cases falls beyond the scope of this article,[203] what follows are suggestions for how the cost–benefit proportionality principle might productively be employed through tailoring Hawai'i Rule 26(b)(2)(iii) to *e-discovery* in Hawai'i courts.[204]

---

[197] HAW. R. CIV. P. 26(b)(2)(iii); FED. R. CIV. P. 26(b)(2)(C)(iii) (roughly equivalent); *see* Eric K. Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395, 443 (1987) (discussing use of Rule 26(b)(2)(iii) "at the outset" of litigation).

[198] *See* Yamamoto, *supra* note 197, at 443, 445, 448–51.

[199] HAW. R. CIV. P. 26(c); FED. R. CIV. P. 26(c); *see, e.g.*, Rivera v. NIBCO, Inc., 384 F.3d 822, 827–28 & n.6 (9th Cir. 2004) (discussing a protective order analysis under Rule 26(c) as requiring great specificity tailored to protect the specific information and source); *In re* Adobe Sys., Inc. Sec. Litig., 141 F.R.D. 155, 158 (N.D. Cal. 1992) (discussing unfair competitive advantage in a motion for a protective order).

[200] FED. R. CIV. P. 26(c).

[201] *See, e.g.*, *Rivera*, 384 F.3d. at 827–28.

[202] *See, e.g.*, *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 356 (11th Cir. 1987).

[203] To the extent that Hawai'i courts tend to underuse this rule in ordinary discovery, we suggest significantly ramped up usage for ordinary as well as e-discovery. Hawai'i appellate courts' general guidance regarding Rule 26(b)(2) cost–benefit analysis is that trial courts have discretion to "limit the amount of discovery on a case-by-case basis even in the absence of sanctionable abuse." Acoba v. Gen. Tire, Inc., 92 Haw. 1, 11, 986 P.2d 288, 298 (1999).

[204] *See* Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 98 (D. Md. 2003)

The one amended federal rule that expressly refers to proportionality in e-discovery does not clearly apply to *all* e-discovery. This rule, amended Federal Rule 26(b)(2)(B), incorporates a two-tiered system for ESI production.[205] The rule provides that, in the first tier, a responding party must produce relevant and reasonably accessible ESI but can withhold ESI deemed "not reasonably accessible."[206] Then, if either a motion to compel or for a protective order is filed, a responding party—in the second tier—"must show that the [ESI] is not reasonably accessible because of undue burden or cost."[207] Regardless of the success of this showing, the court may order discovery if the requesting party also shows "good cause," considering the limitations of Rule 26(b)(2)(C)'s general cost–benefit proportionality principle.[208]

The language of Federal Rule 26(b)(2)(B) thus indicates that e-discovery proportionality considerations do not operate at the threshold of discovery but only come into play when: (1) the responding party contends that particular ESI is not reasonably accessible; (2) a "trigger motion" is filed (either by the responding party for a protective order or by the requesting party to compel production); (3) a showing of undue burden or cost is made by the responding party; *and* (4) a counter showing of good cause is made by the requesting party.[209] But, contrary to the language of the rule, the Federal Advisory

---

("Rule 26(b)(2) balancing factors are all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records."); *cf.* Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 284–91 (S.D.N.Y. 2003) (*Zubulake III*) (articulating a seven-factor test for cost-shifting).

[205] FED. R. CIV. P. 26(b)(2)(B):

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

[206] *Id.*

[207] *Id.*

[208] *Id.* The Proposed Uniform Rules specifically incorporate the last four factors of Federal Rule 26(b)(2)(C)—the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues—but implicitly limit any proportionality considerations to these four factors. *See* LOSEY, *supra* note 47, at 110–11, *cf.* FED. R. CIV. P. 26(b)(2)(B).

[209] *Id.* In critique of the impact of the rules, one commentator suggests that amended Federal Rule 26(b)(2)(B) rewards continued use of outdated computer systems by immunizing from discovery data that is difficult to access under existing ESI systems. *See* LOSEY, *supra* note 47, at 84–90. It seems unlikely, however, that companies would maintain outdated systems for this reason. Doing so would constrict business activity and would also inhibit their ability to abide by amended Federal Rules 16(b) and 26(f), which require parties to quickly identify and review large amounts of electronic data and respond to discovery requests. *See id.* at 84–87 (citing

Committee Notes to Rule 26(b)(2) maintain that proportionality criteria "apply to all discovery of [ESI], including that stored on reasonably accessible electronic sources."[210]

This ambiguity is slight but significant. It is unclear whether the proportionality principle is also to guide parties in crafting e-discovery plans and organizing the full range of parties' e-discovery practices or, similar to Rule 26(c), whether it is to be applied only to disputed requests for particular ESI that is deemed "not reasonably accessible."

Moreover, even if they desire to apply Rule 26(b)(2) broadly, attorneys and judges might easily adopt a restricted approach to proportionality—i.e., for only specific disputes rather than when parties create e-discovery plans and determine e-discovery practices for the entire litigation. This approach would be "easy" and "restricted" because it would mimic the limited protective order approach to burdens and costs. But doing so would bypass the opportunity to invoke the proportionality principle in shaping e-discovery throughout the litigation.

To clarify these ambiguities, we recommend that the proportionality principle embodied in Hawai'i Rule 26(b)(2) and Federal Rule 26(b)(2)(C) operate throughout the litigation for all e-discovery—that is, when parties, attorneys or judges are crafting overarching e-discovery plans as well as when specific e-discovery cost–benefit disputes arise. It should also operate as an integral part of the threshold determination whether ESI is "not reasonably accessible."

The utility and elegance of embracing cost–benefit proportionality throughout the litigation for all e-discovery is underscored by a pre-existing enforcement rule for "disproportionate discovery." Rule 26(g), the general discovery sanctions rule, requires that the attorney sign discovery requests, responses and objections, certifying among other things that the attorney's conduct is consistent with the cost–benefit proportionality principle.[211] Under this general rule, Hawai'i courts are required to impose "an appropriate sanction" against *an attorney or party or both* for violations without substantial justification of the proportionality principle.[212] While Rule 26(g) was not

---

Garrie et al., *Hiding the Inaccessible Truth: Amending the Federal Rules to Accommodate Electronic Discovery*, 25 REV. LITIG. 115 (2006)). Many commentators observe that the "good cause" requirement would likely discourage fraudulent practice. *See id.*

[210] FED. R. CIV. P. 26(b)(2) advisory committee's note (2006).

[211] HAW. R. CIV. P. 26(g)(1):

> [T]hat to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is . . . *not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.*

(emphasis added); *accord* FED. R. CIV. P. 26(g)(1).

[212] HAW. R. CIV. P. 26(g)(2) (emphasis added); *accord* FED. R. CIV. P. 26(g)(3).

crafted with e-discovery in mind, its purpose of deterring wasteful discovery filings applies to e-discovery as well.

2. *Cost-shifting*

Another gap in the federal e-discovery rules regime that is related to the proportionality principle, is whether and when to shift costs of preserving and producing ESI. Traditionally, discovery burdens and costs have fallen largely on responding parties.[213] They are now being shifted with increasing regularity to requesting parties.[214] Without carefully assessed cost-shifting, the high costs of e-discovery can exacerbate the distorting effect of unequal resources among parties and affect strategic litigation decisions independent of the merits.[215]

The most often-cited considerations for determining when courts are to order (or approve) e-discovery cost-shifting are articulated in *Zubulake III*.[216] *Zubulake III* first determined that cost-shifting should only be considered when "inaccessible data" is sought and then described seven cost-shifting factors.[217] The main factors are relatively straightforward: the extent that the request is specifically tailored; the availability of the requested information from other sources; the total cost of production compared to the amount in controversy; and the respondent's available resources.[218] The remaining factors involve more subjective valuing of "the relative ability of each party to control costs and its incentives to do so[,] . . . the importance of the issues at stake in the litigation . . . and the relative benefits to the parties of obtaining the information."[219]

Zubulake III designed its cost-shifting calculus "to simplify application of the Rule 26(b)(2) proportionality test in the context of electronic data and to reinforce the traditional presumptive allocation of costs," but only for "not reasonably accessible" ESI.[220] As discussed, Rule 26(b)(2) cost–benefit

---

[213] *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) ("[T]he presumption is that the responding party must bear the expense of complying with discovery requests . . . .").

[214] *See generally* Ross Chaffin, Comment, *The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 OKLA. L. REV. 115 (2006).

[215] *See, e.g.*, Scheindlin & Rabkin, *supra* note 65, at 369 ("Judges are left to determine cost-shifting motions on a fact-intensive basis by drawing on the often-ignored 'proportionality' provisions of Rule 26(b)(2).").

[216] Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) (*Zubulake III*).

[217] *Id.* (emphasis omitted).

[218] *Id.* (citing Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (*Zubulake I*)).

[219] *Id.* (citing *Zubulake I*, 217 F.R.D. at 324).

[220] *Id.*; *see id.* at 289 ("Factors one through four tip against cost-shifting (although factor two only slightly so). Factors five and six are neutral, and factor seven favors cost-shifting."); *see also id.* (stating that determining how much of costs should be shifted is "a matter of judgment

proportionality analysis encompasses "the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[221] Similar to *Zubulake III*, the Advisory Committee Note to Rule 26(b)(2), in discussing a court's authority to shift costs, only refers to ESI that is "not reasonably accessible."[222]

Restricting cost-shifting to ESI deemed "not reasonably accessible," however, overestimates the similarity between e-discovery and ordinary discovery.[223] E-discovery often costs far more than traditional discovery even if the ESI is reasonably accessible.[224]

This substantial gap in e-discovery rules—that is, the omission of "reasonably accessible ESI" cost-shifting—needs careful filling.[225] The ESI reality justifies Hawai'i courts' serious consideration of case-by-case cost-shifting—under the *Zubulake III* factors—for both "reasonably accessible" and "not reasonably accessible," relevant and non-privileged ESI.

C. Duty to Preserve ESI and Sanctions for Destruction

The Hawai'i courts will likely face ESI preservation and destruction issues but with only limited guidance from the amended Federal Rules. In this section we address gaps in the e-discovery rules regime concerning two critical related issues: the duty to preserve ESI and possible sanctions for its destruction.

1. Attorneys' and clients' duty to preserve ESI

E-discovery on Hawai'i courts' horizon will certainly encompass motions to sanction a party and her attorney for breach of a "duty to preserve" ESI before litigation commenced. But the amended Federal Rules are silent on this

---

and fairness" informed by the seven-factor test); *id.* at 290 (stating that "where cost-shifting is appropriate, only the costs . . . . of making inaccessible material accessible" should be shifted).

[221] HAW. R. CIV. P. 26(b)(2)(iii); *accord* FED. R. CIV. P. 26(b)(2)(C)(iii).

[222] FED. R. CIV. P. 26(b)(2) advisory committee's note (2006).

[223] *See* Qualters, *States Launching E-Discovery Rules*, *supra* note 38 (stating that judges "wouldn't order you to produce a million pages of documents from a warehouse [but] in the electronic era they do [from computer systems]") (alterations in original).

[224] *See, e.g.*, Mazza et al., *supra* note 6, at ¶ 38 n.93 (articulating the high cost of preserving data, even for a single case); Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 894 (2009) (stating that the the cost of e-discovery is high because of both volume and inaccessibility).

[225] *See* Jessica Lynn Repa, Comment, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257 (2004).

threshold question of a party's and attorney's duty to preserve ESI. When and under what circumstances does the duty arise? Who is responsible for implementing ESI preservation policies in practice? What level of culpability is required to breach the duty to preserve—subjective bad faith, recklessness, negligence or mere inadvertence? And what range of sanctions is authorized and appropriate for breaches of the duty?

The Federal Rules regime provides little or no guidance on these key questions. In this subsection we address the first two questions concerning the duty to preserve; in the next we address the latter two questions about sanctions for breach of that duty.

The amended Federal Rules are silent on parties' and attorneys' affirmative duty to preserve ESI.[226] New Federal Rule 37(e), discussed in Section III.C.5, partially addresses preservation and destruction of ESI by providing a safe harbor from sanctions for "loss" of ESI due to "routine, good-faith operation."[227] By shielding parties and attorneys from sanctions for destruction of ESI under limited circumstances the rule implies that there exists an underlying duty to preserve ESI.[228] But the rule does not address when or how that duty arises.

As an integral part of its new rules regime for e-discovery, the Hawai'i courts will therefore need to shape the duty to preserve ESI and to provide clear notice of the foundation for potential sanctions for missteps. In particular, the courts will need to bring clarity to the ambiguous obligation recognized in the Advisory Committee Notes to Federal Rule 26(f)—that attorneys and parties "discuss" preservation and "balance" preservation with businesses' continued operation.[229]

---

[226] Advisory Committee Report, *supra* note 132, at 85 (stating that "[t]he rule itself does not purport to create or affect . . . preservation obligations").

The federal e-discovery rules regime does not address preservation directly, although the Advisory Committee Notes to amended Federal Rule 26(f) suggest attorneys' early discussion about ESI preservation. *See* FED. R. CIV. P. 26(f) advisory committee's note (2006). When determining the scope of ESI preservation, the Notes to Federal Rule 26(f) direct attorneys and businesses to "pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities." FED. R. CIV. P. 26(f) advisory committee's note (2006) (recognizing that "[c]omplete or broad cessation of a party's routine computer operations could paralyze the party's activities." (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.422 (2004))).

[227] FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information *lost as a result of the routine, good-faith operation* of an electronic information system." (emphasis added)).

[228] *Id.*; FED. R. CIV. P. 37(f) advisory committee's note (2006) ("A preservation obligation may arise from many sources, including common law, statutes, and regulations.").

[229] FED. R. CIV. P. 26(f) advisory committee's note (2006).

Evolving federal procedural common law has loosely filled this gap by combining rules to create a preservation duty for attorneys and parties, called the *Zubulake* duty.[230] Briefly stated, *Zubulake* imposes a duty to institute a "litigation hold" on the destruction of ESI "[o]nce [the party] reasonably anticipates litigation."[231] This rather simple formulation of the duty to preserve belies its complexity. The "reasonably anticipates litigation" language means that the duty to preserve ESI often arises well before litigation commences. More fully conceived, the duty also imposes upon a litigant a "duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."[232]

No single rule imposes the *Zubulake* duty. It is an amalgam that draws upon existing general discovery rules, procedural common law and the unique realities of ESI storage, retrieval and destruction.[233] One public critic of the *Zubulake* duty nevertheless acknowledges the importance of rule guidance for the duty to preserve.[234]

---

[230] *See* Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*).

[231] *Id.* at 431 (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (*Zubulake IV*)). This standard for timing makes sense because it is consistent with the Federal Rule 26(b)(3) (and Hawai'i Rule 26(b)(4)) timing for immunity for attorney work-product that is prepared in anticipation of litigation. Courts may turn to this body of case law for interpretation of "reasonably anticipates litigation."

[232] *Zubulake IV*, 220 F.R.D. at 217 (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991)).

[233] *See generally* SCHEINDLIN ET AL., *supra* note 6, at 90–96 (discussing the breadth of and nuanced legal issues of the *Zubulake* duty, some of which are a direct result of the nature of ESI).

[234] One prominent public critic of the *Zubulake* duty argues that the *Zubulake* duty is "draconian," expensive, without legal basis, bad public policy because it shifts responsibilities from parties to their attorneys and will lead to unnecessary satellite litigation. David Levitt, *Counsel's Obligations for E-Discovery*, FOR THE DEFENSE, Aug. 2007, at 44. Levitt argues that the Federal Rules have traditionally emphasized parties' near sole responsibility for discovery. *Id.* at 45. He also observes that the obligation to supplement responses under the *Zubulake* duty is broader than Rule 26(e) suggests because *Zubulake* imposes an affirmative duty to ensure that discovery responses are not erroneous—while the Rule, he argues, merely requires that attorneys or parties update or reveal errors if they learn that updates or errors exist. *Id.* at 45–46. Finally, Levitt argues that the *Zubulake* duty and the amended e-discovery rules will increase expenses and the satellite litigation of discovery disputes, rather than lessen expenses as designed. *Id.* at 46–47. Levitt acknowledges nevertheless that an attorney's greater familiarity with a client's computer systems early in cases "may be a wise idea" so that the attorney can explain to opposing counsel and the court what her client has, what steps the client has taken to preserve ESI and how the client will proceed. *Id.* at 46–47.

The *Zubulake* duty covers an attorney's duty to "coordinat[e] her client's discovery efforts,"[235] in part by "oversee[ing] compliance with the litigation hold."[236] Policed by sanctions, the duty particularly requires attorneys to oversee clients' ESI preservation.[237] As officers of the court and agents for their clients, attorneys are deemed at least partially responsible for their clients' e-discovery preservation and destruction mistakes.[238] *Zubulake* therefore observes that attorneys need to understand the significance of e-discovery disclosures and become "more conscious of the contours of the preservation obligation."[239] *Zubulake* also instructs attorneys to "become *fully* familiar with [their] client's document retention policies, as well as the client's data retention architecture . . . [which will] invariably involve speaking with information technology personnel . . . and communicating with the 'key players' in the litigation."[240]

The *Zubulake* duty also elongates the duty to preserve ESI through the obligation to supplement discovery responses.[241] In conjunction with Rule 26(e), which governs supplemental responses, the *Zubulake* preservation duty encompasses all relevant ESI "in existence at the time the duty to preserve attaches[] and any relevant documents created thereafter."[242] Attorneys

---

[235] *Zubulake V*, 229 F.R.D. at 435.

[236] *Id.* at 432. As this article was going to press Judge Scheindlin issued an opinion she titled "*Zubulake* Revisited: Six Years Later." Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC, ___ F. Supp. 2d ___, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). Among other things, the opinion clarifies that the party's and attorney's duty to preserve encompasses clear instructions to preserve specified ESI, the actual preservation of that ESI and the collection of the preserved ESI. *Id.* at ___, 2010 WL 184312, at *8 (citing SCHEINDLIN ET AL., *supra* note 6, at 147–49).

[237] *See id.*

[238] *E.g.*, Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., 259 F.R.D. 591, 616 (M.D. Fla. Aug. 3, 2009); United States v. Krause (*In re* Krause), 367 B.R. 740 (Bankr. D. Kan. 2007); *Zubulake V*, 229 F.R.D. at 432–33; Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); Metro. Opera Ass'n v. Local 100, Hotel Employees and Rest. Employees Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003); *see* Marcus, *E-Discovery Beyond the Federal Rules*, *supra* note 122, at 324–26; *see also* Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, ¶ 6 n.14 (2008) (discussing federal court decisions regarding varying standards for imposing sanctions for spoliation of discoverable material).

[239] *Zubulake V*, 229 F.R.D. at 433 (citing Telecom Int'l Am. Ltd. v. AT&T Corp., 189 F.R.D. 76, 81 (S.D.N.Y. 1999)).

[240] *Id.* at 432 (emphasis added) (citing *Zubulake IV*, 220 F.R.D. at 218). The *Zubulake* court encouraged attorneys to "be creative" if speaking with every key player is not feasible because of the scope of the case or size of the company client. *Id.*

[241] *Id.* at 432–33; *see also* FED. R. CIV. P. 26(e); HAW. R. CIV. P. 26(e).

[242] *Zubulake IV*, 220 F.R.D. at 218; *Zubulake V*, 229 F.R.D. at 432–33 ("Although the Rule 26 duty to supplement is nominally the party's, it really falls on counsel."); *see* FED. R. CIV. P. 26(e) advisory committee's note (1970) ("Although the party signs the answers, it is his

therefore must "oversee compliance . . . [and continue to] monitor[] the party's efforts to retain and produce the relevant documents" even if the ESI is generated after initial disclosures or its existence and location only later become known.[243]

In *Zubulake* itself, Laura Zubulake filed an EEOC gender discrimination claim in August 2001.[244] UBS' in-house counsel instructed employees to preserve relevant documents in that month.[245] Employees at UBS began deleting or not saving relevant ESI in September 2001.[246] In October of that year Zubulake was fired by her employer, UBS.[247] She brought a Title VII discrimination suit in February 2002.[248] UBS's in-house counsel reiterated the preservation instruction in February 2002 and September 2002, and outside counsel gave similar instructions in August 2002.[249] The court determined that UBS's duty to preserve the ESI began in *April 2001*—well before suit was filed, before Zubulake was fired, before she filed an EEOC discrimination complaint, and most important, before the key ESI was destroyed.[250]

Two facts undergirded the court's determination. First, Zubulake's supervisor conceded in a deposition that he feared litigation as early as April 2001.[251] Second, emails from several key colleagues dating back to April 2001 referred to Zubulake and were designated "UBS Attorney Client Privilege."[252] Therefore, the court determined that the duty to preserve the ESI arose when UBS' officials "reasonably anticipated" a legal claim and litigation—April 2001—almost one year before litigation commenced. At the latest, the duty to

---

lawyer who understands their significance and bears the responsibility to bring answers up to date. . . . In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information.").

[243] *Zubulake V*, 229 F.R.D. at 432.

[244] Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 312 (S.D.N.Y. 2003) (*Zubulake I*).

[245] *Zubulake IV*, 220 F.R.D. at 215–16; *Zubulake V*, 229 F.R.D. at 425.

[246] Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 287 (S.D.N.Y. 2003) (*Zubulake III*).

[247] *Zubulake I*, 217 F.R.D. at 312.

[248] *Id.*

[249] *Zubulake IV*, 220 F.R.D. at 215–16; *Zubulake V*, 229 F.R.D. at 425.

[250] *Zubulake IV*, 220 F.R.D. at 216–17.

[251] *Id.* at 217.

[252] *Id.* Interestingly, these emails were deleted from UBS' system and recovered from UBS' backup tapes. In an earlier motion, the court ordered that costs for UBS to restore backup tapes should be shared. Therefore, if Zubulake had not continued to pursue discovery of emails containing relevant information—even if it meant sharing the high costs for restoring UBS' backup tapes—it is unlikely that these relevant non-privileged emails would have been discovered. Although UBS' in-house and outside counsel repeatedly advised institution of a litigation hold, UBS' implementation did not prevent the overwriting of stored emails prior to or after the date that the hold was "triggered." If UBS' litigation hold on the deletion of relevant emails had been effective, the expense of restoring back-up tapes likely could have been avoided.

preserve arose in August 2001, when UBS' in-house counsel first informally instructed that employees implement a litigation hold—still the month before UBS began to destroy or not save relevant ESI.

We suggest that Hawai'i courts carefully assess the many aspects of the *Zubulake* preservation duty and seriously consider incorporating that duty into Hawai'i e-discovery practice. Since the *Zubulake* duty is extensive and spans across all cases, however, it might sometimes impose onerous preservation obligations beyond what is proportional to the parties resources, the importance of the issues, and the significance of the ESI. It might also unduly burden the daily operations of small and big litigants and governments. To address these problems, the court should employ a proportionality analysis in assessing the extent of a party's preservation duty. Thus, where the costs of preserving relevant ESI threaten to overtake possible litigation benefits, the proportionality principle discussed earlier offers apt guidance. Fully shaping the contours of the duty to preserve to fit Hawai'i practice needs will likely entail thoughtful pronouncements through future cases.

2. Sanctions for destruction of ESI

Parties and attorneys breach their duty to preserve ESI through destruction of ESI subject to a litigation hold. In some instances, as in *Zubulake*, a litigation hold will be required well before the filing of a lawsuit and may be triggered by a key player's or a business' "reasonable anticipation" that a suit will arise. In other cases, a litigation hold may be triggered by the filing of a lawsuit itself. When parties and their attorneys breach the duty to preserve ESI the prospect of sanctions arises.

a. Broader context: Hawai'i court sanctions for non-e-discovery abuse

Hawai'i courts are familiar with the destruction of discoverable information—from mistakes in smaller cases to gross abuses in complex ones.[253] To broaden the context for handling sanction motions for ESI destruction we first highlight the Hawai'i Supreme Court's treatment of the destruction of potential evidence across a spectrum of "ordinary" discovery disputes.

Wong v. City & County of Honolulu started as a simple car accident suit that morphed into a major dispute about the City's destruction of discoverable

---

[253] *E.g.*, Cho v. State of Hawai'i, 115 Haw. 373, 168 P.3d 17 (2007), *cert. denied*, 552 U.S. 1185 (2008); Kawamata Farms, Inc., v. United Agric. Prods., 86 Haw. 214, 948 P.2d 1055 (1997); Wong v. City & County of Honolulu, 66 Haw. 389, 665 P.2d 157 (1983).

"tangible things."[254] Following multiple informal and formal requests for production of a traffic signal box for testing, a private contractor removed and destroyed the box while under the supervision of City employees.[255] The box was essential to the plaintiff's claim that the City failed to properly maintain it.[256] By affirming the court's sanction against the City, the Hawai'i Supreme Court confirmed that the City had a duty to place a "litigation hold" on the box at least upon receiving a formal request for production, if not sooner.[257]

The Circuit Court imposed sanctions against the City under Hawaii Rule 37(d) for its failure to respond to the discovery request.[258] The court estopped the City from claiming that the signal box was not defective or that any malfunction was caused by the manufacturer.[259] The court did not, however, employ the common law doctrine of sanctions for spoliation (destruction) of discoverable material. Instead it relied exclusively upon Rule 37(d) to preclude the City from supporting those defenses through a cross-reference to Rule 37(b)(2)(B)—Rule 37(d) for the authority to sanction and Rule 37(b)(2)(B) for the type of sanction.[260]

Cho v. State is a moderately complex toxic tort case marked by a deliberate destruction of discoverable building debris that it could have "restored," but, understandably, did not.[261] The school custodian, Cho, sued the State for injuries caused by exposure to lead, mercury and arsenic through his ten-year occupancy of a government-leased cottage.[262] The State sent debris from the demolished cottage—crucial to the Chos' claim—to a mainland refuse site.[263] The State violated a court production order because it would cost one million dollars to re-locate and produce the debris.[264] For violating its production

---

[254] *See Wong*, 66 Haw. at 391, 665 P.2d at 159.

[255] *Id.*

[256] *See id.*

[257] *See id.* at 394, 665 P.2d at 161.

[258] *See id.* at 391–93, 665 P.2d at 160–61.

[259] *Id.* at 391, 665 P.2d at 160 (quoting unpublished Circuit Court Order by Judge Arthur S.K. Fong, Oct. 3, 1978).

[260] *Wong*, 66 Haw. at 392–93, 665 P.2d at 160–61.

> If a party . . . fails . . . to serve a written response to a request for inspection . . . the court on motion . . . may . . . make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of this subdivision (b)(2) of this rule.

(citing HAW. R. CIV. P. 37(d) (emphasis omitted)).

[261] 115 Haw. 373, 168 P.3d 17 (2007), *cert. denied*, 552 U.S. 1185 (2008).

[262] *Id.* at 375, 168 P.3d at 19.

[263] *Id.*

[264] *Id.* at 377–78, 168 P.3d at 21–22. The Circuit Court noted that the State decided not to produce the debris, at least in part, because the estimated cost to retrieve and produce it was somewhere between $150,000 and $1 million. *Id.* at 378, 384, 168 P.3d at 22, 28. Upon the Circuit Court's reconsideration of the sanctions order, the State pointed out that in addition to

order, the court sanctioned the State under Hawai'i Rule 37(b)(2)(B), precluding it from contesting the presence of toxins in the soil.[265] As in *Wong*, the court did not employ the common law doctrine of spoliation as the basis for sanctions and instead relied on Hawai'i Rule 37(b). The Hawai'i Supreme Court affirmed.[266]

Complex cases in Hawai'i sometimes involve severe discovery abuse. The string of cases involving the DuPont chemical company is an iconic example of how discovery abuse in Hawai'i is often linked to cases elsewhere.[267] Kawamata Farms, a Hawai'i farm corporation, brought a products liability suit against DuPont.[268] DuPont intentionally withheld numerous crucial technical documents—some of which were later found to have been disclosed in a parallel suit against DuPont in Florida.[269]

Throughout thirty months of discovery the Hawai'i Circuit Court issued twenty-six orders compelling discovery and twenty-seven orders imposing sanctions against DuPont.[270] Judge Ronald Ibarra found that DuPont's concealment of documents containing relevant technical information was part of a "pattern of discovery abuse" and sanctioned DuPont under Hawai'i Rule 37(b)(2) and its inherent power for DuPont's failure to produce relevant information.[271] Judge Ibarra ordered admission of critically damaging evidence, use of adverse jury instructions, the lifting of protective orders and payment of attorneys' fees and costs.[272] Judge Ibarra also ordered $1.5 million in a criminal contempt sanction against DuPont.[273]

---

the $1 million cost to produce—which the trial judge did not know of—the Attorney General was unable to comply because the entire State budget for litigation expenses for that fiscal year was approximately $1.4 million, and the value of the Chos' case was less than $1 million. *Id.*

[265] *Id.* at 379, 168 P.3d at 23 (applying HAW. R. CIV. P. 37(b)(2)(B)). Rule 37(b)(2)(B) permits a court, "as [is] just," to refuse a party to support or oppose claims or defenses as a sanction for that party's failure to obey a court order to provide or permit discovery. HAW. R. CIV. P. 37(b)(2)(B). Here, the court precluded the State's defense that toxins were not present because the State deliberately did not produce the debris in direct violation of a court order.

[266] *Cho*, 115 Haw. at 386, 168 P.3d at 30.

[267] Kawamata Farms v. United Agric. Prods., 86 Haw. 214, 948 P.2d 1055 (1997). See Matsuura v. E.I. DuPont de Nemours & Co., 102 Haw. 149, 150–52, 73 P.3d 687, 688–90 (2003), for a brief discussion of DuPont's Benlate litigation.

[268] *Kawamata Farms*, 86 Haw. at 222, 948 P.2d at 1063.

[269] *Id.* at 228, 948 P.2d at 1069 (without citation to Smith v. E.I. DuPont de Nemours & Co., 727 So. 2d 928 (Fla. Dist. Ct. App. 1998)).

[270] *Id.* at 224, 948 P.2d at 1065.

[271] *Id.*; *see also Matsuura*, 102 Haw. at 150–52, 73 P.3d at 688–90 (discussing the procedural history of Benlate litigation in Hawai'i).

[272] *Kawamata Farms*, 86 Haw. at 224–27, 948 P.3d at 1065–68; *see Matsuura*, 102 Haw. at 150–52, 73 P.3d at 688–90.

[273] *Kawamata Farms*, 86 Haw. at 225, 948 P.3d at 1066. DuPont waived appellate review of sanctions for criminal contempt by not raising objections to the Circuit Court. *Kawamata*

Wong, Cho and *DuPont* reveal that destruction or concealment of litigation information—whether inadvertent or purposeful—poses a discovery challenge for Hawai'i courts. With the continuing expansion of ESI, e-discovery sanction issues will also likely surface across the entire spectrum of cases—from small to large, the collegial to the conflicted.

b. General discovery sanction rules applicable to ESI destruction

For many e-discovery disputes, the general discovery sanctions rule, Rule 26(g), will govern.[274] When litigation commences and attorneys (or parties) sign discovery "requests, responses or objections,"[275] Rule 26(g) imposes a set of obligations as the foundation for potential sanctions.[276] First, the signer must conduct "reasonable inquiry" under the circumstances.[277] Second, sanctions are mandated if the discovery filing is for an "improper purpose" (including harassment, delay or increasing costs), not reasonably grounded in law and facts, or violates the proportionality principle (discussed in Section IV.B).[278] Patterned after Rule 11,[279] Rule 26(g) is intended "to deter those who might be tempted to [engage in discovery mis]conduct in the absence of such a deterrent."[280]

Rule 26(g) seeks to eliminate "kneejerk discovery requests served without consideration of cost or burden to the responding party" and the "equally abusive practice of objecting to discovery requests reflexively—but not reflectively—and without a factual basis."[281] Careless requests and boilerplate objections are even more disruptive in the realm of e-discovery where

---

Farms, 86 Haw. at 248–49, 948 P.2d at 1089–90. While not explicitly stated in the Hawai'i Supreme Court opinion, Judge Ibarra possessed authority to impose these sanctions under Hawai'i Rules 26(g) (discovery sanctions rule analogous to Rule 11), 37(b)(2) and 60(b)(3).

[274] *See, e.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 265 (D. Md. 2008).

[275] Rule 26(g) authorizes "judges [to] impose appropriate sanctions [for groundless or unduly burdensome filings] *and requires them to use it.*" FED. R. CIV. P. 26 advisory committee's note (1983) (emphasis added); *id.* ("[The amendment] . . . is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions."; "Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision."); *see also* HAW. R. CIV. P. 26(g).

[276] *See* FED. R. CIV. P. 26(g); *accord* HAW. R. CIV. P. 26(g).

[277] FED. R. CIV. P. 26(g); *accord* HAW. R. CIV. P. 26(g).

[278] FED. R. CIV. P. 26(g); *accord* HAW. R. CIV. P. 26(g).

[279] FED. R. CIV. P. 26(g) advisory committee's note (1983).

[280] Nat'l Hockey League (NHL) v. Metro. Hockey Club, 427 U.S. 639, 643 (1976) (per curiam). *NHL* has since stood for commitment to the goal of deterring discovery abuse by mandating judicial imposition of sanctions. *See* Barbara J. Gorham, Note and Comment, Fisions: *Will it Tame the Beast of Discovery Abuse?*, 69 WASH. L. REV. 765, 775 (1994).

[281] Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008).

disproportionately expansive requests can overwhelm attorneys and clients and reflexive objections can foreclose access to significant ESI.[282]

Rule 26(g), however, does not govern e-discovery duties to preserve ESI that are breached *before* litigation begins or that do not entail signed filings.[283] Similarly, other general discovery sanction rules are activated by conduct *during*, not before, the litigation. For instance, Rule 37(b)(2) provides sanctions generally for failure to comply with a court order compelling discovery.[284] Rule 37(c) permits sanctions for failure to provide mandatory disclosures under Rule 26(a) or supplement those mandatory disclosures and testifying expert opinions under Rule 26(e).[285] Rule 37(d) provides sanctions for complete failure to respond to a request for interrogatories or inspection or appear at a deposition, including a request for electronic materials.[286] The problem with attempting to apply these general rules to ESI preservation and destruction issues is that they are not tailored to the pre-litigation duty to preserve ESI.

Courts may invoke their inherent power to impose attorneys' fees or case dispositive sanctions if discovery misconduct amounts to bad faith.[287] Proof of bad faith, however, is difficult to muster, and thus courts rarely invoke their inherent power for those sanctions. A common law *tort* claim for intentional or negligent spoliation of evidence is recognized by several jurisdictions, but not by Hawai'i courts.[288]

Therefore the general Hawai'i sanctions rules and the Hawai'i courts' inherent power to control litigation[289] appear to be largely inadequate for e-

---

[282] *See id.*

[283] *See* Grimm et al., *supra* note 73, at 397–99 (discussing limitations that the Rules Enabling Act, 28 U.S.C. § 2072 (2006), places on civil rules).

[284] FED. R. CIV. P. 37(b)(2); HAW. R. CIV. P. 37(b)(2); *see also* Child Support Enforcement Agency v. Roe, 96 Haw. 1, 15, 25 P.3d 60, 74 (2001) (expanding the reach of Rule 37(b)(2) to authorize sanctions "when a court unequivocally and prospectively notifies a party of a discovery requirement that the court expects that party to obey") (quoting Fujimoto v. Au, 95 Haw. 116, 166, 19 P.3d 699, 749 (2001)).

[285] FED. R. CIV. P. 37(c); HAW. R. CIV. P. 37(c).

[286] FED. R. CIV. P. 37(d); HAW. R. CIV. P. 37(d).

[287] Chambers v. NASCO, Inc., 501 U.S. 32, 45–50 (1991) (stating that a court's inherent power to render an attorneys' fees sanction depends upon a finding of bad faith).

[288] Matsuura v. E.I. DuPont de Nemours & Co., 102 Haw. 149, 166–68, 73 P.3d 687, 704–06 (2003). While a tort claim for spoliation of evidence is not yet recognized in Hawai'i, this is likely to be a fertile area for future litigation when parties realize that ESI was destroyed in an earlier case. Where it is recognized, courts require: "(1) the destruction of evidence; (2) the disruption or significant impairment of the lawsuit; and (3) a causal relationship between the destruction of evidence and the inability to prove the lawsuit." *Id.* (citations omitted).

[289] The Hawai'i Supreme Court has recognized generally that "courts have the inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them. . . . [including] the powers to create a remedy for a wrong even in the

discovery. They provide only indirect guidance and do not establish a clear deterrent against improper ESI destruction or a strong incentive for proper ESI preservation. Even if the Hawai'i judiciary adopts the federal e-discovery rules regime, it will need to provide that guidance, particularly by defining, explaining and enforcing the "duty to preserve" ESI. As discussed, Hawai'i courts might look most productively to the *Zubulake* opinions for that guidance.

c. A limited safe harbor for "loss" of ESI

As mentioned,[290] the only rule that specifically addresses ESI "loss," Federal Rule 37(e), actually prohibits sanctions.[291]

More specifically, Federal Rule 37(e) partially addresses ESI destruction by providing a safe harbor from sanctions for "loss" of ESI due to "routine, good-faith operation" of an ESI "overwriting" or destruction policy.[292] By shielding parties and attorneys from sanctions for ESI destruction under limited circumstances the rule implies that there exists an underlying duty to preserve

---

absence of specific statutory remedies, and to prevent unfair results." Kawamata Farms v. United Agric. Prods., 86 Haw. at 242, 948 P.2d at 1083 (quoting Richardson v. Sport Shinko (Waikiki Corp.), 76 Haw. 494, 507, 880 P.2d 169, 182 (1994)). In addition, the court has identified factors for determining whether discovery sanctions are generally appropriate:

> (1) the offending party's culpability, if any, in destroying or withholding discoverable evidence that the opposing party had formally requested through discovery; (2) whether the opposing party suffered any resulting prejudice as a result of the offending party's destroying or withholding the discoverable evidence; and (3) the inequity that would occur in allowing the offending party to accrue a benefit from its conduct.

Id. at 244, 948 P.2d at 1084 (citing *Richardson*, 76 Haw. at 507, 880 P.2d at 182).

[290] *See supra* notes 176–77 and accompanying text.

[291] FED. R. CIV. P. 37(e).

[292] *Id.* ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information *lost as a result of the routine, good-faith operation* of an electronic information system." (emphasis added)).

Businesses lobbied hard for this new rule. *See* Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71, 72 (2004). It provides a partial shield from sanctions for businesses for destroying ESI through routine processes before their duty to preserve ESI kicks in. *Id.* at 72–73; *see also* Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) (citing Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721 (2003)). Healthy disagreement remains over whether this shield is too large or too small and how it operates in practice. Scheindlin & Redgrave, *supra* note 81, at 368–69. Businesses want to "forbid sanctions in the absence of willful or reckless conduct." Scheindlin & Wangkeo, *supra* note 292, at 72. Others argue that a bad faith standard is unworkable and allows for wholesale destruction of ESI. Scheindlin & Wangkeo, *supra* note 292, at 72.

ESI.[293] But the rule does not affirmatively authorize sanctions for breach of that duty or guide the courts in imposing appropriate sanctions.

Under Rule 37(e) the meanings of "routine" and "good-faith" are critical. According to the Advisory Committee, "routine" operation refers to "ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs," including document retention policies and "alteration and overwriting" of ESI that often occurs without users' specific awareness.[294] If routine operation results in loss of ESI, courts must determine if destruction occurred in "good-faith."[295] Good-faith "depends on the circumstances of each case" and may turn upon "whether the party reasonably believes [at the time of destruction] that the information on such sources is likely to be discoverable."[296] The Advisory Committee observed that routine operations should not "thwart discovery obligations by allowing that operation to . . . destroy . . . [ESI] that it is required to preserve."[297]

The Committee, however, stopped short of declaring that a party fails the Rule 37(e) "good-faith" test if it allows routine destruction in breach of its duty to preserve specific ESI. Judge Shira Scheindlin, the author of the *Zubulake* opinions, and other scholars have noted Rule 37(e)'s ambiguities.[298] The "sparse language raises serious questions about its reach and scope," and it "affords *no certain protection* against sanctions."[299]

By piecing together its several statements, it appears that the Advisory Committee contemplated that even "routine" destruction of ESI subject to a tacitly recognized duty to preserve would constitute a breach of that duty and that this "loss" of the ESI would not be in "good-faith." The safe harbor protection from sanctions, therefore, would not apply.[300] Assuming that this is

---

[293] *Id.*; FED. R. CIV. P. 37(f) advisory committee's note (2006) ("A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.").

[294] FED. R. CIV. P. 37(f) advisory committee's note (2006).

[295] *Id.*

[296] *Id.*; *see, e.g.*, U & I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667 (M.D. Fla. 2008) (imposing sanctions for improperly destroying ESI); Doe v. Norwalk Cmty. College, 248 F.R.D. 372, 379 (D. Conn. 2007) (holding that the failure to properly institute a litigation hold was "at least grossly negligent, if not reckless").

[297] FED. R. CIV. P. 37(f) advisory committee's note (2006).

[298] SCHEINDLIN ET AL., *supra* note 6, at 403 (emphasis added).

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

[300] Judge Shira Scheindlin, author of the landmark *Zubulake* opinions, and other well-known commentators of e-discovery law, observed, "[t]he one common thread is that . . . Rule [37(e)] does not excuse a party from rule-based sanctions for a failure to comply with a preservation obligation." *Id.*; *see also* Oklahoma *ex rel.* Edmonson v. Tyson Foods, Inc., 2007 WL 1498973 (N.D. Okla. May 17, 2007).

> The Court notes that although no formal preservation order has been entered herein, the obligation of the parties to preserve evidence, including ESI, arises as soon as a party is

what the rulemakers contemplated, it is not reflected in the language of the rule itself. Most important, this construction of the rule only removes the safe harbor from sanctions under these circumstances. It does not indicate which affirmative rules authorize the imposition of sanctions or appropriate standards for doing so.

This gap is illuminated by the analogous situation of a government's safe harbor from suit (sovereign immunity) and the plaintiff's underlying substantive legal claim. In a suit against the federal or state government a plaintiff must first overcome the government's immunity.[301] If sovereign immunity is overcome by a showing of consent or waiver, then the plaintiff must show that there are substantive law rules that establish the government's liability (for example, negligent breach of duty).[302] The removal of the safe harbor (immunity) itself does not establish liability.

Similarly, a party seeking to sanction an opposing party or counsel for ESI destruction must overcome two hurdles. First, the party must show that ESI was destroyed by other than a "good-faith, routine" operation of an ESI management policy.[303] This removes the safe harbor protection. But it does not automatically lead to sanctions. Second, the party must then proceed to the substantive "liability" determination of whether rules or common law affirmatively authorize sanctions under the specific circumstances.[304]

As an integral part of its new rules regime for e-discovery, the Hawai'i courts will therefore need to expressly determine at the threshold whether "routine"

---

aware the documentation may be relevant. The Court further advises the parties that they should be very cautious in relying upon any "safe harbor" doctrine as described in new Rule 37[e].

SCHEINDLIN ET AL., *supra* note 6, at 403 (quoting *Edmonson*, 2007 WL 1498973, at *6 (alteration in original)).

Judge Scheindlin and commentators also note other limits: (1) the Rule "explicitly excludes [a safe harbor for] the non-party served with a *subpoena duces tecum* for ESI under Rule 45;" and (2) "A judge always has inherent authority or contempt powers [to sanction regardless of Rule authority]." SCHEINDLIN ET AL., *supra* note 6, at 403 (citing Leon v. IDX Sys., 464 F.3d 951, 958 (9th Cir. 2006)).

[301] *See* Pele Def. Fund v. Paty, 73 Haw. 578, 607–08 (1992) (discussing Eleventh Amendment immunity) (quoting W.H. Greenwell, Ltd. v. Dept. of Land & Nat'l Res., 50 Haw. 207, 208–09, 436 P.2d 527, 528 (1968)).

[302] *See, e.g.*, Sierra Club v. Dep't of Transp., 120 Haw. 181, 229, 202 P.3d 1226, 1274 (2009) ("When the [S]tate has consented to be sued, its liability is to be judged under the same principles as those governing the liability of private parties.") (quoting Fought & Co. v. Steel Eng'g & Erection, Inc., 87 Haw. 37, 56, 951 P.2d 487, 506 (1998)).

[303] FED. R. CIV. P. 37(e).

[304] *But see* Phillip M. Adams & Assocs., LLC v. Dell, Inc., 621 F. Supp. 2d 1173, 1188 (D. Utah 2009) (determining whether ESI was destroyed and if it were destroyed in a breach of the duty to preserve; then determining what sanctions are appropriate in light of the Rule 37(e) safe harbor).

destruction of ESI subject to a litigation hold constitutes "loss" not in "good-faith"—thereby removing the Rule 37(e) protection from sanctions.[305] We suggest that it does and that this construction of Rule 37(e)'s safe harbor provision is what the federal rulemakers intended.

The federal district court decision in *Doe v. Norwalk Community College* is illustrative. There the court sanctioned an institutional defendant despite its attempted reliance on the Federal Rule 37(e) safe harbor.[306] The defendant, Norwalk Community College, failed to impose a litigation hold or to follow a formal ESI management policy.[307] The plaintiff moved for sanctions because Norwalk "completely wiped [out]" data on key witnesses' computers and email metadata revealed ESI alteration and destruction.[308] Further, Norwalk destroyed data earlier than designated by its regular document retention policy.[309]

In its discussion of Rule 37(e),[310] the court quoted the Advisory Committee and determined that to take advantage of the safe harbor "a party needs to act affirmatively to prevent the system from destroying or altering the information, even if such conduct would occur in the regular course of business."[311] The court then held that because Norwalk failed to impose a litigation hold on the ESI in light of "pending or reasonably anticipated litigation," the destruction was not in good-faith and the safe harbor rule, thus, failed to shield Norwalk from sanctions.[312]

One clear lesson of *Norwalk* is that businesses' creation and implementation of reasonable routine ESI retention and destruction policies—even before litigation—is a necessary *beginning* (but only beginning) of the early attention approach to e-discovery. Once a litigation hold is triggered, routine "overwriting" of relevant ESI likely will not allow for the safe harbor protections of Rule 37(e).

---

[305] FED. R. CIV. P. 37(e); FED. R. CIV. P. 37(f) advisory committee's note (2006) ("A preservation obligation may arise from many sources, including common law, statutes, and regulations.").

[306] 248 F.R.D. 372 (D. Conn. 2007).

[307] *Id.*

[308] *Id.* at 376.

[309] *Id.* (internal quotation marks omitted).

[310] *See supra* note 112 (stating that the pertinent rule was moved to Rule 37(e) as a result of stylistic amendments in 2007).

[311] *Doe*, 248 F.R.D. at 378.

[312] *Id.* Further, the court determined that Rule 37(e) requires "a routine system in order to take advantage of the good-faith exception" and that Norwalk's lack of "one consistent, 'routine' system" nullified safe harbor protection. *Id.*

d. Crafting an affirmative sanction rule for ESI destruction

A final related gap in the federal e-discovery rules regime is the absence of an affirmative sanctions rule for destruction of relevant ESI—or put another way, a rule authorizing sanctions for an attorney's or client's breach of the duty to preserve ESI. As discussed, the safe harbor immunity of Rule 37(e) would not apply under those circumstances, and judges would then look for affirmative sanctioning authority. The *Zubulake* opinions, again, provide apt guidance for the Hawai'i courts.

i. When are sanctions authorized?

Determining whether sanctions are authorized for destruction of ESI is a two-step inquiry. First, was there a failure to effectively implement (and continue) a litigation hold and therefore a breach of the duty to preserve? In *Zubulake*, the court acknowledged in-house and outside counsels' multiple attempts to enforce UBS' litigation hold, but still noted that both counsel and party were to blame for the destruction of ESI and that many emails "were lost or belatedly produced because of counsel's failures."[313]

Second, if the duty was breached, was the requested ESI "relevant"? In *Zubulake*, the court linked proof of relevance to the culpable state of mind that led to ESI destruction. Relevance is presumed if the destruction was willful.[314] If the destruction was negligent or inadvertent, however, the party seeking sanctions is required to show that missing information is relevant "to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."[315] The "relevance" requirement thus entails a showing that the destroyed ESI would have been favorable to the movant.[316] If, as in *Zubulake*, a court determines that sanctions are authorized because it finds both a breach of a duty to preserve and the relevance of the destroyed ESI, then it determines *what* sanctions are authorized.

ii. What sanctions are authorized?

Zubulake recognized that the purpose of imposing discovery sanctions and "major consideration[s] in choosing an appropriate sanction" are deterrence of future misconduct, punishment for past misconduct and restoration of the

---

[313] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 436 (S.D.N.Y. 2004) (*Zubulake V*).

[314] *Id.* at 436. "Once the duty to preserve attaches, any destruction of [ESI or ordinary] documents is, at a minimum, negligent." Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (*Zubulake IV*) (citations omitted).

[315] *Zubulake V*, 229 F.R.D. at 430–31; *Zubulake IV*, 220 F.R.D. at 221.

[316] *Zubulake V*, 229 F.R.D. at 431.

injured party.[317] For the destruction of ESI, *Zubulake* cited Rule 37 and courts' inherent power as guides for fashioning appropriate sanctions.[318] In light of *Zubulake*'s particular facts, the court considered an "adverse inference" (that the destroyed ESI would have been unfavorable to UBS) jury instruction, payment for depositions or re-depositions and payment for costs of the sanctions motion itself.[319] The court ordered an adverse jury instruction because ESI was destroyed *willfully* and not merely negligently.[320] The court also ordered that UBS pay costs of the motion and depositions and re-depositions.[321]

We suggest that Hawai'i courts draw from *Zubulake*'s insights and also incorporate the Rule 26(g) range of sanctions for the destruction of ESI—even prior to litigation and in the absence of signed filings. There are two overarching rationales for the propriety of Rule 26(g) sanctions for destruction of ESI. The purpose of Rule 26(g)'s mandate of "an appropriate sanction" is deterrence of similar discovery misconduct of both attorneys and litigants.[322] The rationale for Rule 26(g) fits where, as in *Zubulake* and most other cases involving the destruction of ESI, the sanction is intended to deter, not compensate or punish.[323]

In addition, the policy and tone of Rule 26(g) is appropriate for sanctions determinations for the destruction of ESI. The counterpart Rule 11 places an emphasis on deterrence[324] and provides for "nonmonetary directives; an order to pay a penalty into court; . . . an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."[325] In addition, under Rule 11, a court may "strik[e] the

---

[317] *Id.* at 437.

[318] *Zubulake* did not cite Rule 37(e), the safe harbor provision, which was added after *Zubulake V*.

[319] *Zubulake V*, 229 F.R.D. at 431, 436–37.

[320] *Id.* at 437.

[321] *Id.*

[322] FED. R. CIV. P. 26(g) advisory committee's note (1983); *see* FED. R. CIV. P. 11(c).

[323] *Zubulake V*, 229 F.R.D. at 437; FED. R. CIV. P. 26(g) advisory committee's note (1983). A creative judge could apply Rule 26(g) directly as authority to impose sanctions for pre-litigation ESI destruction. If the party seeking ESI submits a Rule 34 request and the opposing party's attorney responds in writing that the ESI has been "lost," the judge can impose sanctions under Rule 26(g) for the following reasons. Assuming the "safe harbor" is inapplicable, the judge could find that the signed "ESI-is-destroyed" response is not reasonably grounded in law because it reflects the violation of the known duty of preservation. *See* HAW. R. CIV. P. 26(g)(2). The range of Rule 26(g) sanctions would then be appropriate.

[324] Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 393 (1990) (stating that "[i]t is now clear that the central purpose of Rule 11 is to deter baseless filings" (citations omitted)); Eric K. Yamamoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora's Box?*, 13 U. HAW. L. REV. 57, 66–68 (1991).

[325] FED. R. CIV. P. 11(c)(4).

offending paper; issu[e] an admonition, reprimand, or censure; require[e] participation in seminars or other educational programs; order[] a fine payable to the court; [and] refer[] the matter to disciplinary authorities . . . ."[326] Further, sanctions imposed under Rule 11 "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."[327] Similarly, Rule 26(g) determinations of what is "appropriate under the circumstances" first looks to non-monetary sanctions in light of the deterrent purpose.[328]

Hawai'i courts may also draw from *Wong v. City & County of Honolulu*, where the non-monetary sanctions imposed were deemed appropriate because they were "commensurate" with the harm.[329] The monetary sanctions in some instances may be warranted by the severity of the breach of the duty to preserve and the degree of harm. For this, courts may draw from *DuPont*, where the defendant faced significant monetary sanctions for ongoing discovery misconduct that caused severe prejudice to the plaintiffs.[330]

V. CONCLUSION

An e-discovery rules regime is imperative for Hawai'i courts. Based on a survey of case law, the experience of federal and other states' courts and recommendations of federal magistrate judges, we suggest that Hawai'i courts incorporate the new federal e-discovery rules regime into the Hawai'i Rules of Civil Procedure—albeit with one caveat. This caveat is that Hawai'i rulemakers (through commentary) and courts (through case pronouncements) fill in key gaps and clarify ambiguities in the federal approach. To illuminate our suggestion and the caveat, we first examined the promise and problems of e-discovery and the federal court and state court responses. We then analyzed the new rules in detail, identified the gaps and ambiguities and offered specific correctives.

E-discovery has arrived. The time is right for the Hawai'i courts.

---

[326] FED. R. CIV. P. 11(b) & (c) advisory committee's note (1993).

[327] FED. R. CIV. P. 11(c)(4).

[328] FED. R. CIV. P. 26(g) advisory committee's note (1983).

[329] Wong v. City & County of Honolulu, 66 Haw. 389, 394, 665 P.2d 157, 161 (1983).

[330] *See generally* Kawamata Farms, Inc. v. United Agric. Prods., 86 Haw. 214, 948 P.2d 1055 (1997).

Method is Irrelevant: Allowing Native Hawaiian Traditional and Customary Subsistence Fishing to Thrive

Andrew R. Carl*

I. INTRODUCTION

In 2002, the Circuit Court of the Third Circuit of the State of Hawai'i, in *Kelly v. 1250 Oceanside Partners*, concluded as a matter of law that:

> Method is relevant to claimed traditional and customary rights. Fishing and gathering practices lose their traditional and customary nature when performed with modern technology that: (a) substantially replaces human dexterity, energy or propulsion (e.g. manual harvesting, hand retrieval of lines and nets, swimming, rowing) or natural energy or propulsion (e.g. surfing, sailing) with engines or motors; or (b) replaces and substantially extends the scope or intensity of traditional methods (e.g. miles-long synthetic lines vs. traditionally made lines). A difference in amount can be a difference in kind.[1]

This conclusion of law is overbroad. Traditional and customary Native Hawaiian subsistence fishing practices that are protected by Hawai'i case law and statutes would lose their protection under application of this holding.

Native Hawaiians have subsisted for over 1,500 years using cultural practices that emphasize conservative use of the islands' finite resources. The Constitution and laws of the State of Hawai'i recognize the importance of subsistence and obligate State protection for traditional and customary Native Hawaiian[2] practices that: (1) were established by November 25, 1892; (2) have

---

* 2010 J.D. Candidate, William S. Richardson School of Law, University of Hawai'i-Mānoa. The author wishes to express his gratitude to Professor Melody Kapilialoha MacKenzie for her advice and encouragement.

[1] Kelly v. 1250 Oceanside Partners, No. 00-1-0192K, slip op. at 10-11 (Haw. 3d Cir. Ct. Oct. 21, 2002). The subsequent history of this case is irrelevant to the issues discussed in this comment, regarding traditional and customary fishing practices with modern technology.

[2] *See* Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Haw. 425, 449, 903 P.2d 1246, 1270 (1995). For the purposes of this comment, the term "Native Hawaiian" is used to refer to any descendent of the inhabitants of the Hawaiian islands prior to 1778. The percentage of ancestry attributable to forbears inhabiting the Hawaiian islands prior to 1778 is irrelevant to subsistence fishing practices because the traditional and customary rights of Native Hawaiians flow from native Hawaiians' pre-existing sovereignty, and do not derive from their race. *See id.*

continued since November 25, 1892; (3) occur within the ahupua'a[3] of the practitioner's residence, with exception for practices not linked to residence within the ahupua'a; (4) are exercised on undeveloped or less than fully developed land; and (5) are exercised in a reasonable manner. When the foregoing factors are applied to subsistence fishing, it follows that subsistence fishing in less than fully developed state waters is statutorily and constitutionally protected where no harm occurs to the recognized interest of another—regardless of the method used.

Part II of this comment briefly covers traditional Hawaiian subsistence and land tenure practices, focusing on the role of subsistence fishing. Part III details the transition from the Hawaiian land tenure system to that of fee simple. Part IV explains the efforts of the Kingdom of Hawai'i to protect the ability of the maka'āinana (common people) to subsist on the land, discussing judicial decisions, statutes, and a constitutional amendment adopted specifically to protect Native Hawaiian subsistence practices. Part V posits that Hawaii's laws and constitution protect Native Hawaiian subsistence fishing in most state waters. Part VI specifically addresses the court's conclusion of law in *Kelly v. 1250 Oceanside Partners*, and argues that subsistence fishing practices are still protected when performed with modern technology. Part VII concludes that the statutorily and constitutionally protected Native Hawaiian right to fish for subsistence can only be regulated to prevent actual harm to a recognized public or private interest.

II. NATIVE HAWAIIAN SOCIETAL AND LAND TENURE PRACTICES

Hawaiian culture was flourishing at the time of Captain James Cook's arrival in the islands in 1778.[4] In 1779, when the chief, Kalani'ōpu'u, and his people greeted Cook and his crew at Kealakekua Bay on the island of Hawai'i, their canoes bore "hogs and various sorts of vegetables" and were laden with religious figures "of a gigantic size, made of wicker-work, and curiously covered with small feathers of various colors" with eyes that "were made of large pearl oysters, with a black nut fixed in the centre, their mouths set with a double row of the fangs of dogs."[5] One of Cook's midshipman's account of the island of Hawai'i reads, "The Country here is one entire plantation; as far as we could see from the ship which is divided into squares by stones thrown together or hedges of sugar cane."[6] A crew member alluded to the political organization

---

[3] *See* HAW. CONST. art. XV, § 4. Hawaiian words are not italicized because Hawaiian, along with English, is an official language of the State of Hawai'i. *Id.*

[4] *See generally* RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM (1938).

[5] ELEANOR C. NORDYKE, PACIFIC IMAGES: VIEWS FROM CAPTAIN COOK'S THIRD VOYAGE 117 (1999).

[6] GEORGE GILBERT, CAPTAIN COOK'S FINAL VOYAGE: THE JOURNAL OF MIDSHIPMAN

of the island by writing that the land was "divided into districts or circles, each of which is presided over by a chief or chiefs, who are subordinate to one [chief]."[7] Cook said of Kealakekua, "[N]owhere, in the course of my voyages, [have I] seen so numerous a body of people assembled at one place."[8]

These descriptions by Captain Cook and his crew reveal that the large population of Kealakekua they encountered was sustained by a society that was organized in a way to effectively and efficiently exist in a land of exhaustible natural resources. Social stratification, land division practices, and subsistence-based agriculture and gathering practices were essential societal mechanisms that supported a population of between 400,000 and 800,000 Native Hawaiians at the time of Cook's visit.[9]

A. Native Hawaiian Societal Organization and Land Tenure Practices

Before the unification of the islands under King Kamehameha I, a kingdom could be the size of part of an island, an island, or several islands together.[10] A ruler of a kingdom was called an "ali'i 'ai moku" (literally translated as "chief who ate the island or district").[11] The ali'i 'ai moku were aided by subordinate ali'i (chiefs), who controlled and distributed lands, regulated the use of scarce resources, managed agricultural production, and conducted religious rituals.[12]

The maka'āinana furnished the raw materials and human resources required for the kingdom to function.[13] David Malo[14] described the function of the maka'āinana as follows:

GEORGE GILBERT 101 (Christine Holmes ed., 1982).

[7] JOHN LEDYARD, JOHN LEDYARD'S JOURNAL OF CAPTAIN COOK'S LAST VOYAGE 129 (James Kenneth Munford ed., 1963).

[8] NORDYKE, *supra* note 5, at 131.

[9] Davianna Pōmaika'i McGregor, *An Introduction to the Hoa'āina and Their Rights*, 30 HAWAIIAN J. OF HIST. 1, 5 (1996) [hereinafter McGregor, *Hoa'āina and Their Rights*].

[10] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854: FOUNDATION AND TRANSFORMATION 9 (1947).

[11] E. S. CRAIGHILL HANDY & MARY KAWENA PUKUI, THE POLYNESIAN FAMILY SYSTEM IN KA'U, HAWAI'I 5 (1998).

[12] *See* DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE 28 (2007) [hereinafter MCGREGOR, NĀ KUA'ĀINA].

[13] *Id.* at 27-28.

[14] *See* 1 KEPA MALY & ONAONA MALY, KA HANA LAWAI'A A ME NA KO'A O NA KAI 'EWALU: A HISTORY OF FISHING PRACTICES AND MARINE FISHERIES OF THE HAWAIIAN ISLANDS 6-7 (2003) [hereinafter 1 MALY & MALY]. David Malo was one of the first Native Hawaiian historians and wrote during the mid-nineteenth century. *Id.* His accounts of Hawaiian life cover ancient Hawaiian customs, beliefs, practices, as well as the importance of fishing in Hawaiian life, religion, and government. *Id.*

> The condition of the common people was that of subjection to the chiefs, compelled to do their heavy tasks, burdened and oppressed, some even to death. The life of the people was one of patient endurance, of yielding to the chiefs to purchase their favor. . . . It was from the common people, however, that the chiefs received their food and their apparel for men and women, also their houses and many other things. When the chiefs went forth to war some of the commoners also went out to fight on the same side with them. . . . It was the maka'āinana also who did all the work on the land; yet all they produced from the soil belonged to the chiefs; and the power to expel a man from the land and rob him of his possessions lay with the chief.[15]

If the maka'āinana were unhappy with their ali'i, they could choose to move away from the land of their birth.[16] However, the accounts of irresponsible and abusive ali'i are exceptional and such abusive leaders were replaced with others who cared for their peoples' well-being.[17]

The ali'i 'ai moku divided his land into territories called ahupua'a, which he apportioned among his higher-ranking chiefs, the ali'i ai ahupua'a (literally translated as "chiefs who ate the ahupua'a").[18] Typically, ahupua'a ran from the top of the mountain to the ocean, contained a stream, and were bounded by geographic features such as valleys.[19] Ahupua'a usually extended into the sea, and most included attached ocean fishing rights.[20]

Ahupua'a were subdivided into strips of land called 'ili, which were allocated to the 'ohana (large and extended multi-generational families).[21] Arable portions of the 'ili were further divided into smaller tracts that were cultivated to support either the ali'i or the 'ohana.[22] The 'ohana were not constrained to support themselves with the resources of their 'ili.[23] Instead, 'ohana members of every 'ili shared resources of the entire ahupua'a.[24] Forested mountain areas provided vines, timber, thatch, and medicinal plants; sloping lands allowed for cultivation of sweet potatoes and crops that require higher altitudes; low-lying land irrigated by streams produced kalo (taro) and

---

[15] DAVID MALO, HAWAIIAN ANTIQUITIES 60-61 (Nathaniel B. Emerson trans., Bernice P. Bishop Museum Spec. Publ'n 2, 2d ed. 1951) (1898).

[16] MCGREGOR, NĀ KUA'ĀINA, *supra* note 12, at 27.

[17] MCGREGOR, NĀ KUA'ĀINA, *supra* note 12, at 28-29.

[18] HANDY & PUKUI, *supra* note 11, at 5.

[19] MCGREGOR, NĀ KUA'ĀINA, *supra* note 12, at 26.

[20] John N. Cobb, *Hawaiian Fishery Rights*, 37 AM. FISHERIES SOC'Y TRANSACTIONS 160 (1908). The fishing rights were contained in zones that, in some instances, spread out laterally from the land boundaries for miles. *Id.* Attached fishing rights usually extended to the reef, or when there was no reef, for up to one and a half miles seaward from the shore. *Id.* at 161.

[21] MCGREGOR, NĀ KUA'ĀINA, *supra* note 12, at 26.

[22] JON J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 5 (1974).

[23] MCGREGOR, NĀ KUA'ĀINA, *supra* note 12, at 26.

[24] *See* MCGREGOR, NĀ KUA'ĀINA, *supra* note 12, at 26.

provided fresh water; and ocean areas allowed access to fish, shellfish, crustaceans, and seaweed.[25]

Ahupua'a resources were distributed among the 'ohana through mutually advantageous exchanges. As Mary Kawena Pukui[26] noted:

> Between households within the 'ohana there was constant sharing and exchange of foods and of utilitarian articles and also of services, not in barter but as voluntary (though decidedly obligatory) giving. Ohana living inland (ko kula ūka), raising taro, bananas, wauke, and olonā, and needing coconuts, gourds, and marine foods, will take a gift to some 'ohana living near the shore (ko kula kai) and in return will receive fish or whatever is needed. The fisherman needing poi or 'awa will take fish, squid or lobster upland to a household known to have taro, and will return with his kalo (taro) or pa'i-'ai (hard poi). . . . In other words, it was the 'ohana that constitutes the community within which the economic life moves.[27]

B. Native Hawaiian Fisherman, Aquatic Gatherers, and their Practices

Native Hawaiians' main source of protein was fish, including shellfish.[28] Thus, fishing played a vital role in their culture. Native Hawaiians gathered aquatic life in all waters from freshwater pools and streams to the waters of the open ocean.[29] All members of society, from the ali'i[30] to the maka'āinana possessed the skills necessary to obtain food from the sea through their own efforts.[31] As Samuel Kamakau[32] noted, "agriculture and fishing were the main

---

[25] MCGREGOR, NĀ KUA'ĀINA, *supra* note 12, at 26.

[26] *See* Chad Blair, *Kawena's Legacy*, HANA HOU! THE MAGAZINE OF HAWAIIAN AIRLINES, Aug.-Sept. 2007, at 86, *available at* http://www.hanahou.com/pages/Magazine.asp?Action=DrawArticle&ArticleID=609&MagazineID=38. Mary Kawena Pukui (1895-1986) was born in Ka'u on the island of Hawai'i. *Id.* It is estimated that she co-authored more than fifty books and over one hundred and fifty songs while working at the Bishop Museum, to make important contributions in recording oral histories of Hawaiians. *Id.*

[27] HANDY & PUKUI, *supra* note 11, at 5-6.

[28] MARGARET TITCOMB, NATIVE USE OF FISH IN HAWAII 9 (2d ed., Univ. of Hawai'i Press 1972) (1952) (quoting HANDY & PUKUI, *supra* note 11).

[29] *Id.* at 4.

[30] *See* JOHN PAPA II, FRAGMENTS OF HAWAIIAN HISTORY 69 (Dorothy B. Barrère ed., Mary Kawena Pukui trans., Bishop Museum Press 1963) (1959) ("Kamehameha was often seen fishing with his fishermen in the deep ocean, where the sea was shallow, and where fish-poison plants were used.").

[31] TITCOMB, *supra* note 28, at 3.

[32] *See* Mike Gordon, *Samuel Kamakau*, HONOLULU ADVERTISER, July 2, 2006, at 16FF. Samuel Kamakau (1815-1876) was born on Oahu and educated at the Lahainaluna Seminary. *Id.* He wrote detailed accounts of Hawaiian history and customs, preserving a way of life that was disappearing from human memory. *Id.* His more than two hundred newspaper articles were in part translated and published in KA PO'E KAHIKO: THE PEOPLE OF OLD (1992). *Id.*

professions always passed on by the grandparents to the boys."[33] Women were primarily responsible for gathering items such as 'o'opu (gobies) and 'ōpae (shrimp) in freshwater as well as limu (seaweed) and other edible plant and fish life on the reefs.[34] Maka'āinana who fished for pleasure or simply to supplement their own table fare would catch fish in tide pools with scoop nets, or "go along the seashore with a net, or set a fishline; or search for fish with a small basket trap; or draw a net over sandy spots in the sea or up onto the shore; or drive fish into nets."[35] Po'o lawai'a (specialized fishermen) also supported Hawaiian society with their catches.[36] While an exhaustive explanation of all fishing techniques utilized by Native Hawaiians is outside the scope of this comment, the following descriptions will help illustrate a selection of their fishing methods.

Native Hawaiians used many types of nets to catch fish. Gill nets from 55 to 1,200 feet long, and up to 25 feet high were employed to entangle fish within their mesh.[37] Seine nets were used to impound fish within enclosures formed by the net or between the net and the shore.[38] Once fish were impounded by the seine net, the fish were either scooped out with another net or the entire seine net was dragged onto the beach with the trapped fish.[39] Bag nets, consisting of a net bag with only one open end, were also used.[40] Small bag nets were fixed to flexible wooden hoops and used to scoop fish by hand.[41] Large bag nets were deployed in deeper waters where they were lowered to the seafloor and then lifted to the surface by lines, ensnaring fish as they rose.[42] It was common practice in some communities to fish collectively with large nets.[43]

---

[33] SAMUEL MANAIAKALANI KAMAKAU, THE WORKS OF THE PEOPLE OF OLD: NA HANA A KA PO'E KAHIKO 59 (Dorothy B. Barrère ed., Mary Kawena Pukui trans., Bishop Museum Press 1976).

[34] TITCOMB, *supra* note 28, at 4.

[35] KAMAKAU, *supra* note 33, at 59.

[36] *See* TITCOMB, *supra* note 28, at 5. Fish were taken in less accessible inshore and offshore waters by the professional fishermen of Hawai'i, the po'o lawai'a and their apprentices. TITCOMB, *supra* note 28, at 5. The po'o lawai'a provided fish for both the maka'āinana and the ali'i using cultural knowledge concerning fishing techniques, apparatus use and manufacture, methods of species capture, habitats of various fish, and seasons of fish spawning. TITCOMB, *supra* note 28, at 5.

[37] T. STELL NEWMAN, HAWAIIAN FISHING AND FARMING ON THE ISLAND OF HAWAII IN A.D. 1778 36-37 (Div. of State Parks, 1970).

[38] *Id.* at 37.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See* DANIEL KAHĀ'ULELIO, KA 'OIHANA LAWAI'A: HAWAIIAN FISHING TRADITIONS 319 (M. Puakea Nogelmeier ed., Mary Kawena Pukui trans., Bishop Museum Press 2006). For

Native Hawaiians fished by line by practicing surface trolling with lures and sub-surface angling with both bait and lures.[44] For surface trolling, pearl shell lures, with a hook of bone, tooth, or turtle shell were frequently attached to a bamboo pole by a twelve-foot line.[45] "When a fish struck the lure, the fisherman would jerk the pole" to set the hook, then quickly lift the fish into the canoe.[46]

Sub-surface angling, using a rig consisting of multiple hooks attached to a main line at intervals close to the bottom, was known as kākā fishing.[47] Daniel Kahā'ulelio[48] noted that each line had from forty to fifty hooks.[49] The kākā rig was used by lowering the line to depths of up to 1,200 feet by way of a stone weight attached to the end.[50] The fisherman retrieved his line when he knew that all of his hooks had been taken.[51] The kākā method was used to catch fish such as kāhala, 'ōpakapaka, uku, and ulua, among others.[52] He'e (octopus) were also caught by sub-surface anglers in near shore waters.[53]

Among other traditional fishing methods, Native Hawaiians practiced torch fishing[54] and spear fishing.[55] Pākali (decoy) fishing involved using a tethered

---

example, in ka la'au (stick smiting) fishing, nets of "two or three fingers' width" would be lowered into shallow waters by two men at the ends. *Id.* Men, women and children, holding sticks or fibers of coconut stumps, would "swim about beating the water toward the center of the net." *Id.* They would continue this until the men at the ends of the net would come together. *Id.* "Many kinds of fish [were] caught such as mullet, awa kalamoho, kala, 'ō'io and so on." *Id.*

[44] NEWMAN, *supra* note 37, at 40-41.

[45] NEWMAN, *supra* note 37, at 40-41.

[46] NEWMAN, *supra* note 37, at 40; *see also* KAHĀ'ULELIO, *supra* note 43, at 33 ("As soon as [the fish] takes the hook pull it in as hard as you can till it lands with a thud in the canoe. If you are not alert when it seizes the hook, the pole will be jerked away into the sea.").

[47] NEWMAN, *supra* note 37, at 41.

[48] *See* KAHĀ'ULELIO, *supra* note 43, at IX. The 1902 articles of Daniel Kahā'ulelio that describe Native Hawaiian fishing practices and appeared in the Hawaiian language newspaper KU'OKO 'A, were translated by Mary Kewena Pukui as KA 'OIHANA LAWAI'A: HAWAIIAN FISHING TRADITIONS (Bishop Museum Press 2005). Kahā'ulelio was trained as a fisherman by his parents and grandparents. Noa Emmett Aluli and Davianna Pōmaika'i McGregor, *Mai Ke Kai Mai Ke Ola, From the Ocean Comes Life: Hawaiian Customs, Uses, and Practices on Kaho'olawe Relating to the Surrounding Ocean*, 26 HAWAIIAN J. OF HIST. 231, 249 (1992). His accounts provide a rich source of information on fishing practices. *Id.*

[49] KAHĀ'ULELIO, *supra* note 43, at 43.

[50] NEWMAN, *supra* note 37, at 41.

[51] KAHĀ'ULELIO, *supra* note 43, at 45.

[52] KAHĀ'ULELIO, *supra* note 43, at 45.

[53] *See* NEWMAN, *supra* note 37, at 42. Hawaiians fished with an octopus lure crafted from cowry shell with a hook covered with a skirt of ti leaves which was attached to a line and lowered to the bottom. NEWMAN, *supra* note 37, at 42; *see also* KAHĀ'ULELIO, *supra* note 43, at 67 ("When the line is let down to the bottom, it is again raised a half a foot or a whole foot from the seafloor . . . as soon as the octopus sees it, it hurries and grasps the top of the shell.").

[54] *See* KAHĀ'ULELIO, *supra* note 43, at 285. A torch was used to illuminate the water at

pākali fish to lure unwary fish of the same species into a waiting net.[56] Woven hīna'i (basket traps) were utilized to catch fish and eel.[57] Fish were trapped in underwater rock impoundments.[58] Mariculture practiced in fishponds also provided a substantial amount of fish.[59]

---

night in places where the tide was low. KAHĀ'ULELIO, *supra* note 43, at 285. If an eel was spotted, it was struck with an implement and then picked up by the fisherman after it had coiled upon itself. KAHĀ'ULELIO, *supra* note 43, at 285. If a fish was found, it was usually ensnared in a net because, as Kahā'ulelio wrote, "all fish remain quiet when the torch light is overhead." KAHĀ'ULELIO, *supra* note 43, at 295. Fish were also speared by torchlight. NEWMAN, *supra* note 37, at 35.

[55] *See* KAMAKAU, *supra* note 33, at 85-86. Hawaiians speared fish using a hard wood spear of about six or seven feet tipped with a bone point. KAMAKAU, *supra* note 33, at 85-86. The Hawaiian spear fisherman would dive to the bottom and lunge at "whatever fish they chose, whether uhu, ulua, kāhala, or some small fish." KAMAKAU, *supra* note 33, at 85-86.

[56] *See* KAMAKAU, *supra* note 33, at 65. Pākali fishing was often used to catch uhu. KAMAKAU, *supra* note 33, at 65. The fisherman would lie on his stomach on his canoe to search for fish while holding the tethered decoy in one hand and paddling with the other. KAMAKAU, *supra* note 33, at 65. When the fisherman saw an uhu honi (kiss) the decoy two or three times with the desire to a ho'āo lāua (marry it), he would pull the decoy up and tie it onto the bottom of a net. KAMAKAU, *supra* note 33, at 65. When the fisherman saw the uhu come back to the netted decoy with the intent to moe pū (sleep with it), he would pull the line of the net to entrap the decoy and the visitor. KAMAKAU, *supra* note 33, at 65. Kamakau reported that on a lucky day a fisherman would catch anywhere from twenty to forty uhu using this method. KAMAKAU, *supra* note 33, at 65-66; *see also* NEWMAN, *supra* note 37, at 38. This same method was also used to catch 'ōpelu. NEWMAN, *supra* note 37, at 38.

[57] *See* KAMAKAU, *supra* note 33, at 83. In this type of fishing, the fisherman would feed fish in one location with sweet potatoes or limu to entice them to enter a baited trap that was later lowered in the same location. KAMAKAU, *supra* note 33, at 83. The fisherman would raise the trap after it had attracted fish and empty his catch into his canoe. KAMAKAU, *supra* note 33, at 84. Hīna'i used to catch kala and palani were big enough for two or three men to crouch inside, while eel traps were tightly woven and square shaped and as big around as two men could reach. KAMAKAU, *supra* note 33, at 79.

[58] *See* KAHĀ'ULELIO, *supra* note 43, at 323. Holoholo fishing was accomplished with a triangular rock-wall formation with a two-foot gap on one corner that was constructed in the shallows. KAHĀ'ULELIO, *supra* note 43, at 323. After the rock formation was constructed and frequented by fish, one fisherman would spread a net across the gap in the rock formation before an assistant fisherman threw a rock into the water near the wall; mullet would rush into the waiting net upon hearing the splash of the rock. KAHĀ'ULELIO, *supra* note 43, at 323. Of this method, Kahā'ulelio remarked, "[t]he work in the beginning is the hardest and when done, you can eat for years." KAHĀ'ULELIO, *supra* note 43, at 323.

[59] *See* Barry A. Costa-Pierce, *Aquaculture in Ancient Hawaii*, 37 BIOSCIENCE 320, 325 (1987). Hawaiians raised fish for consumption in freshwater, brackish-water, and saltwater fishponds. 'Ama'ama, āholehole, and 'o'opu were raised in freshwater ponds. *Id.* Saltwater ponds were constructed by extending rock or coral walls in a semi-circle formation from the shoreline. *Id.* at 326. Canals interlaced the fishponds, which allowed the ponds to be stocked, harvested, and cleaned with minimal human effort. *Id.* At least twenty-two species of fish were cultivated in saltwater ponds. *Id.*; *see also* KAMAKAU, *supra* note 33, at 49 ("Where the fish had

C. Native Hawaiian Emphasis on Natural Resource Conservation

Native Hawaiians were able to maintain sufficient levels of floral and faunal resources to sustain their society through cultural practices that emphasized natural resource conservation. They believed that their gods had created the earth and "everything on the land and in the sea. These resources were there for everyone's use—land, water, sea. Because these things were created by the gods, they must be cared for. No one must take more than they need and everything must be shared."[60]

Native Hawaiians shared the resources of the islands and ensured that no more was taken than necessary for subsistence by instituting conservational kapu. Kapu, in this context, were policies that dictated when specific natural resources could be gathered. For example, a kapu could prevent the taking of deep-water fish during their spawning season when they were susceptible to over fishing.[61] Pukui described the operation of an inshore kapu system:

> A [kapu] for the inshore fishing covered also all the growths in that area, the seaweeds, and shellfish, as well as the fish. When the kahuna had examined the inshore area, and noted the condition of the animal and plant growths, and decided that they were ready for use, that is, that the new growth had had a chance to mature and become established, he so reported to the chief of the area, and the chief ended the [kapu].[62]

These types of kapu were generally imposed by ali'i who determined the size, type, and number of the resources to be gathered as well as the manner in which they were gathered.[63] Kapu were rigidly adhered to and penalties for breaking them were severe, including execution.[64] Fear of supernatural punishment also enforced the kapu system.[65] Because the Hawaiians believed that the will of the chiefs was the will of the gods, they believed that an offender would be unable to hide his actions from an all-knowing power.[66]

---

been raised like pet pigs, they would crowd to the mākāhā (grate which separated the fishpond from the open sea), where the keepers felt of them with their hands and took whatever of them they wanted—awa, 'anae, 'ō'io, or whatever.").

[60] Melody Kapilialoha Mackenzie, *Historical Background*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 3 (Melody Kapilialoha MacKenzie ed., 1991) (quoting *Hearings on the Report of the Native Hawaiians Study Commission Before the Senate Comm. on Energy and Natural Resources*, 98th Cong., 2nd Sess. 104 (1984) (statement of Marion Kelly)).

[61] Paul Lucas, *Gathering Rights*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 60, at 224.

[62] TITCOMB, *supra* note 28, at 14.

[63] Lucas, *supra* note 61, at 224.

[64] TITCOMB, *supra* note 28, at 13.

[65] TITCOMB, *supra* note 28, at 13.

[66] TITCOMB, *supra* note 28, at 13.

III. A CHANGE IN LAND TENURE PRACTICES

When King Kamehameha I brought all of the islands under his control in 1810, he set aside lands he desired for his personal use and allocated the rest among his principal chiefs for distribution to lesser chiefs, who then allocated their lands among the 'ohana on a revocable basis.[67] This was the last time that land was divided in this traditional way. Western contact caused Hawai'i to change drastically during the first quarter of the nineteenth century: the economy transformed from one of subsistence to one of international trade, the native population was decimated by introduced diseases, and traditional notions of ali'i responsibility were disrupted.[68] These changes altered the way in which land was held in the islands.

The first significant deviation from traditional land tenure practices occurred during the reign of Kamehameha I, who broke from tradition by promising ali'i that they would receive hereditary tenure in the lands they received.[69] Upon ascending to the throne, King Kamehameha II largely kept this promise and only sparingly reallocated his lands among the ali'i.[70] This change in land tenure practices did not, however, address demands for land by non-Hawaiians who were anxious to acquire exclusive rights to land in Hawai'i.

King Kamehameha III, alerted by the strong presence of foreigners who were backed by Western military might, expanded these nascent manifestations of land ownership by drastically changing the land tenure system in Hawai'i.[71] On June 7, 1839, Kamehameha III proclaimed the Declaration of Rights and Laws of 1839, which, among other things, explicitly recognized real property ownership rights for the first time.[72] One year later, the Constitution of 1840 affirmed real property ownership rights, providing that property held by foreigners and Hawaiians alike would not be reclaimed by the crown.[73]

---

[67] CHINEN, *supra* note 22, at 6.

[68] Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 850 (1975).

[69] Robert Bruce Graham, Jr., *Traditional Hawaiian Land Law*, *in* 1 HAWAII REAL PROPERTY LAW MANUAL 2-3 (Deborah Macer Chun et al. eds., 2008).

[70] CHINEN, *supra* note 22, at 6.

[71] CHINEN, *supra* note 22, at 7.

[72] *See* CHINEN, *supra* note 22, at 7.

[73] HAW. CONST. OF 1840, *available at* http://www.hawaii-nation.org/constitution-1840.html. The 1840 Constitution read in pertinent part: "Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws." *Id.* at para. 5. It must be noted that the Constitution of 1840 did, however, represent an attempt to maintain the traditional concept that the land belonged to the chief and the people, and the king, as the head of the chiefs and the people, managed the land. Wayne Tanaka, Comment, *Ho'ohana aku, Ho'ōla aku: First Steps to Averting the Tragedy of the Commons in Hawai'i's Nearshore Fisheries*, 10 ASIAN-PAC. L. &

However, the constitution maintained the status quo that foreigners could not acquire land without the king's consent.[74]

Kamehameha III further attempted to appease foreigners interested in land acquisition through the Royal Proclamation of May 31, 1841, which allowed the islands' governors to enter into fifty-year leases with non-Hawaiians.[75] Neither the Constitution of 1840 nor the Royal Proclamation were sufficient to accommodate the fee simple land ownership demands of the hostile foreign world.[76]

In 1845, the Hawaiian government appointed a commission tasked to undertake "the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this Act."[77] The investigation and final ascertainment or rejection of all property claims in the kingdom led to what was called the mahele (division) which ultimately enabled fee simple ownership for both Hawaiians and foreigners alike.

The mahele resulted in the division of the lands of the kingdom to the king, the Hawaiian government, and the chiefs.[78] Kamehameha III "released his claim to a portion of each chief's holdings in exchange for the chief's surrender of claims to the balance."[79] The king then divided the land he received by quitclaim between himself (the Crown Lands), and the chiefs and the people (the Government Lands).[80] All lands divided to the king, government, and chiefs were subject to the rights of the native tenants.[81]

After the mahele, as the king, chiefs, and government began to sell their lands, questions arose regarding what rights the native tenants had in the fee

---

POL'Y J. 235, 256 (2009).

[74] HAW. CONST. OF 1840, para. 14, *available at* http://www.hawaii-nation.org/constitution-1840.html. This paragraph stated:

> Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.

Id.

[75] Levy, *supra* note 68, at 852.

[76] Levy, *supra* note 68, at 853; *see also* Graham, *supra* note 69, at 2-4. In 1843, Richard Charlton, the British consul in Honolulu, seized the Kingdom of Hawai'i for five months until Charlton's seizure was disavowed by British Admiral Thomas. Graham, *supra* note 69, at 2-4.

[77] Levy, *supra* note 68, at 853 (quoting Act of Dec. 10, 1845, ch. 7, §§ 1, 2 (1847), *in* 2 Rev. Laws Haw., at 2120 (1925)).

[78] Levy, *supra* note 68, at 854.

[79] Graham, *supra* note 69, at 2-4.

[80] CHINEN, *supra* note 22, at 26.

[81] CHINEN, *supra* note 22, at 29.

simple ownership of the land.[82] The Act of August 6, 1850, known as the Kuleana Act, settled this question. Under this act, maka'āinana who could prove that they actually cultivated their lands for a living and pay a surveying fee were awarded ownership of the lands that they cultivated, as well as a house lot of not more than a quarter acre in size.[83] The maka'āinana did not fare well during the transition to fee simple land ownership. Although the mahele was intended to grant the maka'āinana one-third of the lands of the kingdom, they only received 28,600 acres—much less than one percent of the total land of the islands, through the Kuleana Act.[84] The subsistence dependent maka'āinana who were becoming dispossessed of their lands required legislative assistance to maintain access rights to survival resources located on private lands.

IV. THE LONG LEGAL HISTORY OF MAKA'ĀINANA SUBSISTENCE PROTECTION

Throughout the transition from the traditional Hawaiian land tenure system to one of fee simple, the Hawaiian monarchy was keenly interested in protecting the maka'āinana right to access the resources of the land and sea. These legal protections originally established by the Kingdom of Hawai'i have been maintained under the rule of the United States.

A. Statutory Protection of Subsistence Practices in the Kingdom of Hawai'i

The earliest express proclamation of the commoners' rights in the use of the land appeared in Section 1 of the Joint Resolution on "The Subject of Rights in Lands, etc." (The Joint Resolution). The Joint Resolution provided:

> The rights of the Hoa aina [sic] in the land, consists of his own taro patches, and all other places which he himself cultivates for his own use, and if he wishes to extend his cultivation on unoccupied parts, he has the right to do so. He has also rights in the grass land, if there be any under his care, and he may take grass for his own use or for sale, and may also take fuel and timber from the mountains for himself. He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the konohiki from pasturing his. He cannot

---

[82] CHINEN, *supra* note 22, at 29.

[83] Kuleana Act (Enactment of Further Principles) (1850) *reprinted in* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I?, app. 3, at 422-23 (2008).

[84] Melody K. MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 61, at 8. Several theories have been put forward explaining why the maka'āinana received so little land through the mahele: many Native Hawaiians did not understand the new law, some did not have money to pay for a survey, some felt that the act of claiming land was a betrayal to their chiefs, and increasing numbers of Native Hawaiians left the agricultural life to find jobs in cities. *Id.*

> make agreements with others for the pasturage of their animals without the consent of his konohiki, and the Minister of the Interior. The hoa'āina has also the right to take fish in those fishing grounds of the konohiki and those other places which are specified in the laws.[85]

As part of the move to fee simple ownership in Hawai'i, the legislature passed Section 7 of the Act of August 6, 1850 (Section 7), which curtailed maka'āinana rights in the land, as previously established under the Joint Resolution. The legislature added the requirement that the maka'āinana obtain permission from landlords (konohiki) before traditional subsistence gathering activities could occur.[86] Although maka'āinana rights diminished, Kamehameha III intended that these rights remain strong due to his concern that "a little bit of land even with allodial title, if [the hoa'āina] were cut off from all other privileges, would be of very little value."[87]

Section 7 resulted in instances of the maka'āinana suffering extreme hardship at the hands of their landlords.[88] The legislature quickly amended this

---

[85] Joint Resolution on the Subject of Rights in Lands, etc., Nov. 7, 1846 *quoted in* LAWRENCE H. MIIKE, WATER AND THE LAW IN HAWAI'I 58-59 (2004).

[86] This statute read:

> When the landlords have taken allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use.

The Act Confirming Certain Resolutions of the King and Privy Council, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges, 1850 Haw. Sess. Laws 202 (Aug. 6, 1850), *quoted in* Pam Bunn & Wayne Costa, Note, *Public Access Shoreline Hawaii v. Hawaii County Planning Commission: The Affirmative Duty to Consider the Effect of Development on Native Hawaiian Gathering Rights*, 16 U. HAW. L. REV. 303, 321 (1994).

[87] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 7, 656 P.2d 745, 749 (1982) (quoting Privy Council Minutes of July 13, 1850).

[88] *See* McGregor, *Hoa'āina and Their Rights*, *supra* note 12, at 11. The translation of petition of 14 Aug. 1851 to J. Kalili stated:

> We are in trouble because we have no firewood and no la'i, and no timber for houses, it is said in the law that those who are living on the land can secure the things stated, this is all right for those persons who are living on lands which have forests, but we, who live on the lands which have no forest, we are in trouble. The children are eating raw potato because of no firewood, the mouths of the children are swollen from having eaten raw taro. We have been in this trouble for three months, the Konohikis with wooded lands here in Kāne'ohe have absolutely withheld the firewood and la'i and the timber for houses.

law to ensure that the maka'āinana could subsist on the land by removing requirements of obtaining landlord permission and actual need for specified resources.[89] This law survived the overthrow of the Kingdom of Hawai'i and exists today as Hawai'i Revised Statute (HRS) section 7-1:

> When the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit . . . .[90]

B. New Laws and Judicial Interpretation

1. Hawai'i Revised Statute Section 1-1

Another statutory provision that has remained in force largely unchanged since the time of the Kingdom of Hawai'i is Hawai'i Revised Statutes (H.R.S.) section 1-1.[91] This statute was originally enacted to codify the sources of common law in the Kingdom as the Law of 1892, chapter 57, section 5, on November 25, 1892.[92] Section 1-1 establishes that the common law of England, as ascertained by English and American decisions was to be the common law of the land, except as provided by the Constitution or laws of the United States, the laws of Hawai'i, fixed by Hawaiian judicial precedent, or *established by Hawaiian usage*.[93]

2. Hawai'i Constitution—Article XII, Section 7

The delegates to the 1978 Constitutional Convention framed article XII, section 7 as follows:

Id.

[89] McGregor, *Hoa'āina and Their Rights*, *supra* note 12, at 11.

[90] HAW. REV. STAT. § 7-1 (2006).

[91] *Id.* § 1-1.

[92] Laws of 1892, ch. 57, § 5; State v. Zimring, 52 Haw. 472, 474-75, 479 P.2d 202, 204 (1970) (stating that "HRS § 1-1 is derived from L. 1892, c. 57, § 5, approved on November 25, 1892").

[93] HAW. REV. STAT. § 1-1 (2006) (emphasis added). This statute reads:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the State to regulate such rights.[94]

The framers stated, "As native Americans, Hawaiians have inherent and fundamental rights to the free exercise of ancient activities necessary for the purposes of sustenance, culture, and religion . . . ."[95] However, the plain language of this article fails to define which customarily and traditionally exercised rights were reaffirmed and protected. Delegates Hoe, Desoto, and Ontai all stated that article XII, section 7 created no new rights other than those protected under existing law.[96] The Standing Committee Report indicates that the article was intended to "encompass all rights of Native Hawaiians, such as access and gathering . . . [and not be] narrowly construed or ignored by the Court."[97]

Delegate Kaapu predicted that the ambiguity of article XII, section 7 would cause Native Hawaiian ahupua'a tenants' rights to be "determined by lawyers . . . and others as they handle trespass charges and other things down the line . . . . That is going to be a problem for historians; historians and lawyers together will finally develop [their precise nature]."[98] His predictions were prescient. In 1982, the Hawai'i Supreme Court began defining the scope of customary and traditional rights held by Native Hawaiians under H.R.S. section 1-1, H.R.S. section 7-1, and article XII, section 7 of the Hawai'i Constitution.[99] However, Native Hawaiian subsistence fishing practices have not yet been examined by an appellate court.

3. Kalipi v. Hawaiian Trust Co.

In *Kalipi*, the Hawai'i Supreme Court heard the appeal of a possessor of land within the two ahupua'a of Manawai and 'Ōhi'a on the island of Moloka'i.[100] The defendant landowners refused to grant plaintiff Kalipi access to their property to gather ti leaf, bamboo, kukui nuts, medicinal herbs, and ferns.[101]

---

[94] HAW. CONST. art. XII, § 7.

[95] DEBATES IN COMM. OF THE WHOLE ON HAWAIIAN AFFAIRS, PROPOSAL NO. 12, *reprinted in* 2 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978 426 (State of Hawai'i 1980) [hereinafter 2 PROCEEDINGS].

[96] *Id.* at 434, 436-37.

[97] STANDING COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978 640 (State of Hawai'i 1980) [hereinafter 1 PROCEEDINGS].

[98] 2 PROCEEDINGS, *supra* note 95, at 436.

[99] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982).

[100] *Id.*

[101] *Id.* at 3, 656 P.2d at 747.

Kalipi argued that he had the right to gather these items under two primary legal theories: (1) such gathering was lawful under H.R.S. section 7-1; and (2) customary and traditional gathering practices were protected under H.R.S. section 1-1.[102]

The court recognized the conflict between the exclusivity traditionally associated with fee simple ownership and the gathering rights of Native Hawaiians.[103] The court stated that it was obligated to protect Native Hawaiian gathering rights and that article XII, section 7 of the Hawai'i State Constitution would guide its determinations.[104]

The court held that four conditions must be met for the statutory protection of Native Hawaiian gathering rights under H.R.S. section 7-1 to apply: (1) that a gatherer's residence within the ahupua'a in which gathering rights were to be exercised; (2) that gathering be limited to, among other items, firewood and house timber, as specified in H.R.S. section 7-1; (3) that gathering take place on undeveloped land; and (4) that gathering rights be utilized to practice native customs.[105]

The court stated that the plain language of the statute required that gathering take place within the ahupua'a in which the gatherer lived and limited the gatherable items to those specified in H.R.S. section 7-1.[106] The court also required that gathering be utilized to practice native customs due to the statute's purpose of "insur[ing] [sic] the survival of those who in 1851 sought to live in accordance with the ancient ways."[107]

The court also decided that although H.R.S. section 7-1 does not require that gathering rights be exercised on undeveloped land, this limitation was necessary. The court stated that gathering on developed land "would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd."[108] Based on the foregoing, Kalipi was not entitled to gather under H.R.S. section 7-1 because he did not reside within the ahupua'a in which he sought to exercise gathering rights.

Kalipi was similarly not afforded protection under H.R.S. section 1-1. The court perceived that the Hawaiian usage exception to the adoption of the English common law represented an attempt to "avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the

---

[102] *Id.* at 3, 9, 656 P.2d at 747, 750.
[103] *Id.* at 4, 656 P.2d at 748.
[104] *Id.* at 4-5, 656 P.2d at 748-49.
[105] *Id.* at 8-9, 656 P.2d at 749-50.
[106] *Id.* at 8, 656 P.2d at 749-50.
[107] *Id.* at 9, 656 P.2d at 750.
[108] *Id.* at 8-9, 656 P.2d at 750.

common law."[109] The court believed that the retention of Hawaiian traditions under H.R.S. section 1-1 "should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area."[110] Traditional practices were held to be protected when they have been continued and did no actual harm.[111] The court further explained that H.R.S. section 1-1 could be "used as a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others."[112] The court held that there was insufficient proof to find that gathering rights under H.R.S. section 1-1 would accrue to Kalipi, because he did not reside within the ahupua'a of Manawai.[113]

4. Pele Defense Fund v. Paty

Ten years after *Kalipi*, members of the Pele Defense Fund (PDF) brought a suit to enter Wao Kele 'O Puna and the Puna Forest Reserve to exercise traditional and customary rights.[114] PDF claimed that the ahupua'a of Wao Kele 'O Puna historically served as a common gathering area for tenants who did not reside within its boundaries.[115] PDF argued that because of this historical use, its members "should not need to establish that they are the 'lawful occupants' of Wao Kele 'O Puna, although they must establish that they are tenants of ahupua'a abutting Wao Kele 'O Puna and have traditionally used Wao Kele 'O Puna for gathering and other native Hawaiian practices."[116]

The Hawai'i Supreme Court agreed with PDF, finding that when the drafters of article XII, Section 7 reaffirmed all customary and traditional rights, they did not intend for that article to be narrowly construed.[117] In light of the drafters' intention to reaffirm all rights, the court held that "native Hawaiian rights protected by article XII, [section] 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised."[118] The court remanded the case for trial to determine whether Wao Kele 'O Puna was a "traditional gathering area utilized by the tenants of the abutting ahupua'a, and that the other requirements of *Kalipi*

---

[109] *Id.* at 10, 656 P.2d at 750-51.
[110] *Id.* at 10, 656 P.2d at 751.
[111] *Id.*
[112] *Id.* at 11-12, 656 P.2d at 751-52.
[113] *Id.* at 12, 656 P.2d at 752.
[114] Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992).
[115] *Id.* at 616, 837 P.2d at 1269.
[116] *Id.* at 616, 837 P.2d at 1269-70 (internal citations omitted).
[117] *Id.* at 620, 837 P.2d at 1272.
[118] *Id.*

[were] met."[119] On remand, the trial court found that Wao Kele 'O Puna was used for traditional and customary practices by non-tenants.[120]

5. Public Access Shoreline Hawai'i (PASH) v. Hawai'i County Planning Commission

This case concerned the issuance of a Special Management Area use permit by the Hawai'i County Planning Commission (HPC) to Nansay Hawai'i, Inc. (Nansay) to pursue development of a resort complex on the island of Hawai'i.[121] Public Access Shoreline Hawai'i (PASH), a public interest membership organization, had opposed the issuance of the permit but was denied case hearings by the HPC.[122] PASH subsequently filed suit.

This case is particularly important for four reasons. First, the court reaffirmed *Pele* by holding that "common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state."[123]

Second, the court held that in determining customary rights, "the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional* practices or exercising otherwise valid customary rights in an *unreasonable* manner."[124] The court continued, however, declaring that "the *reasonable* exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7."[125] The court indicated that traditional and customary practices are unreasonable when they result in actual harm to the recognized interests of others.[126]

Third, the court clarified that no specific blood quantum is required to qualify as a Native Hawaiian for the purposes of exercising traditional and customary rights.[127] The court noted that customary and traditional rights "flow from native Hawaiians' pre-existing sovereignty. The rights of their descendants do not derive from their race per se . . . ."[128]

Finally, the court affirmed the requirement that in order to qualify as Hawaiian usage, the practice must have been established by November 25,

---

[119] *Id.* at 621, 837 P.2d at 1272.

[120] Pele Def. Fund v. Estate of James Campbell, No. 89-089, slip. op., 2002 WL 34205861 (Haw. 3d Cir. Ct. Aug. 26, 2002).

[121] Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Haw. 425, 429, 903 P.2d 1246, 1250 (1995).

[122] *Id.*

[123] *Id.* at 448, 903 P.2d at 1269.

[124] *Id.* at 442, 903 P.2d at 1263.

[125] *Id.*

[126] *Id.* at 450, 903 P.2d at 1271 n.43.

[127] *Id.* at 449, 903 P.2d at 1270.

[128] *Id.*

1892, the date on which the precursor to H.R.S. section 1-1 was passed.[129] The court remanded the case with instructions that the HPC "must protect the reasonable exercise of customary or traditional rights that are established by PASH."[130] The holdings of *PASH* were never applied to the parties because the landowner withdrew his permit application.[131]

6. State v. Hanapi

In *Hanapi*, the Hawai'i Supreme Court heard the appeal of a man who was convicted of criminal trespass in the second degree for entering his neighbor's land to observe land restoration construction taking place.[132] Hanapi's conviction was upheld because he did not adduce sufficient evidence to show that his presence on his neighbor's land to view the land restoration was connected to a firmly rooted traditional or Native Hawaiian practice.[133]

For the purposes of this note, *Hanapi* is important for two reasons. First, the court declared that "if property is deemed 'fully developed,' i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is *always* 'inconsistent' to permit the practice of traditional and customary native Hawaiian rights on such property."[134] This holding clarified *PASH*, which held that "once land has reached the point of full development it may be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights."[135] Second, the court explicitly ruled that "[t]he fact that the claimed right is *not* specifically enumerated in the Constitution or statutes, does not preclude further inquiry concerning other traditional and customary practices that have existed."[136] This holding seems to indicate that the Hawai'i Supreme Court would be willing to broaden protection for traditional and customary Native Hawaiian practices.

V. SUBSISTENCE FISHING IS A NATIVE HAWAIIAN RIGHT IN MOST WATERS OF THE STATE OF HAWAI'I

Nowhere in Hawaii's Constitution, statutes, or case law are Native Hawaiians afforded explicit protection for subsistence fishing practices. This

---

[129] *Id.* at 447, 903 P.2d at 1268.

[130] *Id.* at 451, 903 P.2d at 1272.

[131] Hugh Clark, *Builder Withdraws Its Kona Resort Application*, HONOLULU ADVERTISER, Aug. 2, 1996, at A5.

[132] State v. Hanapi, 89 Haw. 177, 970 P.2d 485 (1998).

[133] *Id.* at 187, 970 P.2d at 495.

[134] *Id.* at 186-87, 970 P.2d at 494-95 (emphasis added) (internal citations omitted).

[135] *PASH*, 79 Haw. at 450, 903 P.2d at 1271.

[136] *Hanapi*, 89 Haw. at 186, 970 P.2d at 494.

absence, however, does not mean that subsistence fishing is not a traditional and customary Native Hawaiian right. *Hanapi* allows further inquiry to determine whether a Native Hawaiian practice is traditional and customary and therefore eligible for legal protection.[137]

The Hawai'i Supreme Court has established five factors which indicate when traditional and customary Native Hawaiian practices receive protection under H.R.S. section 1-1, H.R.S. section 7-1, and article XII, section 7 of the Hawai'i Constitution. *PASH* and *Kalipi* require the following five criteria to be satisfied: (1) establishment of a claimed customary practice by November 25, 1892;[138] (2) continued customary practice since November 25, 1892;[139] (3) exercise within the ahupua'a of the practitioner's residence, with an exception occurring when the practice is not linked to residence within the ahupua'a;[140] (4) exercise on less than fully developed land;[141] and (5) that the customary practice is reasonably exercised.[142] The following five subsections demonstrate that Native Hawaiian subsistence fishing practices qualify for constitutional and statutory protection through the satisfaction of these five factors.

A. Establishment in Practice by November 25, 1892

As mentioned in Part II of this comment, subsistence fishing was a traditional and customary Native Hawaiian practice for centuries before November 25, 1892.

B. Continuing Practice Since November 25, 1892

An unbroken tradition of subsistence fishing can be demonstrated by utilizing the accounts of Native Hawaiian subsistence fishermen after 1892. In 2002, Wayne Leslie, a subsistence fisherman, testified before the Circuit Court of the Third Circuit of the State of Hawai'i that his family has fished for subsistence since the time of his great-grandfather.[143] In 1942, Louis M. Paulo Sr. assisted his 'ohana in catching aku and ahi by paddling a canoe and trolling pearl shell lures in waters three miles offshore from Miloli'i.[144] In the 1920s,

---

[137] *Id.* at 186, 970 P.2d at 494.

[138] *PASH*, 79 Haw. at 447, 903 P.2d at 1268.

[139] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 10, 656 P.2d 745, 751 (1982).

[140] *PASH*, 79 Haw. at 448, 903 P.2d at 1269.

[141] *Hanapi*, 89 Haw. at 186-87, 970 P.2d at 494-95 (emphasis added).

[142] *PASH*, 79 Haw. at 442, 903 P.2d at 1263.

[143] Kelly v. 1250 Oceanside Partners, No. 00-1-0192K (Haw. 3d Cir. Ct. Oct. 21, 2002).

[144] ROBERT T. B. IVERSEN ET AL., NATIVE HAWAIIAN FISHING RIGHTS: PHASE 2 MAIN HAWAIIAN ISLANDS AND THE NORTHWESTERN HAWAIIAN ISLANDS 45 (1990).

Henry Andrew Leslie Jr., assisted his family in catching bottom fish using a kākā rig in waters up to 900 feet deep offshore from Nāpo'opo'o.[145] He also caught ōpelu for his family during these years.[146] Evidence of the continuing practice after 1982 is completed by Daniel Kahā'ulelio's articles.[147]

C. Exercise Within the Ahupua'a of the Practitioner's Residence

It is well established that traditional and customary subsistence practices exercised within tenants' ahupua'a of residence receive protection under the Hawai'i Constitution.[148] Traditional ahupua'a fisheries extended to the reef, or when there was no reef, for up to one and a half miles seaward from the shore.[149] Consequently, ahupua'a tenants' subsistence fishing practices are protected within the fisheries of their own ahupua'a.

Native Hawaiian traditional and customary rights can extend beyond the ahupua'a of residence where such rights have been customarily and traditionally exercised in another ahupua'a.[150] Where ahupua'a tenants have traditionally traveled to another ahupua'a in order to fish,[151] their fishing practices in the non-residential ahupua'a should be protected. It is important, however, to respect the integrity of the traditional ahupua'a system and not extend protection to fishing practices without traditional and customary ties.

Traditional and customary subsistence fishing practices exercised in the open waters beyond ahupua'a fisheries should be eligible for a blanket exemption from the ahupua'a of residence rule. The history of Native Hawaiian subsistence fishing in the open ocean extends so far back that case-by-case determinations of customary practice would be impractical. The maka'āinana have enjoyed the right to fish in the waters outside the coral reef from 1839[152]

---

[145] *Id.* at 40.

[146] *Id.*

[147] *See generally* KAHĀ'ULELIO, *supra* note 43.

[148] Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Haw. 425, 448, 903 P.2d 1246, 1269 (1995).

[149] Cobb, *supra* note 20, at 161.

[150] Pele Def. Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992).

[151] *See* MCGREGOR, NĀ KUA'ĀINA, *supra* note 12, at 27. On Moloka'i, tenants of the ahupua'a of the windward valleys would fish in the ahupua'a of Kaluako'i during the summer months. MCGREGOR, NĀ KUA'ĀINA, *supra* note 12, at 27.

[152] *See* Act of June 7, 1839, ch. III, § 8, 1842 King. Haw. Laws 18, 25-27 (amended Nov. 9, 1840), *reprinted in* 1 MALY & MALY, *supra* note 14, at 244. The statute read in pertinent part:

> His majesty the King hereby takes the fishing grounds from those who now possess them, from Hawai'i to Kaua'i, and gives one portion of them to the common people, another portion to the land-lords, and a portion he reserves to himself.
>
> These are the fishing grounds which his Majesty the King takes and gives to the people; the fishing grounds without the coral reef. viz. the Kilohee grounds, the Luhee ground, the Malolo ground, together with the ocean beyond.

until the present day. Daniel Kahā'ulelio personally knew of one hundred deep sea fishing grounds.[153] Native Hawaiians continued to fish in the open ocean into and through the twentieth century.[154] Samuel Kamuela Pohaku Grace, who was born in 1927, paddled out more than five miles to fish for 'ahi and a'u in his youth.[155] Robert Ka'iwa Punihaole, who was born in 1923, recalled "Like us, my youth, when we fish, we go maybe three or four miles, that the farthest we go, we don't go more then that."[156] There are many more who fished in the deep seas outside the boundaries of the ahupua'a.[157] In light of this widespread practice, subsistence fishing in the open waters beyond the fisheries of the ahupua'a should qualify as a traditional and customary right.

D. Exercise on Less Than Fully Developed Land

The Hawai'i Supreme Court's "less than fully developed" test utilized for Native Hawaiian practices on dry land is applicable to all waters of the state with the exception of fishponds.[158] All subsistence fishing done outside the

---

> But the fishing grounds from the coral reefs to the sea beach are for the landlords, and for the tenants of the several lands, but not for others. . . .

Id. "Kilohee grounds" are waters shallow enough for wading, or examining the bottom of a canoe; "Luhee grounds" refers to the area where the bottom was too deep to be seen, and he'e had to be caught by line; "Malolo grounds" are waters that are rough and choppy, and where malolo (flying fish) are frequently found. TITCOMB, *supra* note 27, at 15.

[153] KAHĀ'ULELIO, *supra* note 43, at 55.

[154] *See generally* 2 KEPA MALY & ONAONA MALY, KA HANA LAWAI'A A ME NA KO'A O NA KAI 'EWALU: A HISTORY OF FISHING PRACTICES AND MARINE FISHERIES OF THE HAWAIIAN ISLANDS 513 (2003) [hereinafter 2 MALY & MALY].

[155] *Id.*

[156] *Id.* at 533.

[157] *See* IVERSEN, *supra* note 144, at 40. Henry Andrew Leslie practiced bottom fishing using a kākā rig in waters up to 900 feet deep in the waters offshore from Nāpo'opo'o. IVERSEN, *supra* note 144, at 40; *see also* 2 MALY & MALY, *supra* note 154, at 1057. Gilbert Neizman, born in 1934, remembered that his father would fish three to four miles away from shore. 2 MALY & MALY, *supra* note 154, at 1057.

[158] State v. Hanapi, 89 Haw. 177, 186-87, 970 P.2d 485, 494-95 (1998). Lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure were provided as an example of fully developed lands in *Hanapi*. *Id.* While fishponds may not be zoned for fishing, the structure of the fishpond certainly qualifies as an improvement. The purpose of the improvement, to contain fish for mariculture, indicates that fishponds are fully developed. Classification as fully developed would keep with the intent of the framers of article XII, section 7 to protect growers' agricultural products. *See* 1 PROCEEDINGS, *supra* note 95, at 434. Delegate Wurdeman stated of what was to become article XII, section 7: "We do not seek to interfere with the legitimate agricultural use of these lands. No one is advocating the trampling of sugarcane [or] the pilferage of pineapple . . . ." 1 PROCEEDINGS, *supra* note 95, at 434. Traditional and customary fishpond management practices also indicate that the owner of a fishpond has the legitimate expectation that aquatic life could not be harvested without the

limits of fishponds should be considered as occurring on less than fully developed land.

E. Reasonable Exercise

According to *PASH*, "the *reasonable* exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7."[159] Native Hawaiian subsistence fishing practices must be for subsistence purposes,[160] and must work no actual harm upon the recognized interest of the state to enact regulations necessary for the conservation of aquatic life.[161]

1. Subsistence purposes

Native Hawaiian practices exercised for subsistence purposes are protected by the Hawai'i Constitution.[162] Hawaii's courts have not yet defined what "subsistence" means in the context of traditional and customary rights. A statutory definition of sustenance, however, can be found in H.R.S. section 188-22.6(c)(2), which regulates the designation of Community Based Subsistence Fishing Areas.[163] This statute defines subsistence as "the customary and traditional Native Hawaiian uses of renewable ocean resources for direct personal or family consumption or sharing."[164] This definition imposes unreasonable burdens on traditional and customary practices.[165] Without fully functioning ahupua'a, today's Native Hawaiians do not have the means necessary to gather all resources needed for survival.[166] The limitation on the exchange of goods to "sharing" also undercuts ancient practices resembling the western practice of bartering.[167]

---

owner's permission. *See* KAMAKAU, *supra* note 33, at 48. Kamakau's description of measures to combat fish thieves by fishpond caretakers indicates that fish could not be taken from a fish pond without permission of the caretaker or the ali'i. KAMAKAU, *supra* note 33, at 48. Any fishing within a fishpond is properly done with the owner's permission.

[159] Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Haw. 425, 442, 903 P.2d 1246, 1263 (1995).

[160] *See* HAW. CONST. art. XII, § 7.

[161] *See* Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 11-12, 656 P.2d 745, 751-52 (1982); *PASH*, 79 Haw. 425, 450, 903 P.2d 1246, 1271 n. 43 (1995).

[162] *See* HAW. CONST. art. XII, § 7.

[163] HAW. REV. STAT. § 188-22.6 (2005).

[164] *Id.* § 188-22.6(c)(2).

[165] *See* Jodi Higuchi, Comment, *Propagating Cultural Kīpuka: The Obstacles and Opportunities of Establishing a Community-Based Subsistence Fishing Area*, 31 U. HAW. L. REV. 193, 219 (2009).

[166] *Id.*

[167] *Id.* at 219-20.

The Governor's Moloka'i Subsistence Task Force Final Report defined subsistence on Moloka'i as:

> [T]he customary and traditional uses . . . of wild an[d] cultivated renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, transportation, culture, religion, and medicine; for barter, or sharing, for personal or family consumption and for customary trade.[168]

This definition is preferable to the current statutory definition of subsistence because it better reflects actual practices of resource exchange among the 'ohana.[169] This definition is better suited than the current statutory definition to guide Hawaii's courts in determining the protected limits of Native Hawaiian subsistence fishing.

2. No actual harm to the recognized interests of others

Traditional and customary practices that actually harm the recognized interests of others may be excluded from legal protection. The State of Hawai'i has the recognized interest of regulating for public safety, health, and welfare under the police power.[170] The regulation of aquatic resources for conservation purposes falls within the police power of the state.[171] While Hawaii's courts have not yet addressed the issue of balancing Native Hawaiian subsistence fishing rights with the power of the state to enact conservation regulations, the United States Supreme Court and lower federal courts have established a framework for balancing Native American treaty fishing rights with states' power to enact conservation regulations.[172] These cases have consistently held that Native American treaty protected fishing rights may only be limited if necessary to conserve threatened aquatic life.

In 1854 and 1855, the United States executed nine treaties, known as the "Stevens Treaties," with twenty-three Pacific Northwest tribes.[173] In each treaty, tribes were accorded "exclusive use" of their reservation land as well as off-reservation guarantees for the "taking [of] fish."[174] Article III of the Treaty of Medicine Creek is representative of the provision in all Stevens Treaties

---

[168] MOLOKA'I SUBSISTENCE TASK FORCE, GOVERNOR'S MOLOKA'I SUBSISTENCE TASK FORCE FINAL REPORT 2 (1994).

[169] *Id.* at 220.

[170] *See* Haw. Insurers Council v. Lingle, 120 Haw. 51, 60, 201 P.3d 564, 573 (2008).

[171] Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 398 (1968).

[172] *See, e.g., id.*; United States v. Wash., 384 F. Supp. 312 (W.D. Wash. 1974); Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969).

[173] Vincent Mulier, *Recognizing the Full Scope of the Right to Take Fish Under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest*, 31 AM. INDIAN L. REV. 41, 41 & n.1 (2006).

[174] WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY § 1.2(A) (2008).

pertaining to the taking of fish and other necessary items for subsistence.[175] It reads:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.[176]

The U.S. Supreme Court confronted the issue of whether and to what extent a state was permitted to encumber Stevens Treaty fishing rights in *Puyallup Tribe v. Department of Game of Washington*.[177] The State of Washington had barred set nets, fixed fishing appliances, and monofilament gill net webbing in all state waters for the taking of salmon or steelhead.[178] The Puyallup and Nisqually tribes used set nets to fish for subsistence and commercial purposes in violation of state law.[179] The Department of Game of Washington and another brought suits for declaratory and injunctive relief from certain fishing by Native Americans of the Puyallup Tribe and Nisqually Tribe.[180]

The Court first presumed that fishing by nets and commercial fishing were customary at the time the Treaty was signed.[181] The Court stated that the Treaty did not identify the manner in which fishing may be done nor its purpose,[182] noting that if the "Treaty had preserved the right to fish at the 'usual and accustomed places' in the 'usual and accustomed manner,'" it would have had "quite a different case."[183] The Court saw no reason why the rights of the Native Americans could not be regulated by the state because under the Treaty,

---

[175] *Id.*

[176] Treaty with Nisqualli, Puyallup, etc., art III, 10 Stat. 1132, 1133 (1854), *reprinted in* INDIAN AFFAIRS: LAWS AND TREATIES, VOL. II (TREATIES) 495, 496 (Charles J. Kappler, ed., Government Printing Office 1903). This article is strikingly similar to HRS § 7-1. The terms which require gathering on open and unclaimed land, and prohibit the interference with shellfish cultivation is prohibited is in keeping with the requirements that traditional and customary practices of Native Hawaiians take place on less than fully developed land, and not interfere with private rights. The terms of the treaty, like the laws and constitution of Hawai'i, do not specify the methods of fishing that are protected. This treaty was concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington on December 26, 1854. *Id.* at 495.

[177] 391 U.S. 392 (1968).

[178] Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 396 (1968).

[179] *Id.*

[180] *Id.* at 394.

[181] *Id.* at 398.

[182] *Id.*

[183] *Id.*

the right to fish was held "in common with all [the] citizens of the Territory."[184] The Court held that the "manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."[185]

The Court's holding in *Puyallup* was applied by the United States District Court of Oregon in *Sohappy v. Smith*.[186] In that case, David Sohappy was arrested for violating Oregon's prohibition on gill net fishing in the Columbia River.[187] Members of the Yakama tribe filed suit seeking a decree defining their treaty right to take fish at all usual and accustomed places.[188] The court held that the State could "regulate fishing by non-Indians to achieve a wide variety of management or conservation objectives," limited "only by its own organic law and the standards of reasonableness required by the Fourteenth Amendment."[189]

The court further held, however, that the state could not take the same liberty in regulating treaty-protected fishing rights. The court explained that the "measure of the legal propriety of a regulation concerning the time and manner of exercising this 'federal right' [treaty-protected fishing right] is, therefore, 'distinct from the federal constitutional standard concerning the scope of the police power of the State.'"[190] The court declared that "the state must show there is a need to limit the taking of fish and that the particular regulation sought to be imposed upon the exercise of the treaty right is necessary to the accomplishment of the needed limitation."[191] The court noted that this "applies to regulations restricting the type of gear which Indians may use as much as it does to restrictions on the time at which Indians may fish."[192]

The court interpreted *Puyallup* to require that, "[f]irst, the regulation must be necessary for the conservation of the fish. Second, the state restrictions on Indian treaty fishing must not discriminate against the Indians. And third, they must meet appropriate standards."[193] The fishing restrictions that encumbered the plaintiffs' treaty fishing rights were swept aside.[194] After the case, the court maintained jurisdiction over this issue to ensure that the parties had an

---

184 *Id.*
185 *Id.*
186 Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969).
187 Mulier, *supra* note 171, at 51.
188 *Sohappy*, 302 F. Supp. at 903-04.
189 *Id.* at 908.
190 *Id.* (quoting *Puyallup*, 391 U.S. at 402).
191 *Id.*
192 *Id.* at 908-09.
193 *Id.* at 907 (internal quotation marks omitted).
194 *Id.* at 908.

opportunity for timely and effective review as regulations consistent with the opinion were implemented.[195]

The United States District Court for the Western District of Washington's decision in *United States v. Washington*[196] restricted the power of the state to regulate treaty protected fishing rights even further than *Sohappy*. In *Washington* the court specifically held that "[e]very regulation of treaty right fishing" be "reasonable and necessary to prevent demonstrable harm to the actual conservation of fish."[197] The court defined "reasonable" to mean that a conservation measure is "appropriate to its purpose" and defined "necessary" as meaning "in addition to being reasonable must be essential to conservation."[198] This case also explicitly held that "[t]he Stevens treaties do not prohibit or limit any specific manner, method or purpose of taking fish. *The treaty tribes may utilize improvements in traditional fishing techniques, methods and gear subject only to restrictions necessary to preserve and maintain the resource.*"[199]

a. Recognized interests in Hawai'i

Native Americans' right to take fish is guaranteed under the Stevens Treaties; Native Hawaiians' right to engage in customary and traditional subsistence fishing practices is guaranteed by Hawaii's laws and constitution. The foundational similarity of legal protection for fishing practices suggests that the reasoning of *Puyallup*, *Sohappy*, and *Washington* can be applied in determining the reasonableness of Native Hawaiian subsistence fishing practices. These cases establish that treaty protected Native American fishing practices become unreasonable when they conflict with state regulations enacted to conserve aquatic life. The same should be true in Hawai'i. Traditional and customary Native Hawaiian subsistence fishing properly yields to State regulations enacted to conserve Hawaii's aquatic life.

Hawaii's fisheries have not been spared from the worldwide trends of overexploitation and severe depletion.[200] Years of chronic overfishing have led to declines in fish abundance and size.[201] Growing human population,

---

[195] *Id.* at 911.

[196] United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).

[197] *Id.* at 342.

[198] *Id.*

[199] *Id.* at 402 (emphasis added).

[200] Alan M. Friedlander et al., *Coupling Ecology and GIS to Evaluate Efficacy of Marine Protected Areas in Hawaii*, 17 ECOLOGICAL APPLICATIONS 715, 715 (2007).

[201] *Id.*

destruction of habitat, and the introduction of overly efficient fishing techniques have contributed to fisheries' decline.[202]

As a result, the Hawai'i legislature has adopted a regulatory scheme to protect fish and other marine resources by creating five Marine Management Areas (MMAs). Marine Life Conservation Districts (MLCDs) have been implemented to conserve and replenish marine resources by limiting fishing practices and other consumptive uses.[203] Fishing or taking any marine life within MLCD boundaries is prohibited.[204] Marine Fisheries Management Areas (FMAs) were enacted to manage, preserve, protect, conserve, and propagate fishes and other aquatic life.[205] The Natural Area Reserves System (NARS) was created to protect in perpetuity examples of Hawaii's aquatic plants and animals as well as Hawaii's unique geographical features.[206] Bottom-fish Restricted Fishing Areas (BRFAs) were enacted to conserve bottom fish species by restricting fishing in twenty percent of the known fishing areas where bottom fish spawn.[207] Bottom fishing is banned within BRFAs.[208] Community-Based Subsistence Fishing Areas (CBSFAs) were implemented to protect fishing practices traditionally and customarily exercised by Native Hawaiians for subsistence, cultural, and religious reasons.[209] In CBSFAs, community members assist the Department of Land and Natural Resources (DLNR) to create management strategies based on Native Hawaiian values.[210] The State also regulates activities within the reefs surrounding the Hawai'i Marine Laboratory Refuge on Moku O Lo'e Island in Kāne'ohe Bay.[211] The island and its surrounding reef are a unique "living laboratory" and its "living resources are critically important to the preservation of Hawaii's marine resources."[212]

---

[202] *Id.*

[203] Denise Antolini, *Marine Reserves in Hawai'i: A New Call for Community Stewardship*, 19 NAT. RESOURCES & ENV'T 36, 37 (2004).

[204] *See* HAW. REV. STAT. § 190-1 (2005).

[205] Antolini, *supra* note 203, at 38.

[206] STATE OF HAW. DEP'T OF LAND & NATURAL RES., ABOUT, http://hawaii.gov/dlnr/dofaw/nars/about-nars (last visited Oct. 6, 2009). Of the nineteen NARS in the state, only the 'Āhihi-Kīna'u on Maui and the Kaho'olawe Island Reserve NARS include marine components. Antolini, *supra* note 203, at 39.

[207] Antolini, *supra* note 203, at 39.

[208] HAW. CODE R. § 13-94-8 (Weil 2003).

[209] Antolini, *supra* note 203, at 40.

[210] *See, e.g.*, HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9 (2005 & Supp. 2007).

[211] *See* DIV. OF AQUATIC RES., HAWAI'I FISHING REGULATIONS (2008). It is unlawful to take any aquatic life within the boundaries of the Hawai'i Marine Laboratory Refuge. *Id.*

[212] Written Testimony of Jo-Ann Leong, Dir. Haw. Inst. Of Marine Biology, to Sen. Comm. on Judiciary & Gov't Operations, on S.B. 1311 (Mar. 2, 2009), *available at* http://www.capitol.hawaii.gov/session2009/Testimony/SB1311_SD1_TESTIMONY_JGO_03-02-09.pdf.

The Hawai'i State Legislature directs the DLNR to adopt rules concerning the protection, propagation, conservation, and allocation of aquatic life in all state waters.[213] The DLNR fulfills this responsibility by establishing: (1) size limits, (2) bag limits, (3) open and closed fishing seasons, (4) gear restrictions, and (5) restrictions on types of bait, and (6) conditions for entry into areas for taking aquatic life.[214]

The common thread that runs through the purposes of each Marine Management Area, the Marine Laboratory Refuge at Moku O Lo'e Island, and H.R.S. section 187A-5 is the conservation of aquatic life. These regulations legitimately apply to Native Hawaiians practicing subsistence fishing under the rationale of *Puyallup*, *Sohappy*, and *Washington*, because they were all enacted in order to conserve aquatic life which is actually threatened. This is not to say that Native Hawaiians may not fish within these areas; however, their fishing must take place in conformity with applicable fishing regulations enacted to conserve aquatic life that is actually threatened.

Another recognized interest is that of konohiki fishing area owners to regulate their fishing areas. The Declaration of Rights and Laws of June 7, 1839 codified the conservational kapu system and recognized the rights of the ali'i to manage and conserve their fisheries subject to the rights of the maka'āinana to take fish.[215] The Declaration recognized what became known as konohiki[216] fishing rights, which remained in force at the time of the overthrow of the Kingdom of Hawai'i.[217] The Organic Act of 1900 recognized vested konohiki fishing rights, continuing their existence in federal statutes.[218] Konohiki fisheries remaining today are governed by H.R.S. section 187A-23,[219] which preserves the essence of the 1839 Declaration by continuing to recognize vested konohiki and maka'āinana fishing rights.[220]

---

[213] HAW. REV. STAT. § 187A-5 (2005).

[214] *Id.*

[215] Alan Murakami, *Konohiki Fishing Rights and Marine Resources*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 61, at 173.

[216] *See* PAUL NAHOA LUCAS, DICTIONARY OF HAWAIIAN LEGAL LAND TERMS 57 (1995) (citing Territory v. Bishop Trust Co., 41 Haw. 358, 361-62 (1958)). The term konohiki originally referred to agents appointed by chiefs; later it came to refer to the chiefs or landlords themselves. *Id.*

[217] Murakami, *supra* note 215, at 175. Within konohiki fisheries, fishing was restricted to the exclusive but joint use of the konohiki and the tenants of the ahupua'a; the konohiki had the right to reserve one species of fish for exclusive use; or prohibit fishing during certain months of the year, and during the fishing season, take from each tenant one-third of the fish caught in the fishery. Murakami, *supra* note 215, at 175.

[218] Hawai'i Organic Act §§ 95-96 (1900).

[219] HAW. REV. STAT. § 187A-23 (2005).

[220] Murakami, *supra* note 215, at 173.

Subsistence fishing practices in konohiki fishing areas should be subject to the konohiki fishing area owners' recognized interest. Under state law, the konohiki fishing area owner may (1) set apart one given species or variety of aquatic life for his exclusive use, or (2) prohibit during certain months of the year, all taking of aquatic life within the private fishery, in lieu of setting apart one given species of fish for his own use; provided that the konohiki may exact up to one-third of the aquatic life taken within the private fishery during the konohiki fishing season.[221] Unlimited subsistence fishing as a traditional and customary practice would harm the recognized interest of konohiki fishing areas owners to regulate their fisheries and therefore properly yields to konohiki regulation.

VI. MODERN METHODS OF SUBSISTENCE FISHING ARE PROTECTED

Traditional and customary subsistence Native Hawaiian fishing practices may be limited only when they conflict with the recognized interests of others. The State has the recognized interest of protecting Hawaii's aquatic life. Konohiki fishing area owners have the recognized interest of regulating fishing practices within their fisheries. Because modern fishing methods alone do not conflict with the recognized interests of the State or of konohiki fishing area owners, Hawaii's laws require that method is irrelevant to traditional and customary subsistence fishing rights.

The United States Supreme Court and other federal courts have reached the same conclusion regarding treaty protected fishing rights of Native Americans under the Stevens Treaties. The United States Supreme Court in *Puyallup* held that the "*manner of fishing*, the size of the take, the restriction of commercial fishing, and the like may be regulated by the state *in the interest of conservation* . . . ."[222] The Oregon federal district court held that "the state must show *there is a need to limit the taking of fish* and that the particular regulation sought to be imposed upon the exercise of the treaty right is *necessary* to the accomplishment of the needed limitation," and that this "*applies to regulations restricting the type of gear which Indians may use* . . . ."[223] The Washington federal district court explicitly held that "[t]he Stevens Treaties do not prohibit or limit any specific manner, method or purpose of taking fish. *The treaty tribes may utilize improvements in traditional fishing techniques, methods and gear subject only to restrictions necessary to preserve and maintain the resource.*"[224]

---

[221] HAW. REV. STAT. § 187A-23(c)-(d) (2005).

[222] Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 398 (1968) (emphasis added).

[223] Sohappy v. Smith, 302 F. Supp. 899, 908 (D. Or. 1969) (emphasis added).

[224] United States v. Washington, 384 F. Supp. 312, 402 (W.D. Wash. 1974) (emphasis added).

The holdings of these cases are entirely applicable in the context of Native Hawaiian subsistence fishing practices because much like the Stevens Treaties, Hawaii's laws and Constitution do not explicitly prohibit nor limit the specific manner or method of taking fish. As long as Native Hawaiians fish for subsistence purposes, the State may not require them to fish using ancient techniques to receive protection for this right. The only exception occurs when the subsistence fishing methods must be limited to protect the recognized interests of others.

Moreover, the framers of article XII, section 7 intended to protect the substance of subsistence practices, not their form. The framers stated that "[a]s native Americans, Hawaiians have inherent and fundamental rights to the free exercise of ancient activities necessary for the purposes of sustenance, culture, and religion . . . ."[225] The Standing Committee Report indicates that article XII, section 7 was intended to "encompass all rights of Native Hawaiians, such as access and gathering . . . [and not be] narrowly construed or ignored by the Court."[226] If the right to fish for subsistence were so narrowly construed to require that fishing be done in traditional ways, the purpose of the right, to protect the "free exercise of ancient activities necessary for the purposes of sustenance," would be thwarted.[227]

Furthermore, compelling policy reasons demand that method be irrelevant to traditional and customary subsistence fishing practices. Traditional fishing implements cannot be obtained in numbers sufficient to equip all Native Hawaiian subsistence fishermen. The entire functioning ahupua'a collaborated to furnish Native Hawaiian fishermen with the items necessary for fishing. Kahā'ulelio's description of the community resources and cooperation required to weave a net for laulima fishing is illustrative:

> The first thing that the head fisherman does is to direct the men and women to go up to collect wauke, returning to clean it, strip the bark, dry it, and when well-dried, then make a net, and this net was called puhi iki. Again they would go up to cut olonā, scrape the fibers clean and make a net with mesh the width of a finger . . . . When the net is ready, then the head fisherman again sends the men, women and large children able to hike upland, to go and get yellow and dried ti leaf. . . . When that was done, the people went to the mountains for dried wiliwili wood, or collected dried gourds, to be used as floaters for the lau, the drag line knotted with ti leaves. Then they would go for dried banana leaf stalks to be used as rope to secure the floaters to the lau line, or a rope made of wauke bark could be used.[228]

---

[225] 2 PROCEEDINGS, *supra* note 95, at 426.

[226] 1 PROCEEDINGS, *supra* note 97, at 640.

[227] 2 PROCEEDINGS, *supra* note 95, at 426.

[228] KAHĀ'ULELIO, *supra* note 43, at 3.

Undertakings of this magnitude are not feasible in Hawaiian communities today.[229] While some individuals do specialize in the production of traditional Hawaiian fishing implements, the dearth of such items available for purchase in 'Oahu fishing stores or online suggests that these implements are not readily available to all. Some traditional fishing implements may no longer even be obtainable because the knowledge required to produce them has probably disappeared.[230]

Additionally, the Native Hawaiian people have a history that is filled with instances of past implementation of new and more effective technologies. During the voyaging period between Hawai'i and Tahiti, from A.D. 1400 to 1600, migrating Polynesian chiefs and priests brought new techniques for cultivation, irrigation, aquaculture, and fishing with them to Hawai'i.[231] The adoption of these introduced innovations resulted in a food surplus that allowed the Hawaiian population to grow and advance.[232]

Native Hawaiians began to integrate foreign technologies into their culture upon first contact with the West. One of the members of Captain Cook's crew wrote, "[b]efore we left Keragegooa [(Kealakekua)] we saw many small fishhooks which they made with the nails they got from us . . . ."[233] Kahā'ulelio reveals that Hawaiians in the early 1900s continued to adopt foreign technologies by using mosquito netting for fishing nets.[234] It is not reasonable to end the Native Hawaiians' centuries-long tradition of adopting new technologies today.

The use of modern fishing methods also helps to avoid future loss of Native Hawaiian culture. Fishing knowledge is a fragile and perishable cultural treasure that is passed down to each successive generation. If Native Hawaiians are discouraged from fishing because they are prevented from using modern methods, the traditional knowledge that allows them to successfully subsist might die with the generation that stops fishing. Fishing knowledge has been lost before in Hawai'i. Kahā'ulelio despaired at the loss of fishing knowledge in his day: "Your writer knows a hundred deep-sea fishing grounds since his boyhood that I used to go with my father. I wonder what fraction of these our fishermen of today know."[235]

---

[229] *See* Higuchi, *supra* note 165, at 219.

[230] *See* KAHĀ'ULELIO, *supra* note 43, at 189. Kahā'ulelio sadly noted the disappearance of people skilled in making hinalea fishing traps: "Where your writer dwells were people that were skilled in making nets to use in hinalea fishing. When my sister passed away. . . no one else was left who knew how it was made and those that remain are but mere pebbles to pelt mice with." KAHĀ'ULELIO, *supra* note 43, at 189.

[231] McGregor, *Hoa'āina and Their Rights*, *supra* note 9, at 4.

[232] McGregor, *Hoa'āina and Their Rights*, *supra* note 9, at 5.

[233] NEWMAN, *supra* note 37, at 52 (alteration in original) (citation omitted).

[234] KAHĀ'ULELIO, *supra* note 43, at 11.

[235] KAHĀ'ULELIO, *supra* note 43, at 55.

Nevertheless, Substantial cultural fishing knowledge is still alive and well today. Professor Davianna Pomaka'i McGregor noted: "Hawaiian fishermen may use motorboats rather than canoes to get to their ancestral fishing grounds[,]" and "[t]hey may use a nylon net rather than one woven from native plant materials to surround fish or to entangle them in the overnight fluctuating tides. In most cases, they are still utilizing ancestral knowledge of ocean tides, currents, and reefs to locate and catch the fish."[236] Living knowledge concerning traditional fishing practices must be kept alive by allowing those who currently fish for subsistence purposes with modern fishing methods to continue to do so.

VII. CONCLUSION

Method is irrelevant to the practice of Native Hawaiian subsistence fishing. Even though modern fishing technology may replace "human dexterity, energy or propulsion," or "natural energy or propulsion," or substantially extend "the scope or intensity of traditional methods," the State cannot regulate subsistence fishing activities merely because they are performed in a non-traditional manner. Native Hawaiians have the constitutional right to fish for subsistence purposes, in a reasonable manner, in the undeveloped waters of the State of Hawai'i. Subsistence fishing can become unreasonable when it interferes with the recognized interests of others. Subsistence fishing is unreasonable when it interferes with the ability of konohiki fishery owners to manage their fisheries, or would otherwise violate valid state regulations necessary to conserve aquatic life.

This right as originally established during the Kingdom of Hawai'i, and as perpetuated by the State of Hawai'i, was intended to allow Native Hawaiians to continue to subsist on their islands as they have for centuries. Modern fishing methods not only allow Native Hawaiians to subsist from the resources of the sea but also to maintain their cultural fishing traditions. What matters is that all subsistence fishing, which, by its very nature, does not interfere with the recognized interest of another, complies with a definition of subsistence that matches or is similar to that articulated by the Moloka'i Subsistence Task Force. If fish are caught in quantities that exceed subsistence needs, the number of fish harvested defeats the protected right, not the method in which they are taken.

---

[236] MCGREGOR, NĀ KUA'ĀINA, *supra* note 12, at 15.

Maka'ala Ke Kanaka Kahea Manu:* Examining a Potential Adjustment of Kamehameha Schools' Tuition Policy

Lahela Hiapola'ela'e Farrington Hite**

I. INTRODUCTION

In 1893, a group of civilians, supported by the full power of the United States Navy and the United States Minister to the Kingdom of Hawai'i, successfully overthrew the Hawaiian monarchy. This coup d'état ushered in over a century of hardship and deprivation for the Native Hawaiians.[1] Kamehameha Schools[2] is one of the few remaining institutions embodying the

---

* Translation: "A man who calls the birds should always be alert." This is an 'ōlelo no'eau, a native Hawaiian proverb. The ancient Hawaiian chiefly class, the ali'i, wore beautiful capes and headdresses crafted by weaving many tiny, brightly colored feathers into mesh woven bases of the native Hawaiian plant, olonā. The Kanaka Kahea Manu, the Bird-Catcher, would imitate bird calls to attract the birds, catch them, pluck out a small number of tiny feathers from each, and release them. Once he had called the birds, the Kanaka Kahea Manu had to stay alert so that he could quickly capture the birds when they came near. The 'ōlelo no'eau advises one who wishes to succeed to be alert to any potential opportunities that may arise. *See* MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS NUMBER 2087, 227 (1983). Hawaiian words will not be italicized in this note because Hawaiian is an official language in the State of Hawai'i. Some letters of the Hawaiian alphabet may not be visible on commercial electronic databases such as LexisNexis or Westlaw.

** Juris Doctor Candidate, William S. Richardson School of Law, 2010. The author would like to extend her gratitude to: Professor Melody K. MacKenzie, Assistant Professor of Law, Director, Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law for all her guidance; Colleen I. Wong, Vice President for Legal Services, Kamehameha Schools, for going out of her way to answer her questions; Janet Zisk, Archivist, Kamehameha Schools, for initial research assistance; and Kenika Terlep for all his love, support, and time.

[1] *See* HAW. REV. STAT. § 10-2. For the purposes of this paper, "Native Hawaiians" or "Native Hawaiian" are the two terms used to reference individuals and groups descended from the original inhabitants of the Hawaiian archipelago. "Native Hawaiians" and "Native Hawaiian" are used in this paper in lieu of "indigenous Hawaiians" or "kanaka maoli" as those are the terms most readily adopted and used by Congress and in other forms of legislation when referring to individuals or groups of individuals who can trace their heritage back to members of a distinct and unique aboriginal society who occupied and exercised sovereignty over the land area that now comprises the State of Hawai'i, prior to the first contact with non-indigenous peoples in 1778.

[2] In this paper, The Kamehameha Schools will be referred to as "Kamehameha" or "the Schools."

love and hope that the Hawaiian ali'i felt for their native subjects. Because of increasing litigation, Kamehameha Schools' ability to further assist Native Hawaiians is in jeopardy. Kamehameha Schools is intimately linked to the Native Hawaiian community; thus, any fate which befalls the Schools will have major repercussions throughout the Native Hawaiian community.

In the Ninth Circuit Court of Appeals' 2006 Kamehameha Schools decision, a simple footnote hinted that the Schools might be able protect itself from future litigation over its preferential admissions policy and fulfill its mission by adjusting its tuition policy.[3] This footnote complements an issue raised in the dissenting opinion which explored the effects of the educational contract between a private school and its students on Kamehameha Schools' admissions policy.[4] Although joining in the dissenting opinion, Judge Alex Kozinski wrote a separate opinion that further crystallized the issue.[5]

This paper will examine the suggestion that an elimination of Kamehameha's tuition policy could serve as a means of protecting an important resource for the advancement of Native Hawaiians. Part II of this paper discusses the history of Kamehameha Schools and its ties to the Native Hawaiian community. Part III examines the litigation surrounding Kamehameha Schools, Part IV evaluates the two major arguments in support of the Schools' Hawaiians-first admissions policy, and Part V examines a property rights approach to education and the practical effects of eliminating tuition.

---

[3] Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827, 837 n.9 (9th Cir. 2006).

> The Kamehameha Schools are non-profit, rather than commercial. But, because the [S]chools charge tuition (albeit at a rate that represents only a fraction of the cost to educate students), the bargained-for exchange of payments for instruction exists here, as it did in *Runyon*. We need not and do not decide whether § 1981 would apply if the Schools charged no tuition at all, but simply donated education to Native Hawaiian students.

Id.

[4] *Id.* at 860 ("The parents . . . sought to enter into contractual relationships with the schools for educational services . . . . Under those contractual relationships, the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments.") *Id.* (Bybee, J., dissenting) (quoting *Runyon v. McCrary*, 427 U.S. 160, 172-73 (1976)).

[5] *Kamehameha*, 470 F.3d at 888-89 ("[T]he issue we are called on to decide may be a problem of the schools' own making . . . I don't believe section 1981 [42 U.S.C. § 1981] would apply at all if the schools were run entirely as a philanthropic enterprise and allowed students to attend for free.").

II. THE HISTORY OF KAMEHAMEHA SCHOOLS AND ITS ROOTS IN THE KINGDOM OF HAWAI'I

The Kamehameha Schools serves to educate and benefit the descendents of the first indigenous inhabitants of the Hawaiian islands.[6] The importance of the Schools' mission is directly tied to the continuing negative effects of colonization on Native Hawaiians in their homeland. It is essential to understand Hawaiian history to fully recognize the necessity of protecting the Native Hawaiian preferential admissions policy of Kamehameha Schools.

A. "[C]olonization Has Brought More than Physcal Transformation to the Lush Sacred Islands of Our Ancestors."[7]

Hawai'i was first inhabited by great Polynesian sea-faring voyagers who mapped out the vast Pacific Ocean many years before the European Age of Discovery, arriving in Hawai'i as early as 0 A.D.[8] The descendents of these voyagers, the Native Hawaiians, developed and promulgated a rich and complex society, in which government, religion, and social organization were closely intertwined.[9] With the introduction of western economic, political, and religious ideologies came the introduction of a series of diseases to which Native Hawaiians had no natural immunities.[10]

Physically, Native Hawaiians shouldered the burden of basic survival and faced an uphill battle with myriad diseases brought on western ships to Hawaiian shores. Among them, syphilis, gonorrhea, tuberculosis, small pox, measles, leprosy, and typhoid fever cut the 1840s Native Hawaiian population by approximately ninety percent of its estimated size at the time of Captain Cook's arrival in 1778.[11]

As the numbers of Native Hawaiians decreased, mounting foreign presence in the islands brought a series of influences and policies from which Native Hawaiians are still recuperating. Between the first western contact with the island nation in 1778 and the annexation to the United States in 1898, Native Hawaiians had been systematically stripped of their mother tongue, religion,

---

[6] Will of Bernice Pauahi Bishop, Para. 13, *available at* http://www.ksbe.edu/puahi/codicil1.php.

[7] HAUNANI K. TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 3 (rev. ed. 1999).

[8] Davianna McGregor, *An Introduction to the Hō'āina and Their Rights*, 1 HAWAIIAN JOURNAL OF HISTORY 30 (1996).

[9] *See* NATIVE HAWAIIAN RIGHTS HANDBOOK 3-4 (Melody Kapilialoha MacKenzie ed., Native Hawaiian Legal Corporation 1991); HAUNANI-KAY TRASK, *supra* note 7 at 5-6.

[10] DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAI'I ON THE EVE OF WESTERN CONTACT 7-8 (1989).

[11] TRASK, *supra* note 7, at 6.

societal structure, system of government, cultural practices, and inherent land and water rights.[12]

In 1842, American President Tyler and the United States House Committee on Foreign Affairs asserted American dominance and conquest over Hawai'i inherent in the concept of manifest destiny.[13] In 1843 and again in 1849 the Hawaiian Kingdom's sovereignty was challenged by foreign powers.[14] King Kamehameha III, Kauikaeouoli, realized the vulnerability of his nation in comparison to larger countries with greater military might. As a result, he determined that a possible way to prevent future attempts of foreign occupation was through private land ownership. In 1848, King Kamehameha III began to divide and privatize Hawaiian lands according to western standards in the Māhele.[15] Though perhaps founded in the best of intentions, the process of western land privatization dispossessed Native Hawaiians of hānau, their birth sands, and divested them of cultural rights in those lands. By 1888, most of the land in the Kingdom was controlled by foreigners.[16] A majority of the land that remained in Native Hawaiian hands eventually funneled its way into the estate of Princess Bernice Pauahi Bishop, founder of Kamehameha Schools, to become the primary asset of the Estate and source of the Schools' financial resources. The Princess's holdings withstood the series of events that would eventually result in the annexation of Hawai'i to the United States.

In 1866, the U.S.S. Lackawanna was stationed indefinitely at Honolulu to protect the interests of United States citizens within the Kingdom, primarily the American sugar plantation owners, who favored annexation as a means of

---

[12] *See* David Keanu Sai, *Revisiting the Fake Revolution of January 17, 1893*, http://www.hawaiiankingdom.org/pdf /Failed_Revolution_of_1893.pdf (last visited Jan. 10, 2010) (discussing significant questions which have been raised regarding the legality of the annexation of Hawai'i to America by political scientists); *see also*, David Keanu Sai, *American Occupation of the Hawaiian State: A Century Unchecked*, 1 HAWAIIAN J.L. & POL. 46 (2004).

[13] Edward P. Crapol, *John Tyler and the Pursuit of National Destiny*, 17 J. OF THE EARLY AM. REPUBLIC 467 (1997).

[14] *See* JEAN IWATA CACHOLA, KAMEHAMEHA III: KAUIKEAUOLI (1995); *see also* TRASK, *supra* note 7, at 6-7. Hawai'i was first illegally annexed to Britain in 1843 when British Captain Lord George Paulet pointed the cannons of the British Royal Navy at Honolulu and rationalized that his actions were necessary to sufficiently protect the rights of British citizens who resided within the Hawaiian Kingdom. After a five-month occupation, the sovereignty of the Hawaiian Kingdom was restored. In 1849, France attempted a similar feat and issued King Kamehameha III, Kauikeauoli, a list of ten demands to show favor to the twelve French citizens within the Kingdom. King Kamehameha III discarded the list of demands and reaffirmed the independence of the Hawaiian Kingdom and its preference for its Native subjects. The French responded by petty vandalism on the governor's mansion and theft of the King's yacht, which was never returned.

[15] TRASK, *supra* note 7, at 6-7; LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 8-16 (1992).

[16] TRASK, *supra* note 7, at 7.

avoiding increasing American sugar tariffs.[17] Although the idea of cession and/or annexation was increasingly popular among foreign residents in the islands, it was not entertained by the Hawaiian ali'i or their native people. Hawaiian newspapers characterized annexation as a, "blow aimed at our national existence, and comes not from the natives of the soil but from men of foreign birth . . . The annexation of these islands would be national death."[18] But this national death would come, and Princess Pauahi would bear witness.

In 1875, King David Kalākaua, Hawai'i's second elected monarch, finally signed a reciprocity treaty with the United States which caused a boom in the Hawaiian economy and an increase in foreign presence and power.[19] This shift in political power accompanied a steady decrease in the Native Hawaiian population.[20] In 1887, a group of white businessmen forced the King, under threat of duress, to sign what has come to be known as the "Bayonet Constitution," through which the King effectively relinquished all powers to the legislature. Voting requirements were severely restricted by property and income, which resulted in an electorate comprised of mostly rich white males.[21]

Native Hawaiian resistance to the Bayonet Constitution was quelled by an increase in American military presence. In early 1893, Queen Lydia Kamaka'eha Lili'uokalani, successor to her brother, King David Kalākaua, drafted a new constitution that eliminated voting restrictions and restricted the electorate to citizens of the Kingdom.[22] Her efforts to promulgate the new constitution were thwarted by a group of American businessmen who called themselves "The Committee of Safety," and who ultimately forced the Queen's cession in January 1893. The Queen did so under protest.[23] In July 1893, the

---

[17] *Id.* at 7-8.

[18] *Id.*

[19] See GEORGE SEWALL BOUTWELL, THE RECIPROCITY TREATY WITH HAWAI'I: SOME CONSIDERATIONS AGAINST ITS ABROGATION: WITH OFFICIAL DOCUMENTS RELATING TO THE TREATY (Judd & Detweiler Printers and Publishers 1886) (presenting an American perspective on the treaty and its effects); *see also Hawaiian Sugar in Caucasus*, NEW YORK TIMES, June 13, 1897, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=9805EEDC 1F39E43 3A25750C1A9609C94669ED7CF.

[20] David E. Stannard, *Disease and Infertility: A new Look at the Demographic Collapse of Native Populations in the Wake of Western Contact, 24* J. AM. STUD. 325-50 (1990).

[21] BAYONET CONSTITUTION OF 1887 (repealed through cession to the United States), *available at* http://www.alohaquest .com/archive/constitution_1887.htm; *see also* http://www.Hawaiianbar.org/pdf/doc6.pdf (describing the Bayonet Constitution).

[22] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM VOL.3, 1874-1893: THE KALĀKAUA DYNASTY 582-86 (1967).

[23] *See* Liliuokalani v. The United States, 45 Ct. Cl. 418, 435 (1910) (quoting the Queen's cession).

> I yield to the superior force of the United States of America . . . to avoid any collision of armed forces and perhaps the loss of life . . . until such time as the Government of the United States shall, upon the facts being presented to it . . . reinstate me and the authority

United States sent Special Commissioner James H. Blount to Hawai'i to investigate the events leading up to and surrounding the overthrow of the Hawaiian monarchy. His report to the 1893 United States House of Representatives Foreign Relations Committee has come to be known as the Blount Report.[24]

President Cleveland sympathized with the Queen and sought to restore her powers and the independence of the Hawaiian Kingdom. However, President Cleveland did not run for re-election. His successor to the presidency, William McKinley, was of the opposite view and saw the conquest of Hawai'i as a natural progression towards American military dominance in the Pacific.[25] On July 6, 1898, a joint resolution passed both houses of Congress annexing Hawai'i to the United States.[26] McKinley signed it into law the next day.[27]

More than a century later, Native Hawaiians, landless and impoverished in their homeland, are still feeling the effects of President McKinley's decision to annex Hawai'i. Programs benefiting Native Hawaiians continue to be underfunded, and Native Hawaiian rights issues have been largely pushed aside.

Recommendations for enhancing the legal status of Native Hawaiians have been put before Congress.[28] The federal government has formally

---

which I claim as the constitutional sovereign of the Hawaiian Islands" and determining that the Queen was not due compensation for the seizure of the Crown Lands since she held the lands in her capacity as sovereign).

Id.

[24] THE BLOUNT REPORT, *available at* http://libweb.hawaii.edu/digicoll/annexation/blount.html, THE BLOUNT REPORT, OP. CIT. UNDER, PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, DECEMBER 18, 1893, 53d Cong., 3d Sess., HOUSE EX. DOC. NO. 47 (1893). The Blount Report has come to be known as the single most damning document regarding the United States' involvement with the illegal overthrow of the Hawaiian Kingdom. The report highlighted the illegality of the overthrow and the interconnectivity between the United States' military and the dispossession of Queen Lili'uokalani. It has never been rescinded. *See* Executive Documents of the House of Representatives for the Third Session of the Fifty-Third Congress. 1894-95. 35 Volumes (Washington D.C.: Government Printing Office, 1895).

After the findings contained within the Blount Report had been provided to Congress, Queen Lili'uokalani filed suit against the United States in 1910, seeking compensation for the loss of crown lands. *Liliuokalani*, 45 Ct. Cl. at 435.

[25] *See* WILLIAM MCKINLEY AND SIDNEY M. BALLOU, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE REPORT OF THE HAWAIIAN COMMISSION, G.P.O. WASHINGTON, DC, 1898; *see also Hawaiian Sugar in Caucus*, N.Y. TIMES, June 13, 1897, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=9805EEDC1F39E433A25750C1A9609C94669ED7CF.

[26] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 209 (2007).

[27] J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

[28] *See, e.g.*, Native Hawaiian Government Reorganization Act of 2005 (The Akaka Bill) S. 147, 109th Cong. (2005).

acknowledged a debt owed to the Native Hawaiian People.[29] Congress has enacted legislation promoting Native Hawaiian self-sufficiency on an equal footing with other indigenous peoples in America.[30] However, Native Hawaiians do not share equal status as quasi-sovereign entities with a "government-to-government" relationship with the United States.[31] Native Hawaiians currently have a limited set of indigenous rights which have been restricted by executive action and judicial opinion.[32]

In January 1993, and on the eve of leaving the White House, President George H.W. Bush's administration issued the Sansonetti opinion, which explicitly stated that the United States was in no way responsible for the 1893 overthrow of the Hawaiian Kingdom and as such had no special trust relationship with Native Hawaiians.[33] The Sansonetti opinion was rescinded in the same year under President William J. Clinton's administration, which

---

[29] Apology Resolution, Pub. L. 103-150 § 1(3)-(5) (1993).

[30] *See, e.g.*, Hawkins-Stafford Elementary and Secondary Education Improvement Act, Pub. L. No. 100-297, 102 Stat. 130 (1988) (which released federal money for educating Native Hawaiians); Library Service and Construction Act, 20 U.S.C. § 351 (1988) repealed by Act Sept. 30, 1996, P.L. 104-208, Div A, Title I, §101(e) [Title VII, §708(a)], 110 Stat. 3009-312, which explicitly authorizes the Secretary of Education to make grants to organizations that serve or represent Native Hawaiians; Job Training Partnership Act, 29 U.S.C. § 1501 et. seq (1987) repealed by Act Aug. 7, 1998, P.L. 105-220, Title I, Subtitle F, § 199(b)(2), 112 Stat. 1059 (effective on July 1, 2000, as provided by § 199(c)(2)(B) of such Act, which stated that due to the high unemployment and economic disadvantages in Indian, Alaska Native, and Native Hawaiian communities, there was need for preferential programs for these groups which would prepare them for entry into the job market; Economic Opportunity Program, Native American Program Act, 42 U.S.C. § 2701 et. seq. (1964) repealed by Act Aug. 13, 1981, Pub.L. No 97-35, Title VI, Subtitle B, § 683(a), 95 Stat. 519, which appeared as former 42 U.S.C.S. § 9912(a), effective Oct. 1, 1981, which had the expressly stated goal of promoting economic self-sufficiency for American Indians, Alaska Natives, Native Hawaiians, and other Native American Pacific Islanders; National Housing Act, 12 U.S.C. § 1701 et. seq. (1986); Native Hawaiian Health Care Act of 1988, 42 U.S.C. § 11701 (1988).

[31] *See* Morton v. Mancari, 417 U.S. 535 (1974) (describing the political relationship between Native American Indians and Native Alaskans and the U.S. Government); *but see* Kahawaiola'a v. Norton, 386 F.3d 1271, 1281 (2004) (holding that the relationship between Native Hawaiians and the United States was not the same as the one identified in *Mancari*).

[32] MACKENZIE, *supra* note 9, at x-xi, 20.

> Until recently, American society did not acknowledge that Native Hawaiians have rights that are unique and distinct from those of other citizens . . . Even today, Native Hawaiians must constantly assert to defend their rights in a foreign, and often hostile, legal system if they are to remain a separate and distinct native people.

Id. at ix.

[33] Op. Dep't Interior Solicitor M-36978, Sansonetti Opinion (1993), *cited in* Hawaii Advisory Committee to the U.S. Commission on Civil Rights, Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefiting Native Hawaiians 33 (2001), *available at* http://www.usccr.gov/pubs/sac/hi0601/hawaii.pdf.

subsequently enacted the Apology Resolution. The Apology Resolution acknowledged the United States' responsibility for the overthrow of the Hawaiian Kingdom, but did so without redefining a trust relationship.[34] Despite proposed increased funding for Native Hawaiian programs under the Barack H. Obama Administration, federal funding for Native Hawaiian programs have been cut and Congressional acts establishing a basis for funding such programs have been rescinded over the past decade.[35]

Meanwhile, the United States Supreme Court has whittled away at Native Hawaiian rights through the 2000 Rice v. Cayetano[36] decision, which permitted all Hawai'i state residents to vote in Office of Hawaiian Affairs elections.[37] Equally as damming in the opinion is the Court's use of the term "race" to define Native Hawaiians as a group.[38] This has led to a series of challenges to state programs that benefit Native Hawaiians.[39] Because of this tumultuous history, Native Hawaiians are faced with many sociological and economic uphill battles. There are few resources that remain dedicated to Hawai'i's native sons and daughters. Of these, one of the most important is Kamehameha

---

[34] Apology Resolution, Pub. L. 103-150 (1993); Statement of Solicitor John D. Leshy, U.S. Dep't of the Interior, Nov. 15, 1993.

[35] Dennis Camire, *Native Hawaiian programs cut in Bush's 2009 Budget*, HONOLULU STAR-BULLETIN, Feb. 4, 2008, *available at* http://the.honoluluadvertiser.com/article/2008/Feb/04/br/br6072941583.html; Helen Alton, *UH Medical School Shuts Native Hawaiian Center*, HONOLULU STAR-BULLETIN, Apr. 26, 2007, *available at* http://starbulletin.com/2007/04/26/news/story02.html.

[36] Rice v. Cayetano, 528 U.S. 495 (2000) (holding that although the Office of Hawaiian Affairs ("OHA") was solely concerned with acting for the benefit of Native Hawaiian citizens, elections to its board of trustees could not be restricted to Native Hawaiians because OHA is state-funded agency)

[37] *See* Office of Hawaiian Affairs, http://www.oha.org (last visited Jan. 10, 2010). The Office of Hawaiian Affairs (OHA) is a statewide quasi-autonomous government agency in charge of providing opportunities for the betterment of Native Hawaiians. Drawing their funding from trust funds and lands held in trust, OHA participates in a variety of task forces and community groups, and provides many community-based programs with funding and assists in coordinating different community groups for joint purposes. It also represents Native Hawaiian interests in the Hawai'i State Legislature.

[38] *Rice*, 528 U.S. at 516 (explaining "[n]ative Hawaiian means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778 . . . [or] descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 . . . .") (internal quotations omitted).

[39] *See, e.g.*, Arakaki v. Cayetano, 324 F.3d 1078 (9th Cir. 2003) (dismissing the case for lack of standing, taxpayers' constitutional challenge of state funding for programs benefitting Native Hawaiians); Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003) (challenging constitutionality of allocation of ceded land revenues through the Office of Hawaiian Affairs (OHA) business loan and homestead programs that give preference to Native Hawaiians.); Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007). Both *Arakaki* and *Carroll* were later consolidated and subsequently dismissed for lack of standing.

Schools. It is imperative to the survival of Native Hawaiians that Kamehameha Schools be allowed to remain devoted solely to their betterment as its founder wished.

B. A Princess Leaves Her Legacy: The Foundation of Kamehameha Schools and its Mission

Princess Bernice Pauahi Pākī Bishop, great-granddaughter of King Kamehameha I, was born on December 19, 1831 in Honolulu, Hawai'i to High Chiefs Abner Pākī and Laura Kōnia.[40] At the time of her birth, the Native Hawaiian population was approximately 124,000.[41] By the time she wrote her will in 1883, only 44,000 Native Hawaiians remained.[42]

Throughout her life, the Princess bore witness to the cultural and physical demise of her people, which pushed Native Hawaiians to the brink of extinction. The Native Hawaiians lacked immunity to the diseases brought by the Europeans, which led to a series of epidemics that ravaged the Native Hawaiian populace.[43] Growing Western cultural and economic influence weakened traditional Native Hawaiian value systems and spirituality.[44] Pauahi Pākī, like many other ali'i, took her responsibilities to her people seriously and was devastated by the rapid deterioration of her people.[45] In drafting her will, Pauahi Pākī, the sole heir to most of the lands of high-ranking chiefs throughout the Kingdom, intended to use her properties and assets to help restore Native Hawaiians to their once healthy state and enable them to remain powerful and competitive with the other great peoples throughout the world.[46] Her husband, Charles Reed Bishop, said of her:

> [Pauahi's] heart was heavy when she saw the rapid diminution of the Hawaiian people going on decade after decade . . . [she hoped] [t]hat there would be a turning point, when, through enlightenment . . . the natives would not only hold their own in numbers, but would increase again like people of other nations . . . . And so, in order that her own people might have the opportunity for fitting themselves for such competition, and be able to hold their own in a manly and friendly way, without asking any favors which they were not likely to receive,

---

[40] Kamehameha Schools, *Ke Ali'i Bernice Pauahi Paki Bishop (1831-1884): Founder of Kamehameha Schools*, ¶ 2, http://www.ksbe.edu/pauahi/index.php. [hereinafter *Ke Ali'i Bernice Pauahi Bishop*].

[41] *Id.* at ¶ 5.

[42] *Id.*

[43] Kamehameha Schools, *Biography of Bernice Pauahi Bishop*, ¶ 3, http://www.ksbe.edu/pauahi/bio.php (last visited Jan. 10, 2010) [hereinafter *Biography of Bernice Pauahi Bishop*]; *see also* STANNARD, *supra* note 10, at 1-8.

[44] *Id.*

[45] *Id.* at ¶ 4.

[46] *Id.* at ¶ 5.

> these schools were provided for, in which Hawaiians have preference, and which she hoped they would value and take the advantages of as fully as possible.[47]

When Pauahi Pākī drafted her will in 1883, King Kamehameha IV, Alexander Liholiho, and his wife, Queen Emma Nā'ea, had already established the Queen's Hospital to provide Native Hawaiians with the most current medical treatment available.[48] Therefore, the princess focused on education. It was Pauahi Pākī's belief that a lack of education among Native Hawaiians largely contributed to the rapid decline of her people.[49] Accordingly, she left her estate, about nine percent of the total lands of what is now the State of Hawai'i, as the foundation of Kamehameha Schools:

> I give, devise and bequeath all of the rest, residue and remainder of my estate real and personal, wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars . . . to be known as, and called the Kamehameha Schools . . . I direct my trustees to invest the remainder of my estate in such a manner as they may think best, and to expend the annual income in the maintenance of said schools . . . and to devote a portion of each years income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood . . . I desire my trustees to provide first and chiefly a good education . . . and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women.[50]

After the Princess' death on October 16, 1884, her husband, Charles Reed Bishop, saw to it that her wishes were fulfilled, and provided for the financial backing for the construction of the first school facilities and oversaw the establishment of Kamehameha Schools as one of the estate's five original trustees.[51] The love and dream of Pauahi Pākī for her people has grown to become one of the most important resources for Native Hawaiians to this day.

---

[47] Charles Reed Bishop, Founders' Day Speech, *The Purpose of the School*, 1 Handicraft: A Monthly Journal Dedicated to Manual Training 1, 1 (Jan. 1889), *available at* http://kapalama.ksbe.edu/archives/FirstYears/links/handicraft1889.php [hereinafter *The Purpose of the School*].

[48] *Biography of Founder Queen Emma*, http://www. queensmedicalcenter.net/ index.php?option=com_content&view=article&id=8&Itemid=110 (last visited Jan. 10, 2010). *See also The Purpose of the School*, *supra* note 47. "She wished to establish an institution bearing the name Kamehameha . . . and a hospital or hospitals and schools for boys and girls were mentioned, and in consideration of the Queen's Hospital already established . . . it was decided that schools would be preferred."

[49] *Biography of Bernice Pauahi Bishop*, *supra* note 43.

[50] Will of Bernice Pauahi Bishop, *supra* note 6, at ¶ 13.

[51] *Charles Reed Bishop*, http://www.ksbe.edu/pauahi/ crbishop.php (last visited Jan. 10, 2010).

Kamehameha Schools continues to play an important role in the Native Hawaiian community and positively affect many Native Hawaiian children.

C. "He Lei Poina 'ole Ke Keiki:"[52] The Interplay Between Kamehameha Schools and its Importance to the Native Hawaiian Community

The Princess's estate, valued at a total of over $7.7 billion, supports a private, pre-kindergarten through twelfth grade institution, as well as a state-wide educational system which serves thousands of Native Hawaiian students annually in financing education and educational opportunities at all levels.[53] "Kamehameha Schools' mission is to fulfill Pauahi's desire to create educational opportunities in perpetuity to improve the capability and well-being of people of Hawaiian ancestry."[54] Kamehameha Schools is a necessary presence in the Native Hawaiian community and is fundamental to the success of Native Hawaiians now, more than ever.

According to the 2000 United States Census data, there are approximately 401,162 Native Hawaiians within the United States, with 239,655 (sixty per cent in Hawai'i alone.[55] In the state of Hawai'i, Native Hawaiians generally tend to live in smaller, poorer, rural, isolated communities.[56] Additionally, Native Hawaiian communities demonstrate the lowest rates of literacy and completion of high school.[57] Most recent studies indicate that the Native Hawaiian population is responsible for approximately 33% of all births to unwed mothers, between 40-50% of all teenage pregnancies, and ranks at the bottom of national and state-wide health and educational assessments, with only 12% of the population, on average, attaining a four-year college diploma,

---

[52] 'Ōlelo No'eau. Translation: "The child is a never forgotten garland."

[53] Thomas Yoshida, *Kamehameha Schools Releases FY 2008 Education Financial Summary*, January 09, 2009, *available at* http://www.ksbe.edu/article.php?story=20090109145224286.

[54] *KSBE Mission Statement*, 19, STRATEGIC PLAN 2000-2015, Kamehameha Schools 2000, *available at* http://www.ksbe.edu/ spi/PDFS/Publications/EntireDocument.pdf

[55] ANNETTE HAYASHI, 2006 NATIVE HAWAIIAN DATA BOOK, 17, OFFICE OF HAWAIIAN AFFAIRS 2006, http://www.oha.org/pdf/data book /2006/DataBook2006Demographics.pdf (follow Media/ Publications hyperlink; then follow Hawaiian Databook hyperlink; then follow Databook 2006 hyperlink) ([hereinafter HAYASHI].

[56] *Id.*, at 31; No Child Left Behind Act of 2001 §§ 7202(16)(H), 20 U.S.C. § 7202 (2001), omitted by Pub. L. 107-110, Title V, §501, Jan. 8, 2002, 115 Stat. 1776, *available at* http://www.ed.gov/policy/ elsec/leg/esea02/pg104.html.

[57] No Child Left Behind Act of 2001 §§ 7202(16)-(18), 20 U.S.C. § 7202 (2001), omitted by Pub. L. 107-110, Title V, §501, Jan. 8, 2002, 115 Stat. 1776, *available at* http://www.ed.gov/policy/elsec/leg/esea02/pg104.html; *see also* Nā Ho'oulu Hawaiian Data Center, *Hawaiian Students in the Hawai'i State Department of Education 2001-2002*, PASE REPORT NO. 2001-02: 12 (July 2002), http://www.ksbe.edu /pase/pdf/Reports/K-12/01_02_12.pdf.

and 85% graduating from high school.[58] Native Hawaiian children experience the highest state-wide rates of exposure to family conflict, substance abuse, and lowest levels of parental involvement and discipline for "anti-social behaviors."[59]

Early exposure to dysfunctional communities and crime may lead Native Hawaiian children to become adults who engage in self self-destructive behavior including arrests and incarceration, substance abuse, hyper-sexuality, and violence.[60] The current state of affairs is tragically misaligned with traditional Native Hawaiian social and cultural belief systems, which once provided strong consequences for such inappropriate and unacceptable behaviors, and ensured that family harmony and functionality were not only maintained but enhanced by the broader community structure.[61] In all areas of interest, the Native Hawaiian population is suffering and at risk. But the Native Hawaiian community is not without hope.

Kamehameha Schools currently enrolls approximately 5,400 Native Hawaiian students state-wide, about eight point four per cent of the current population of school-aged Native Hawaiian children.[64] The Schools' admissions policies target specific Native Hawaiian communities by allocating certain spots to applicants from certain areas, in an attempt to directly address the needs of these areas in the state in which Native Hawaiians are concentrated suffering the most.[62] Additionally, the Schools provide boarding opportunities for those students who would otherwise be characterized as "day students" should the student have demonstrable need of a more stable home environment to succeed educationally.[63] In this way, the Schools act as a protector of Native Hawaiian school-aged children, providing as much stability and familiarity as possible.[64] Moreover, Kamehameha Schools provides a series of off-campus educational and cultural enrichment resources for Native Hawaiians who do not attend the Schools.[65] Most current data indicates that these programs reach and assist more than 11,000 Native Hawaiian keiki.[66]

---

[58] HAYASHI, *supra* note 55, at 28-38, 48-52.

[59] KAMEHAMEHA SCHOOLS, KA HUAKA'I, 187-8, PAUAHI PUBLICATIONS, 2005, *available at* http://hawaiidigitallibrary .org/elib/cgi-bin/library?c=nhea&l=en.

[60] *Id.* at 188; *Kamehameha*, 470 F.3d at 833-34; U.S. DEPT OF THE INTERIOR AND U.S. DEPT OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY 2 (2000), *available at* http://purl.access.gpo.gov/GPO/LPS14622.

[61] E.S. CRAIGHILL HANDY, MARY KAWENA PUKU'I, *ET AL.*, POLYNESIAN FAMILY SYSTEM IN KA'Ū HAWAI'I, CHARLES E. TUTTLE COMPANY (1976).

[62] Koren Ishibashi, *Official Enrollment at Kamehameha Schools' Campuses and Preschool Locations: School Year 2005-06*, 5-6, PASE REPORT, November 2005, *available* at http://www.ksbe.edu/pase/pdf/Reports/K-12/05_06_8.pdf.

[63] *Id.* at 6-7.

[64] *Id.* at 8-10.

[65] *See Kamehameha Schools / Bishop Estate Program Evaluation & Planning Data Report,*

The positive effect of the Schools on the Native Hawaiian community cannot be overlooked. As of 2004, Kamehameha Schools had a ninety-five percent rate of graduation, with ninety-seven percent of those graduates planning on attending accredited institutions of higher learning.[67] Of those going onto college, approximately sixty percent are Hawai'i residents who occupy professional or management positions in their chosen fields.[68] It is impossible to deny the Schools' role in assisting the Native Hawaiian community in its constant struggle to recover from the devastating effects of the loss of its sovereignty, land, health, and culture.

It may be reasoned that communities with an increased level of higher education may be less likely to demonstrate self-destructive behaviors, and when such behaviors are present, the communities will be better equipped to address such problems and mitigate their effects. The educational opportunities and cultural identity provided by Kamehameha Schools produces this result among Native Hawaiians. Additionally, although Kamehameha Schools no longer receives federal funds, in the past, the United States Congress has specifically recognized the role that Kamehameha Schools plays in assisting the Native Hawaiian community in its quest for self-determination. Congress recognized the importance of the Schools directly, by enacting legislation specifically to provide funds for the education of Native Hawaiians.[69] One scholar, Angela Kuyo, supports the idea of the United States government facilitating assistance to Native Hawaiians via a Native Hawaiian institution as a means of empowering self-determination and "encourag[ing] reconciliation between the United States government and the Native Hawaiian people."[70]

REPORT NO. 2000-01: 7 November 2000, http://www.ksbe.edu/pase/pdf/Reports/K-12/00_01_7.pdf.

[66] MARY KAWENA PUKU'I AND SAMUEL H. ELBERT, HAWAIIAN DICTIONARY, UNIVERSITY OF HAWAI'I PRESS, HONOLULU, 1986. *Keiki* is the Native Hawaiian word for children. For information regarding the number of children and families affected by Kamehameha Schools community education and outreach programs, *see supra* note 62.

[67] *See Destinations Unlimited: KS Senior Survey, Class of 2003 and 2004*, PASE REPORT 03-04: 31 (September 2004), http://www.ksbe.edu/pase/pdf/Reports/K-12/03_04_31.pdf.

[68] Koren Ishibashi, *Geographic and Social Ties to Hawai'i: Responses from the KS Alumni Survey*, REPORT NO. 05-06: 6 (October 2005), available at http://www.ksbe.edu/pase pdf/Reports/ Post-graduation/05_06_5.pdf.

[69] *See* Hawkins-Stafford Elementary and Secondary Education Improvement Act, Pub. L. No. 100-297, 102 Stat. 130 (1988). This Act released federal money specifically for the education of Native Hawaiians. Title IV, entitled education for Native Hawaiians, provided supplemental Native Hawaiian educational programs and specifically entrusted Kamehameha Schools with developing Native Hawaiian modeled curriculum and family-based education, which would target the broader Native Hawaiian community outside of the Schools themselves.

[70] Angela (Riya) Kuo, *"Let Her Will Be Done:" The Role of KS Admissions Policy in Promoting Native Hawaiian Self Determination*, 13 UCLA ASIAN PAC. AM. L.J. 72, 72 (2007).

Unfortunately, the history of litigation surrounding Kamehameha Schools has compromised its ability to fulfill its mission, with potentially harmful effects upon the Native Hawaiian populace.

III. KAMEHAMEHA SCHOOLS BECOMES AN INCREASINGLY POPULAR TARGET FOR LITIGATION

As one of the richest schools in the nation and as one of the largest land-holders in the state of Hawai'i, it is understandable that Kamehameha Schools and the trust from which it draws funding have been the focal point of litigation. In the past, litigation tended to surround the provisions of Princess Pauahi's will that concerned the application of her vast holdings as financial backing for the Schools.[71] However, whether deciding in favor of or against the Schools, in general, courts have never presumed to either alter the provisions of the will itself or declare portions of the will invalid.[72] More modern courts, however, have displayed a propensity to alter certain provisions of the will under the legal doctrine of *cy pres* which gives courts the power to alter provisions of wills or trusts for a variety of reasons.[73]

With an increasing number of cases under 42 U.S.C. § 1981 challenging the Schools' admissions policy, it is necessary that Kamehameha Schools protect itself from the possibility of any court modifying its Hawaiians-first admissions preference under the doctrine of *cy pres*. Currently, the Schools continues to be pulled into court over the alleged conflict between its admissions policy and § 1981 which explicitly prohibits contractual interactions between parties that

---

[71] *See, e.g.*, Thurston v. Bishop, 7 Haw. 421 (1888) (awarding certain lands inherited by the Princess to the Kingdom of Hawai'i, and holding that the Princess had no legitimate claim to the lands because of technicalities occurring when land claims were "established" during the Māhele). *See also* LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI, 8-16 (discussing the Māhele); *Bishop v. Gulick*, 7 Haw. 627 (1889) (rejecting Kamehameha Schools' claims for exemption from property taxes for lands used to fund its educational mission); *but* see *id.* at 633 (Dole, J., dissenting) ("[A]s it seems to me, the intent of the legislature to exempt all property devoted to the maintenance of private schools is perfectly obvious.").

[72] *See, e.g.*, Smith v. Lindsay, 20 Haw. 330 (1910) (granting the trustees' request for a stricter interpretation of the Princess' will so as to resist pressure from the Attorney General to broaden the range of financial assistance to "orphans and indigents," who were not of Hawaiian descent. The court ruled on the trustees' request without questioning the practicability or legality of any of the will's provisions); *see also* The Will of Bernice Pauahi Bishop, *supra* note 6, at ¶ 13:

> I direct my trustees to . . . devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood[.].

Id.

[73] RESTATEMENT (THIRD) OF THE LAW OF TRUSTS §67 (2009).

consider the race of either party as the sole factor in establishing the contractual relationship. The best way to understand the urgency of this situation is by examining the history of litigation surrounding the Schools and the position in which Kamehameha Schools finds itself.

A. The Problem Begins: A Brief History of Kamehameha Schools and Section 1981 Litigation.

The year 1945 marked the first time that the Hawai'i courts administratively deviated from the expressed provisions of Pauahi Pākī's will.[74] In that case, the Hawai'i Supreme Court approved the merger of the separate boys and girls schools because a change in the circumstances since the drafting of the original will permitted a deviation from the will's original provisions.[75] Although the establishment of a co-educational campus was not detrimental to Kamehameha Schools per se, it did signal that the will was no longer iron-clad and that the climate of the courts had changed. It became a very real possibility that the courts would modify any provision of the will they deemed appropriate.

In 1993, the Ninth Circuit Court of Appeals modified certain provisions of the will that gave rise to the lawsuit. While not utilizing the doctrine of *cy pres* to actually *alter* the contested provisions, the Ninth Circuit issued a holding that affected the applicability of the contested clause. In 1991, an applicant for a teaching position at the Schools filed a complaint with the Equal Employment Opportunity Commission (E.E.O.C.) against Kamehameha Schools/Bishop Estate (KS/BE) because the school refused to hire her due to her religious affiliation, which stood in discord with a provision of Pauahi's will mandating that all teachers at the school be Protestant.[76] The E.E.O.C. filed suit on behalf of the woman against the school in federal district court.[77] The district court granted the Schools' motion for summary judgment on the theory that the Schools' hiring requirement fell within the scope of Sections 702 and 703(e)(1) of Title VII of the Civil Rights Act of 1964, which provides an exception for hiring employees with specific religious backgrounds on the basis of a bone

---

[74] Collins v. Tavares, 37 Haw. 109 (1945).

[75] *Id.*

[76] Will of Bernice Pauahi Bishop, *supra* note 6, at ¶ 13.

> I give, devise and bequeath all of the rest, residue and remainder of my estate . . . unto the trustees below named . . . to hold upon the following trusts, namely: to erect and maintain ... schools . . . called the Kamehameha Schools ... I also direct that the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular sect of Protestants.

Id.

[77] Equal Employment Opportunity Comm'n v. Kamehameha Sch./Bishop Estate, 780 F. Supp. 1317 (D. Haw. 1991).

fide occupation qualification.[78] The court determined that the Schools' desire to maintain a "Protestant presence" on campus, was necessarily tied its educational goals.[79]

> On appeal, the Ninth Circuit reversed and found that when it weighed all significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious . . . . The, ownership and affiliation, purpose, faculty, student body, student activities, and curriculum of the Schools [were] either essentially secular, or neutral as far as religion [was] concerned, and . . . [concluded that] the general picture of the Schools [reflected] a primarily secular rather than a primarily religious orientation.[80]

Consequently, the Schools could not use a potential employee's religion as the basis for a hiring decision. On remand, the district court found that the continuation of any such practices would give rise to legitimate claims against Kamehameha Schools.[81] *E.E.O.C. v. KS/BE* was the first "discrimination-type" lawsuit filed against the Schools and would, arguably, open the door to later discrimination-based lawsuits under § 1981.

In 2003, an anonymous plaintiff filed suit in federal district court against Kamehameha Schools challenging the Schools' "Hawaiians-first" admissions policy as a violation of § 1981 of the Civil Rights Act.[82] In *Doe v. Kamehameha Schools*,[83] Judge Alan Kay found that Kamehameha Schools had "a legitimate justification for its admissions policy, which serves a legitimate

---

[78] Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (1964). ("[T]his subchapter shall not apply to . . . a religious . . . educational institution . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . educational institution . . . of its activities.") (Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)(1) (1964). ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion . . . in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."). Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)(2) (1964). ("[I]t shall not be unlawful employment practice for a school . . . to hire and employ employees of a particular religion . . . if the curriculum of such school . . . is directed toward the propagation of a particular religion.").

[79] *Equal Employment Opportunity Comm'n*, 780 F. Supp. 1317, at 1321-24, *rev'd*, 990 F.2d 458 (9th Cir. 1993).

[80] *Equal Employment Opportunity Comm'n*, 990 F.2d at 460-61

[81] Equal Employment Opportunity Comm'n v. Kamehameha Sch./Bishop Estate, 848 F. Supp. 899 (D. Haw. 1993).

[82] 42 U.S.C.S. § 1981 (2009) (guaranteeing equality of all citizens' in contract, both personally and publicly, whites). Originating in the Civil Rights Acts of 1866 and 1870, § 1981 makes purposeful discrimination based solely on race, ancestry, or ethnic characteristics in the making or enforcement of contracts, by private or government entities illegal.

[83] Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141 (D. Haw. 2003), *rev'd in part*, 416 F.3d 1025 (9th Cir. 2005), *rev'd en banc*, 470 F.3d 827 (9th Cir. 2006).

remedial purpose, and that the policy reasonably relates to this purpose . . . . The preference provided by the admissions policy is not perpetual nor an absolute bar to the admittance of other races to Kamehameha Schools."[84]

Relying on the findings of Congress and Native Hawaiian history, Judge Kay held that Kamehameha Schools' admissions policy constituted a valid race-conscious remedial affirmative action program.[85] On appeal, the Ninth Circuit Court of Appeals reversed this holding of the lower court.[86] The Ninth Circuit stated that it was the Schools' burden to prove that the applicant in question was rejected, or a Native Hawaiian applicant chosen, for a legitimate nondiscriminatory purpose.[87] The court reasoned that because the Schools' student-body was Native Hawaiian, the Schools did not present a legitimate affirmative action program and created an absolute bar for non-Native Hawaiians to access education at the Schools, and as such, its preference was illegal.[88] The Schools appealed the decision and petitioned for an *en banc* rehearing of the Ninth Circuit Court of Appeals, which was granted.

The Ninth Circuit Court of Appeals *en banc* panel held, by a narrow margin, that the preferential admissions policy was valid.[89] The court reasoned that because Kamehameha's admissions preference does not limit alternative possibilities for non-qualified applicants, and that, in re-enacting § 1981 in 1991, Congress specifically intended to allow Kamehameha to maintain its admissions preference...[90] The majority opinion also acknowledged the undisputed educational imbalances faced by Native Hawaiians as formally recognized by, "[c]ongress [which] has expressly recognized the educational disadvantages suffered by Native Hawaiians and their marginalized status."[91] The court further reasoned:

> In view of those facts and congressional findings, it is clear that a manifest imbalance exists in the K-12 educational arena in the state of Hawaii, with Native Hawaiians falling at the bottom of the spectrum in almost all areas of educational progress and success. Furthermore, it is precisely this manifest imbalance that the Kamehameha Schools' admissions policy seeks to address. The goal is to

---

[84] *Kamehameha Sch.*, 295 F. Supp. 2d at 1146.

[85] *Id.* at 1156 (explaining "[a]t present, Kamehameha Schools aims to redress the under-representation of the Native Hawaiians in contemporary society, thereby remedying the continuing effects of marginalization and the impact of western civilization.").

[86] Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 416 F.3d 1025 (9th Cir. 2005).

[87] *Kamehameha Sch.*, 416 F.3d at 1036, *rev'd en banc*, 470 F.3d 827 (9th Cir. 2006).

[88] *Id.* at 1041.

[89] *Kamehameha Sch.*, 470 F.3d at 829.

[90] *Id.* at 827.

[91] *Id.* at 843.

> bring Native Hawaiian students into educational parity with other ethnic groups in Hawai'i.[92]

The majority also stated:

> [N]othing in the record suggests that educational opportunities in Hawai'i are deficient for students, like Plaintiff, who lack any Native Hawaiian ancestry. To the contrary, the same statistical data that portray the difficulties of Native Hawaiian children generally portray much greater educational achievement, in both public and private primary and secondary schools, for children of all other racial and ethnic groups in Hawaii. Those students denied admission by Kamehameha Schools have ample and adequate alternative educational options.[93]

In so reasoning, the Ninth Circuit weighed several factors which have come to be known as the "modified *Johnson* factors." Based on precedent established in *Johnson Controls,*[94] the Ninth Circuit in *Kamehameha* modified the factors used by the United States Supreme Court in determining whether a racial preference is illegal in a private Schools' admissions policy.

The Court adjusted "the first *Johnson* factor to account for [an] external focus," such that private schools may utilize racial admission preferences to remedy significant imbalances in academic achievement which affect the community as a whole.[95] The second factor was modified to ensure that the private school, in applying its racial preference during admissions, acted within a reasonable scope of inquiry, such that the rights of applicants, who fell outside the preferred population, were not "unnecessarily trammeled" such that their potential advancement was "absolutely bar[red]."[96] The third factor was modified in such a way that the questioned admissions policy must not unreasonably exceed its scope and go beyond the remedy it was instituted to embody.[97] For all three modified *Johnson* factors, the Ninth Circuit found in favor of Kamehameha Schools.[98]

Unmoved by this comprehensive reasoning, plaintiff John Doe petitioned the United States Supreme Court for a writ of certiorari, but the case was settled out of court in 2007 and the petition was subsequently dismissed.[99] The Ninth Circuit's *en banc* ruling stands as the law of Hawai'i, but this ruling did not discourage new plaintiffs from filing suit.

---

[92] *Id.*

[93] *Id.* at 844.

[94] Johnson v. Trans. Agency, 480 U.S. 616 (1987).

[95] *Kamehameha*, 470 F.3d at 842.

[96] *Id.* at 844-45.

[97] *Id.* at 842.

[98] *Id.* at 839-846.

[99] Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 550 U.S. 931 (2007).

On August 6, 2008, a new group of "Doe" plaintiffs filed suit against Kamehameha alleging that the Schools preference for Native Hawaiian applicants was illegal under § 1981 and was, therefore, unenforceable.[100] United States Magistrate Barry Kurren ordered the plaintiffs to disclose their identities in order to proceed with the suit.[101] Although the Doe plaintiffs challenged the order, reconsideration was denied in December 2008[102] when the court found that the plaintiffs failed to "show an objectively reasonable fear of extraordinarily severe retaliation [without anonymity]."[103] On appeal in February 2009, United States District Judge Michael Seabright affirmed the order requiring that all parties disclose their identities.[104] The four Doe plaintiffs appealed the issue to the Ninth Circuit Court of Appeals, and oral argument was heard in Honolulu on October 13, 2009.[105]

B. At-Risk: The Schools' Present Position as the Result of Section 1981 Litigation

Because Kamehameha Schools plays such an important role in the Native Hawaiian community and in the future well-being of Native Hawaiians, it is understandable that the more precarious and vulnerable the Schools, the greater the potential harm to Native Hawaiians who have benefited from the Schools.

Herein the problem lies: Kamehameha Schools was established as the active arm of a charitable trust designed to aid and assist Native Hawaiian children by providing them with educational opportunities.[106] Thus, it would be ideal for the Schools to retain a "Hawaiians-first" admissions policy as the most effective means of fulfilling the goals of the trust. However, under current antidiscrimination law and policy, it seems unlikely that the Schools will be able to withstand the constant onslaught of litigation and maintain a preference for Native Hawaiian children without eliminating tuition.

---

[100] Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, No. 08-00359 JMS-BMK, 2008 U.S. Dist. LEXIS 88594 (D. Haw. Oct. 28, 2008).

[101] *Id.* at *2.

[102] Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, No. 08-00359 JMS-BMK, at *12 (D. Haw. Dec. 31, 2008).

[103] *Id.* at *11 (citing Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058 at 1063 (9th Cir. 2000) (internal quotations omitted).

[104] Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, No. 08-00359 JMS-BMK, 2009 U.S. Dist. LEXIS 9067 (D. Haw. Feb. 6, 2009).

[105] Susan Essoyan, *Secret Plaintiffs Appeal Kamehameha Lawsuit: Students Not at Risk Over Suit, Judge Says*, HONOLULU STAR-BULLETIN, March 6, 2009, *available at*, http://www.starbulletin.com/news/hawaiinews/090306_Secret_plaintiffs_appeal_Kamehameha_lawsuit.html.

[106] Will of Bernice Pauahi Bishop, *supra* note 6.

In light of the continuing litigation, Kamehameha Schools is in a vulnerable position. Even if the lower courts continue to issue opinions in the Schools' favor, and the Schools react quickly enough to appease all potential claimants, it is still possible that a higher court could find the contested admissions policies illegal and either eliminate or alter them entirely.[107] Kamehameha Schools would want to avoid this possibility at all costs.

Currently, Kamehameha Schools is considered an arm of a private charitable trust. As a charitable trust, Kamehameha Schools is afforded certain legal benefits (i.e. tax exempt status) and protection. To receive these protections as a charitable trust, Kamehameha Schools, and the estate from which it springs, must accomplish goals that are beneficial to the larger community.[108] Fortunately for Kamehameha Schools, the advancement of education is considered a charitable purpose, and no formal standards have been established to determine the exact interest of the community, as the interests of the community vary according to time and place.[109]

Despite this leeway in classical doctrines governing charitable trusts, the admissions preference at Kamehameha Schools could still yield to the court's discretion under the doctrine of *cy pres*.[110] An application of this sort would affect Kamehameha Schools' ability to direct its benefits and efforts specifically towards Native Hawaiian children.

Generally, when it becomes unlawful, impossible, or impracticable for the terms of a charitable trust to be carried out, a court will modify an appropriate portion of the trust so that it may still fulfill a purpose that reasonably approximates the originally designated charitable purpose.[111] The cause of the charitable trust itself may fail in court and be modified if the particular purpose has become illegal or impossible to carry out.[112] Thus, if the courts were to find that the provision of Pauahi's will dedicating the resources of the Bishop Estate and Kamehameha Schools to Native Hawaiians is illegal, then that particular provision of the trust could be modified. If this modification were to take place, it would likely open up the assets of the Estate and Schools to all school-aged children, regardless of their Native Hawaiian ancestry. As a result, resources once concentrated for the betterment of Native Hawaiians would be shared with a much broader populace, so that it may be assumed that Native Hawaiians would receive a lesser percentage of these resources.

---

[107] *Kamehameha*, 470 F.3d at 860-61.

[108] *See* RESTATEMENT (THIRD) OF THE LAW OF TRUSTS § 28 gen. cmt. a (2003).

[109] *Id.*

[110] *See* Unif. Trust Code § 413, U.L.A. Trust Code § 413 (2005).

[111] *Id.* § 67, cmt. c.

[112] *Id.*

IV. "THE BEST SOLUTIONS ARE OFTEN SIMPLE, YET UNEXPECTED:"[113] EXAMINING A CHANGE IN THE TUITION POLICY AS A POTENTIAL SOLUTION

Kamehameha Schools has been an advocate for the advancement of Native Hawaiians by providing a competitive education with a strong emphasis on traditional Native Hawaiian cultural values.[114] Because of the positive influence of the Schools within the Hawaiian community and the importance of the Schools' role in providing education for Native Hawaiians, preserving Kamehameha Schools has become a priority for Native Hawaiians and the State of Hawai'i.[115] Because of the intensity and frequency of legal challenges to the Schools' admissions policy, an examination of all potential legal fortifications is necessary. Previous suggestions, while certainly meritorious, may not fully solve the problem at hand. Eliminating tuition may provide the Schools with the legal protections necessary to ensure that it continues fulfilling its mission of assisting as many members of the Native Hawaiian community as possible.

20/20 Hindsight: A Re-examination of Past Suggestions

Many have been willing and able supporters of Kamehameha Schools in times of legal crisis in recent years, submitting numerous *amicus curiae* briefs to the courts on behalf of a wide variety of local and national groups and individuals.[116] Over the course of the 2003 *Doe v. Kamehameha Schools*

---

[113] Julian Casablancas, The Strokes, *First Impressions of Earth*, Sony BMG Music (2006).

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

[115] Jon M. Van Dyke, *Why Kamehameha Schools Will Prevail in its Efforts to Limit enrollment to Hawaiians Only*, HONOLULU STAR-BULLETIN, Aug. 24, 2003, at D1; Randall W. Roth, *The Kamehameha Schools Admissions Policy Controversy*, 5 INT'L J. NOT-FOR-PROFIT LAW 1 (2002). Curtis Lum, *State Supports Kamehameha in Admissions Suit*, HONOLULU ADVERTISER, Nov. 7, 2003, at B3.

[116] *See, e.g.*, Brief for 'Ahahui Ka'āhumanu et al., as Amicus Curiae Supporting Defendant-Appellees, *Doe v. Kamehameha*, 441 F.3d 1029 (2005) (No. 44-15044); Brief for Kamehameha Schools Association of Teachers and Parents et al., as Amicus Curiae Supporting Defendant-Appellees, *Doe v. Kamehameha*, 441 F.3d 1029 (2005) (No. 44-15044); Brief for National Association of Independent Schools, as Amicus Curiae Supporting Defendant-Appellees, *Doe v. Kamehameha*, 441 F.3d 1029 (2005) (No. 44-15044); Brief for Mufi Hanneman, Mayor of the City and County of Honolulu, as Amicus Curiae Supporting Defendant-Appellees, *Doe v. Kamehameha*, 441 F.3d 1029 (2005) (No. 44-15044); Brief for 'Ilio'ulaokalani Coalition, as Amicus Curiae Supporting Defendant-Appellees, *Doe v. Kamehameha*, 441 F.3d 1029 (2005) (No. 44-15044); Brief for Hawai'i Civil Rights Commission, as Amicus Curiae Supporting Defendant-Appellees, *Doe v. Kamehameha*, 441 F.3d 1029 (2005) (No. 44-15044); Brief for

litigation alone, eleven *amicus curiae* briefs were submitted to the Ninth Circuit Court of Appeals in support of the Schools' petition for an *en banc* review of the Ninth Circuit's original holding.[117] Each of these briefs introduced perceptions and interpretations of Kamehameha's admissions policy and relationship with Native Hawaiians. While truthful and worthy, these suggestions may fail to protect the Schools.

Despite a Ninth Circuit Court of Appeals' *en banc* decision in favor of the Schools, petitioner Doe saw fit to appeal to the United States Supreme Court.[118] Certiorari was denied after a fast settlement by the Schools that temporarily slowed the flow of litigation.[119] However, various attorneys throughout Hawai'i are constantly searching for new plaintiffs through whom they may bring suit against the Schools.[120] Indeed, in 2008, four students filed another lawsuit challenging the Schools' Hawaiians-first admissions policy.[121] Thus, it is vital to examine the potential shortcomings of previous interpretations of Kamehameha Schools' admissions policy and why a change in its tuition policy may prove a viable alternative. Although many suggestions have been made, it is most efficient to consider the two most prevalent before examining elimination of tuition as an alternative.

The first argument in support of Kamehameha Schools' admissions policy is one of historical justification.[122] Culturally, it was the responsibility of the

---

State of Hawai'i, as Amicus Curiae Supporting Defendant-Appellees, *Doe v. Kamehameha*, 441 F.3d 1029(2005) (No. 04-15044); Brief for Native Hawaiian Legal Corporation et al., as Amicus Curiae Supporting Defendant-Appellees, *Doe v. Kamehameha*, 441 F.3d 1029 (2005) (No. 04-15044); Brief for The Hawai'i Congressional Delegation, as Amicus Curiae Supporting Defendant-Appellees, *Doe v. Kamehameha*, 441 F.3d 1029 (2005) (No. 04-15044); Brief for Hawai'i Business Roundtable et al., as Amicus Curiae Supporting Defendant-Appellees, *Doe v. Kamehameha*, 441 F.3d 1029 (2005) (No. 04-15044).

[117] *Id.* Amicus Curiae Briefs were filed on behalf and in support of Kamehameha Schools by: Hawai'i Civil Rights Commission, Hawai'i Business Roundtable, Equal Justice Society and the Japanese American Citizens League, National Association of Independent Schools, National Indian Education Association and the Alaska Federal Natives, Native Hawaiian Legal Corporation, State of Hawai'i Attorney General, Honolulu City Corporation Counsel, Hawaiian Service Organization, 'Ilio'ulaokalani Coalition, U.S. Congressional and Senate Delegation, and the Ohana Council. *See also* http://www.ksbe.edu/lawsuit/ summary.php.

[118] *Kamehameha*, 550 U.S. 931 (denying certiorari).

[119] *Id.*; *Attorney Solicits Plaintiffs for Kamehameha Schools Lawsuit* (KITV News Broadcast 22 May 2007), *available at* http://www.kitv.com /news/13370001/detail.html.

[120] Alexandre Da Silva, *Lawyer's Search for Clients to Sue Kamehameha Raises Questions*, HONOLULU STAR BULLETIN, May 23, 2007, *available at*, http://archives.starbulletin.com/2007/05/23/news/story05.html.

[121] *Kamehameha Sch.*, No. 08-00359 JMS/BMK, 2008 U.S. Dist. LEXIS 88594 (D. Haw. Oct. 28, 2008) (order denying plaintiff's motion to proceed anonymously as Doe defendants) *aff'd Kamehameha Sch*, NO. 08-00359 JMS/BMK, 2009 U.S. Dist. LEXIS 9067 (D. Haw. Feb. 6, 2009).

[122] Brief for 'Ilio'ulaokalani Coalition, as Amicus Curiae Supporting Defendant-Appellees,

Native Hawaiian ali'i, or chiefs, to care for their people and work toward the benefit of the communities over which they presided.[123] It has been argued that as the creation of a Hawaiian ali'i who acknowledged and embraced her responsibilities to her people, Kamehameha Schools is simply the long-standing embodiment of Princess Pauahi's fulfillment of her duties. Moreover, because the Schools were established while Hawai'i was a sovereign entity, the Civil Rights Act of 1866, and accordingly § 1981, *cannot* apply to the admissions policy because at the time they were enacted, they were not intended to subsume Kamehameha Schools' admissions policy within its authority or within the authority of the United States Constitution.[124] This contention is bolstered by the fact that neither the Bishop Estate nor Kamehameha Schools currently receive federal funding, and that Kamehameha Schools was established on the private lands of a member of the Hawaiian royal family to address the pressing remedial needs of Native Hawaiians—needs that continue to this day.[125]

While the Ninth Circuit Court of Appeals sitting *en banc* directly acknowledged this suggestion in their opinion,[126] the ruling was only slightly in favor of the schools..[127] Moreover, given the current political climate of the courts, were this argument to be presented to the United States Supreme Court, the Court may decide against the Schools given relevant precedent.

For example, in 2003, the United States Supreme Court held in *Grutter v. Bollinger* that the protections against racial discrimination in § 1981 were coextensive with the equal protection clause of the Fourteenth Amendment.[128] Thus, race-conscious admissions preferences *could be* viable under both § 1981 and the Fourteenth Amendment so long as the program utilized a "plus" factor test, where "a rejected applicant will not have been foreclosed from all consideration for that seat simply because he was not the right color . . . and he would have no basis to complain of unequal treatment under the Fourteenth Amendment."[129] Moreover, in the same opinion, the Court supported the race-conscious admission program in question because it was not to be indefinitely

---

Doe v. Kamehameha, 441 F.3d 1029 (2005) (No. 44-15044); Brief for Japanese American Citizens League of Hawaii-Honolulu Chapter, et al. as Amici Curiae Supporting Defendant-Appellees, Doe v. Kamehameha, 441 F.3d 1029(2005) (No. 44-15044), *available at* http://www.ksbe.edu/lawsuit/ summary.php.

[123] DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE 24-28 (2007).

[124] Susan K. Serrano, et al., *Restorative Justice for Hawai'i's First People: Selected Amicus Curiae Briefs in Doe v. Kamehameha Schools*, 14 ASIAN AM. L.J. 205, 210 (2007).

[125] *Id.*

[126] *Kamehameha*, 470 F.3d at 849.

[127] *Id.* at 827.

[128] Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

[129] *Id.* at 341.

employed.[130] Although no Constitutional claims have been raised against the heavily contested admissions policy, this reasoning can be readily extended to Kamehameha Schools' Hawaiians-first admissions policy.

Because Kamehameha Schools' race-conscious admissions preferences does not have an explicit expiration date, the preference would arguably terminate as soon as Native Hawaiians are on equal footing with other peoples or not as at risk. However, a decisive factor in the Court's approval of the race-conscious admissions program at issue in *Grutter* was that the school in question successfully argued that its program had a "sunset clause" and provided for outside periodic review of its necessity.[131] Because of this, an argument requiring "flexibility" in the "sunset clause" requirement of Kamehameha Schools' policy may not withstand judicial scrutiny.

Again in 2006, the United States Supreme Court issued an opinion that might be applied unfavorably to Kamehameha Schools' admissions policy. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court found that plans utilizing race as a factor for assigning students to particular schools, even though utilized in an asserted attempt to maintain racial diversity throughout the school system, violated the equal protection clause of the Fourteenth Amendment.[132] Despite the school district's use of a race-conscious program to assist rather than harm, the Court said that no matter the reasoning behind its application, utilizing race as a major factor in assigning students to particular schools is impermissible.[133] If this rationale were applied by any court to the admissions preference utilized by Kamehameha Schools, the Schools' admissions policy would be held unconstitutional despite its intent to remedy the negative effects of historical wrongs committed against Native Hawaiians.

Though an argument founded in historical justification may be historically and culturally accurate, it would be dangerous for the Schools to rely on this argument alone as justification for retaining its current admissions policy.

A second argument in support of Kamehameha Schools' admissions policy is that the preference outlined in the admissions criteria is a political classification and not a racial one, akin to the political preference outlined in the United States Supreme Court holding in *Morton v. Mancari*.[134] A political preference of this sort may be found because the United States has recognized a special trust relationship with Native Hawaiians as an indigenous people, similar to the special trust obligation the United States has established with Indian Tribes.[135]

---

[130] *Id.* at 341-343.

[131] *Id.*

[132] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 745-46 (2007).

[133] *Id.* at 723.

[134] 417 U.S. 535 (1974).

[135] *Doe*, 470 F.3d at 850-53 (Fletcher, J., concurring).

This special trust relationship is codified by a number of federal preferential programs specifically directed towards Native Hawaiians, and evidenced by the presumption that Congress is fully aware of previous legislation when it enacts new laws.[136] As such, Congress was fully aware of statutory preferences for Native Hawaiians when it reenacted § 1981 in its current form in 1991.[137]

There are several potential problems with this approach to the admissions policy. First, a Native Hawaiian reliance on any of the holdings from the United States Supreme Court decision in *Mancari* is precarious at best because the Court explicitly stated that the finding of a political preference in that case was *sui generis*, limited to the specific facts of that case.[138] The political preference outlined in *Mancari* has been broadened over the years to validate a variety of preferential programs for Native Americans and Native Alaskans.[139] More recently, however, courts have used a powerful footnote in *Mancari*, to restrict the use of a political preference to members of federally recognized Indian Tribes.[140] Consequently, Native Hawaiians are not yet a federally recognized "Indian Tribe," and because it is still unclear as to what form possible federal recognition may take, it would be unwise to assume that Native Hawaiians would be embraced within the preference outlined in *Mancari*. Moreover, because federal recognition of Native Hawaiians is not assured, it is possible that the Supreme Court will continue to narrowly restrict *Mancari* such that it may not apply to Native Hawaiians by the time federal recognition is achieved.

A second problem in assuming the existence of a political relationship is the Ninth Circuit Court of Appeals' precedent, *Kahawaiola'a v. Norton*.[141] In *Kahawaiola'a*, the court established that while Native Hawaiians are indeed a group that the federal government may treat preferentially in certain

---

[136] *See* Hawaiian Homes Commission Act, 42 Stat. 108 (1921), Native Hawaiian Education Act, 20 U.S.C. §§ 7512 (12)-(13) (2002); Native Hawaiian Health Care Act of 1988, 42 U.S.C. §§ 11701 (13), (14), (19), (20) (1988); *Doe*, 470 F.3d at 847 (stating that "we assume that congress is aware of existing law when it passes legislation") (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)).

[137] Serrano, *supra* note 124, at 211.

[138] *Mancari*, 417 U.S. at 554. ("The preference . . . is granted to . . . members of quasi-sovereign tribal entities . . . [i]n that sense . . . the legal status . . . is truly sui generis.").

[139] *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007); Adarand v. Pena, 515 U.S. 200 (1995); *see also* County of Yakima v. Confederated Tribes & Bands of the Yakima Nation, 502 U.S. 251 (1992); Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991).

[140] *Mancari*, 417 U.S. at 549 n.24 ("This preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature.").

[141] 368 F.3d 1271.

circumstances, Native Hawaiians cannot automatically be counted among Indians for any guaranteed benefits arising from an acknowledged special relationship with the United States.[142]

Even if Native Hawaiians were to receive federal recognition as some form of an "Indian Tribe," for lack of a better available Congressional definition, this political preference may apply to Kamehameha Schools, but without providing the necessary protection. Precedent in the Ninth Circuit dictates that discrimination in favor of federally recognized tribes by any entity except the federal government is impermissible as discrimination on the basis of national origin.[143] Thus, even if it were successfully argued that Native Hawaiians could benefit from preferential treatment based upon a special relationship with the United States, Kamehameha Schools may not be fully insulated. While Kamehameha Schools may still be able to retain its preference for Native Hawaiians, it may be faced with the additional challenge of extending this preference to members of other federally recognized native groups.

Because the two most common arguments in support of the preferential admissions policy run into such legal complications, the following section will address how a change of the tuition policy at Kamehameha Schools may shield the Schools from further litigation under 42 U.S.C. § 1981.

V. TIPPING THE BALANCE: A CHANGE IN TUITION POLICY MAY PROTECT THE SCHOOLS FROM FUTURE LITIGATION

Despite the enormously positive effect Kamehameha Schools has had and continues to have on the Native Hawaiian community, the most recent attention garnered has been in relation to lawsuits over its 120-year-old admissions policy granting preference to Native Hawaiian applicants. Unfortunately, attention of this sort, detracts from the mission of Kamehameha Schools, and encourages further litigation. As a private institution, Kamehameha Schools requires tuition as a means of guaranteeing enrollment.[144] This tuition has become intertwined with the legal challenges Kamehameha faces under 42 U.S.C. § 1981. The relationship between the cost of tuition and the admissions policy has not been ignored, but it is often overlooked and downplayed. An

---

[142] *Id.* at 1282-83 (holding that the exclusion of Native Hawaiians from Department of Interior's regulations of acknowledging federally recognized Indian tribes did not comprise discrimination in violation of equal protection clause of the Fifth Amendment).

[143] Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117 (9th Cir. 1998) (holding that discrimination based on tribal affiliation was discrimination based on national origin and a violation of Title VII of the Civil Rights Act, which did not provide for such forms of beneficial treatment).

[144] Letter from Ms. J. Zisk, Kamehameha Schools/Bishop Estate archivist and historian, to author (Feb. 2, 2009) (on file with author).

understanding of the interplay between § 1981 and Kamehameha Schools, when married with basic, classic elements of property law, presents a unique solution to the legal problems facing Kamehameha Schools: that eliminating tuition will help prevent future admissions preference challenges.

A. 42 U.S.C. § 1981 and its Applicability to Kamehameha Schools

All of the challenges to Kamehameha Schools' admissions policy have arisen under a claimed violation of § 1981 of the Civil Rights Act. In pertinent part, 42 U.S. C. § 1981 reads,

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.[145]

This antidiscrimination law has a significant effect on an individual's ability to forge a legally binding contract with another party. The scope of § 1981 is traditionally used to regulate contracts in the public sphere, but has been broadened to regulate contracts made in the private sphere. Namely, it mandates that contracts be made without basing the agreement solely on the race of the parties involved.[146]

A contract is defined as a bargained for exchange.[147] The most readily identifiable indicia of the presence of a contract is *consideration.*[148] As a private institution, Kamehameha Schools establishes a relationship with its Native Hawaiian students on a contractual basis, in the exchange of tuition for education received. The problem arises in the Schools' refusal to enter into this "contractual relationship" with applicants who are *not* Native Hawaiian. One scholar summarizes this predicament:

> The challenge created by these laws is to draw the line between behavior that would be considered a legitimate refusal to contract with another person and behavior that would be prohibited as private discrimination based on the other person's race. As a result, controversies over the proper interpretation of such

---

[145] 42 U.S.C. § 1981(b) (West, Westlaw through Pub.L. 111-87).

[146] *See, e.g.,* Runyan v. McCrary, 427 U.S. 160 (1976) (holding that the private school in question was engaged in private, commercial contracts, and that § 1981 prohibits racial discrimination in making and enforcing private contracts and is not protected by the First Amendment as a form of freedom of association); *Regents of the Univ. of California v. Bakke,* 438 U.S. 265, 315 (1978) (holding that race may be properly considered as one of many factors taken into account when administering a preferential admissions policy); *see also* Eyal Diskin, Section 1981 and the Alchemy of Race and Contract (2008), *available at* http://works.bepress.com/ eyal_diskin/1.

[147] RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS §§ 1-8 (1981).

[148] *See* Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891).

> antidiscrimination duties inevitably involve significant normative choices regarding what conception of contract relationships, or ideal type of contract, should be promoted by antidiscrimination law and policy.[149]

Kamehameha Schools presently charges $3,237 per commuter student per year, and $6001 per boarding student per year, with approximately forty-five percent of its student body receiving some form of additional financial aid.[150] Currently, with the presence of financial aid, the consideration for the Schools' contracts with students lies in the exchange of money for educational services. Each year, Kamehameha Schools spend approximately $20,000 per student.[151] In light of this spending, the amount of tuition is nominal. At most, it is a symbolic representation of a "contract" between the Schools and its students. Should the Schools eliminate tuition, Kamehameha Schools' provision of education would not be the object of a contract, but rather, the giving of a gift, as classically defined in property law.

B. Education as a Property Right

The Fourteenth Amendment to the United States Constitution provides in pertinent part, "[n]o State shall . . . deprive any person of life, liberty, or property; without the due process of law."[152] The Constitution does not enumerate education as "property" explicitly protected under this Amendment.[153] However, litigation over various education-related claims, has

---

[149] Diskin, *supra* note 146; *But c.f.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev.. 1161, 1161 (1995) ("[A] large number of biased . . . decisions result not from discriminatory motivation, as current legal models presume, but from a variety of unintentional categorization-related judgment errors characterizing normal human cognitive functioning."); Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988) (for the general proposition that racial discrimination has been primarily relegated to culture and society since state-sponsored racism is no longer a staple in formal law); Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 467, 477-496 (1988) (for the general proposition that the doctrine of legal realism has contributed to the distinction between private and public racism); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1423 (1982); *see also* Emily M.S. Houh, *Critical Race Realism: Reclaiming the Antidiscrimination Principle through the Doctrine of Good Faith in Contract Law*, 66 U. Pitt. L. Rev. 455 (2005) (contract law plays a limited role in antidiscrimination jurisprudence).

[150] *See* Kamehameha Schools Admissions Office, K-12 Admissions, http://www.ksbe.edu/admissions/k.12.php#tuition (last visited Jan. 10, 2010); *see also Kamehameha Schools 2007-2008 Kapālama Campus Profile, available at* http://kapalama.ksbe.edu/high/home/academics/files/SchoolProfile0708.pdf.

[151] *Kamehameha*, 470 F.3d at 832.

[152] U.S. Const. amend. XIV.

[153] *Id.*

centered on property laws, including the Fourteenth Amendment.[154] Accordingly, on several occasions, courts, including the United States Supreme Court, have stated that education falls within the realm of property rights.[155] In this regard, it is practical to address problems with the Schools' admissions preference from a property-law perspective.

Although the United States Supreme court has never opined about whether education may be gifted, the court has considered questions about education in light of property rights on several occasions.[156] What these cases mean, when viewed in conjunction with each other, and with the Fourteenth Amendment is that children have property rights in education such that education itself is considered property.[157] The key Supreme Court opinion that addressed education as a property right was its 1975 decision in *Goss v. Lopez*.[158] In that case, the Court held that impeding a child's ability to engage in educational processes infringes upon that child's property rights in education.[159] In writing his opinion, Justice White stated, "[t]he state is constrained to recognize a student's legitimate entitlement to . . . [an] education as a property interest."[160] That education is the object of a property interest has been cited and followed in subsequent decisions, and is still good law.[161]

In *Board of Curators v. Horowitz*, the Supreme Court determined that property interests are, "creatures of state law . . . [that are] recognized by state law."[162] Courts have defined education as a responsibility within the purview of states and local governments.[163] The State of Hawai'i creates a property

---

[154] *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 576 (1975) (removing a child from educational activities "for more than a trivial period is a serious event" involving two due process factors, the first of which is that suspension affects students' property rights which cannot be "shed . . . at the schoolhouse door.").

[155] *Id.* at 574-75 (holding that "[a]lthough Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not shed their constitutional rights at the schoolhouse door," and recognizing "a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause . . . .") (internal citations and quotations omitted).

[156] *Id.*; *see also* Boyd v. Bd. of Dir. of the McGehee Sch. Dist. No. 17, 612 F.Supp. 86 (D. Ark. 1985) (holding that a student could not be suspended from a sports team until he had received notice of any charges against him and the opportunity to defend himself against the charges.).

[157] PATRICIA H. HINCHEY, STUDENT RIGHTS: A REFERENCE HANDBOOK 64 (2001)

[158] 419 U.S. 565 (1975).

[159] *Id.*

[160] *Id.* at 574.

[161] *See, e.g.*, K.D. v. Oakley Union Elem. Sch. Dist., 2008 U.S. Dist. LEXIS 9559 (2008).

[162] Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 82 (1978).

[163] *See* San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1 (1973); *see also* Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W. 2d 491 (Tex. Sup. Ct. 1991).

interest in education through its truancy laws, which mandate school attendance for minors within a certain age range, with only narrow exceptions.[164] Courts have found that truancy laws of this sort are a means of state establishment and recognition of this property right.[165] As such, education itself may be considered property. The applicability of state established truancy laws (among other laws) which serve to reinforce the concept of education as a property right, apply equally to private and public schools since education, while traditionally a state function, has never been exclusively reserved to the state.[166] Because education has no distinct corporeal form, it is arguable that education could be legally protectable intangible property that confers upon those in possession legally enforceable rights including the right to distribution, which may be in the form of a gift if so chosen.[167]

This classification would confer typical property rights, including those of distribution, assignment, and transfer by means of a gift, on the education provided by Kamehameha.

C. Property Law and Gifts

In property law, generally, a gift is the gratuitous transfer of property from one person to another without compensation or consideration.[168] For the transfer of a gift to be completed, there must be a transfer of dominion or control over the object or property in question.[169] Education has never been *excluded* by the courts as a form of property *incapable* of being given as a gift to a donee. The fact that education has been included as the object of a contract or property right by the courts indicates exactly the opposite—that education *is* property that *may* be given as a gift to a recipient of a donor's choosing.

Because the Schools are established in the will of Bernice Pauahi as a charitable institution with a disposition for a specific purpose, the Bishop Estate trustees are responsible for conferring the benefits, namely educational

---

[164] HAW. REV. STAT. § 320A-1132(a) (requiring all children ages six to sixteen to attend a public or private school).

[165] *See, e.g., Goss,* 419 U.S. at 573-74 ("Here on the basis of state law, [the students] plainly had legitimate claims of entitlement to . . . education . . . . The state is constrained to recognize a student's legitimate entitlement to an education as a property interest.").

[166] *Id.* at 455; *see, e.g.,* Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) (citing Nebbia v. New York, 291 U.S. 502 (1934)) (declining to rule on whether all actions by businesses that provided essential public services, or services traditionally reserved to the state, qualified as state actions).

[167] Uniform Copyright Act of 1976, 17 U.S.C. § 106A (1976).

[168] Welton v. Gallagher, 2 Haw. Ct. App. 242, 245 (1981) *superseded on other grounds by* Welton v. Gallagher, 65 Haw. 528 (1982). *See* Bennett v. Bennett, 8 Haw. Ct. App. 415 (1991); Almeida v. Almeida, 4 Haw. Ct. App. 513 (1983).

[169] Hocks v. Jeremiah, 759 P.2d 312, 315 (Or. Ct. App. 1988).

opportunities, upon the beneficiaries of the trust by and through Kamehameha Schools in accordance with current trust law doctrines.[170] Gifts, including those effectuated through trustees, are freely transferrable.[171] If the gift of education flows from Kamehameha Schools to the students, it is entirely legally possible for the transfer of complete ownership of the education to occur (so long as the students, as the recipients of the gift, are neither agents of Kamehameha Schools nor the Bishop Estate), satisfying the three classical elements of a gift.[172]

1. Education meets the classical requirements of a gift

After establishing the identification of the donor and donee, the three classical elements of a gift must be met in order to ensure that the gift is legally viable. The three classical elements of a gift are: (1) a *delivery* of either the subject matter of the gift, or a written instrument embodying the terms of the gift from the donor to the done; (2) the donor must possess the *intent* to make a present gift; and (3) the donee must *accept* the gift.[173] In order for the tuition-free gift of education to be successfully given from Kamehameha Schools to its selected recipients, and to withstand judicial scrutiny, the gift must meet all three requirements.

a. Delivery of education

The first legal requirement for a gift, delivery, mandates that control of the subject matter of the gift pass from the donor to donee; a mere oral statement of the gift will not suffice to evidence delivery.[174] For the transfer to be complete there must be an evident transfer of dominion and control over the object of the gift.[175]

For the delivery of a gift to withstand legal scrutiny it must be as "perfect and as complete as the nature of the property and the attendant circumstances and

---

[170] RESTATEMENT (THIRD) OF TRUSTS § 28, cmt. a (2003). See also, Will of Bernice Pauahi Bishop, *supra* note 6, at ¶ 13, codicil 2, ¶ 4. (empowering trustees to "determine whether tuition shall be charged in any case.").

[171] *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 6.2 (2003).

[172] *See, e.g.,* Pikeville Nat. Bank & Trust Co. v. Shirley, 135 S.W.2d 426 (Ky. 1939) (holding that when a third person is instructed to give the gift to the donee, the third person takes as trustee).

[173] *Hocks*, 759 P.2d 312.

[174] *See* Newman v. Bost, 29 S.E. 848 (N.C. 1898).

[175] *See In re* Matter of Cohn, 176 N.Y.S. 225 (Sup. Ct. N.Y. 1919) (discussing the proper role of delivery in the sense of providing a reliable and objective manifestation of the intent to give).

conditions will permit."[176] This emphasis on the circumstances surrounding the delivery of property serve to protect the donor because the act of delivery impresses upon it the finality of the transaction, furnishing objective evidence of the intent of the donor and concrete evidence to substantiate a legal claim to the object of the gift.[177]

Courts traditionally recognize three basic forms of delivery as a means of conveying a gift from one party to another: *symbolic*, *constructive*, and *actual*.[178] Actual delivery of a gift is the manual physical transfer of the subject matter from donor to donee.[179] If actual delivery of a gift is possible, it must be made.[180]

In the context of education, students can be said to receive the education when they attend and participate in classes. Therefore, Kamehameha Schools successfully completes delivery of education to its intended recipients. In addition, because education is not tangible property, but is evidenced by the issuance of a diploma, symbolic delivery is also applicable in this instance. Generally, symbolic delivery will not be allowed unless manual transfer of the property is impossible or inconvenient as in the case of the manual transfer of heavy property or intangible property.[181] Symbolic delivery entails the delivery of something in lieu of the subject matter of the gift and is intended to represent or signify the exchange when actual physical conveyance is impossible or inconvenient.[182] A written instrument, such as a deed or diploma, typically a symbol of commencement from an educational institution, may also signify symbolic delivery of a gift.[183]

Successful delivery is evidenced by the transfer of dominion and control over the education.[184] Dominion and control is measurable, in the case of education, through the student's application of the information learned in practice through tests, papers, projects, and presentations. Testing a student's exercise of

---

[176] McCarton v. Estate of Watson, 693 P.2d 192, 195 (Wash. Ct. App. 1984).

[177] *Cohn*, 176 N.Y.S. 225.

[178] *See, e.g.*, Gruen v. Gruen, 496 N.E.2d 869, (N.Y. 1986), *distinguished on other grounds by In re* Lefrak, 227 B.R. 222 (S.D.N.Y. 1998).

[179] Orient Overseas Line v. Globemaster Baltimore, Inc., 365 A.2d 325, 335 (Md. 1976).

[180] *See, e.g.*, Hudgens v. Tillman, 151 So. 863 (Ala. 1933); Johnson v. Hilliard, 160 P.2d 386 (Colo. 1945); *In re* Meyer's Estate, 45 N.E.2d 495 (Ill. App. 1942).

[181] *See* Howell v. Herald, 197 S.W.3d 505, 508 (Ky. 2006).

[182] *Newman*, 29 S.E. at 850-51.

[183] *See, e.g., Driscoll v. Driscoll*, 143 Cal. 528, 534 (1904).

> Delivery . . . must be according to the nature of the thing . . . . If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property. If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument).

[184] *Welton*, 2 Haw. Ct. App. at 247 (holding that a "donor must divest himself of control of the gift for delivery to be complete.").

dominion and control over the education received at Kamehameha Schools also serves to establish Kamehameha Schools' intent to gift the education to its students. This intent satisfies the second element of a gift.

b. Intent and education

The requirement of intent is fairly basic: the donor must have the objectively identifiable intent to make a present gratuitous transfer of an object to the donee without any form of compensation or consideration.[185] The key is there must be an intent to make a *present* transfer, not a transfer that will take effect in the future.[186] The transfer of education from a school to a student is a present transfer when information and knowledge are imparted on a daily basis.

Kamehameha Schools is responsible for developing curricula for both their own campuses and other, public school campuses around the State of Hawai'i.[187]

The relationship between Kamehameha Schools and its students is enhanced by this concern shown for the students, and the students' return to class, day after day, year after year, until commencement, signifies the third necessary element for a gift: acceptance.

c. Acceptance and education

In order for a gratuitous transfer to withstand legal scrutiny and be considered a "gift," the donee must accept the gift.[188] Courts usually presume clear and unequivocal acceptance, such that the finality of the transaction is signified, absent clear indicia to the contrary.[189] Regular attendance on a daily basis and a return to the same educational institution annually until commencement suffices to signify the student's acceptance of the gift of education.

If the donee repudiates at any point during the transfer, the transfer is deemed incomplete, and there is no gift for lack of acceptance. Because

---

[185] *Id.* at 245, *superseded on other grounds by* Welton v. Gallagher, 65 Haw. 528 (1982).

[186] *Hocks*, 759 P.2d at 315 ("A gift to take effect in the future is ineffective.").

[187] *See* Hawkins-Stafford Elementary and Secondary Education Improvement Act, Pub. L. No. 100-297, 102 Stat. 130 (1988) (releasing federal funds specifically for the education of Native Hawaiians and entrusting Kamehameha Schools with the duty to develop Native Hawaiian-modeled curricula and family-based education which would target the broader Native Hawaiian community outside of the Schools themselves).

[188] RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS § 6.2, cmt. y (2000) (stating that a gift of personal property is not complete until it is accepted by the donee).

[189] *Id.* (stating that absent clear and obvious indicia otherwise, courts will presume that acceptance has occurred).

students at Kamehameha Schools may leave the school to seek educational opportunities elsewhere, they are free to repudiate at any time. Therefore, the gift of education is renewed annually. A passage from one grade level to the next combined with a return to the same school the following school year is indicative of a clear and unequivocal acceptance of the gift, symbolizing the finality of the annual transaction.

2. The Elimination of tuition from Kamehameha Schools and its effect on this "gift of education"

Traditionally, gifts can be selectively given to any donee the donor chooses. There are no formal restrictions on how a donor may evaluate and choose potential recipients. In this vein, were Kamehameha Schools to stop charging tuition, the Schools could retain its Hawaiians-first admissions preference as a means of selectively transferring this gift. This favoritism is not actionable as a form of discrimination. Without tuition, preference for Native Hawaiians during the admissions process would be constitutional as that of a private actor, compelled *not* by state law but by a private will.[190] It would not come remotely close to imposing one of the "badges and incidents of Slavery" that would trigger judicial or Congressional regulation.[191] Moreover, schools may utilize factors, like race, to make certain decisions under limited circumstances, if such factors are tied to the importance of their educational mission.[192] Aiding and assisting Native Hawaiians by providing them with educational opportunities that they may not otherwise have *is* the mission of Kamehameha Schools.[193] By eliminating tuition, Kamehameha Schools may immunize itself against litigation generated by the alleged conflict between its admissions preference

---

[190] *See Parents Involved*, 551 U.S. at 729-31, 739, 742-44.

> The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations. . . . We put the burden on state-actors to demonstrate that their race-based policies are justified.

Id. (internal quotations and citations omitted).

[191] Civil Rights Cases, 109 U.S. 3 (1883) (holding that sections 1 and 2 of the 1875 Civil Rights Act were unconstitutional because they sought to regulate private action, that the Thirteenth Amendment prohibits the badges and incidents of slavery, and that the private discrimination in question did not amount to badges and incidents of slavery).

[192] *Grutter*, 539 U.S. at 329 (holding that the Equal Protection Clause does not prohibit the narrowly-tailored use of race in the schools' admissions process to further the schools' compelling interest in obtaining certain educational benefits).

[193] Charles Reed Bishop, *The Purpose of the School*, *supra* note 47; *see also* Will of Bernice Pauahi Bishop, *supra* note 6, at ¶ 13. (stating "I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women.").

and § 1981. As an arm of a tax-exempt institution, this is an extremely important goal for Kamehameha Schools.

3. Conditional gifts and the dangers of contracts

Some would argue that even *if* Kamehameha Schools were to stop charging tuition, a contract is still present between the parents or legal guardians, on behalf of the minor students, and the school itself. It may be simplistically characterized as an education in exchange for compliance with school policies, rules, guidelines, etc., This interpretation is misguided. While all of these elements are important aspects of the educational experience at Kamehameha Schools, none of them, taken individually or collectively, gives rise to the presence of a contract between Kamehameha Schools and its students in light of traditional legal doctrines.[194]

As is the case with many other private schools, Kamehameha Schools has not only graduation requirements, but also enforces dress code and student conduct policies. At first, these requirements appear to be conditions of the larger social contract between the students and Kamehameha Schools which, sans tuition, would be conditions of the gift. Conditions generally fall into two categories: conditions precedent, and conditions subsequent.

A condition precedent is one which must be fulfilled before a particular disposition or action can occur.[195] A gift subject to a condition precedent means that the donee does not acquire the property until he satisfies a relevant condition.[196] Some courts view gifts given under conditions precedent as incomplete transfers since they are not totally gratuitous.[197] This is because in using the condition precedent, the donor is not completely vesting ownership of the object of the gift to the donee. While gifts given under conditions precedent *may* be valid and *do* exist, they give rise to other concerns, and the condition precedent comes very close to consideration for a contract.[198]

---

[194] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. b (1981) ("In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement. . . . the law is concerned with the external manifestation rather than the undisclosed mental state . . . it is not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise.").

[195] BLACK'S LAW DICTIONARY 293-294 (6th ed. 1990) ("[A condition precedent is] a stipulation or prerequisite in a contract, will, or other instrument constituting the essence of the instrument . . . . An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. "). In this way it is the effective equivalent of consideration for a contract.

[196] MOHAMED RAMJOHN, SOURCEBOOK ON LAW OF TRUSTS 183 (2d. ed. 1998).

[197] Sonja A. Soehnel, *Effect of Impossibility of Performance of Condition Precedent to Testamentary Gift*, 40 A.L.R. 4th 193(1985).

[198] Within the context of wills and testamentary gifts, a "condition precedent" is a

The condition precedent essentially affects the donor's intent to give the gift at present. This is one of the three classical requirements of a gift, which, if unsatisfied, affects the validity of the gift.

Furthermore, this second approach to the "conditions" set by Kamehameha Schools would transform the relationship between Kamehameha Schools and their students from that of donor-donee to contracting parties—the very relationship Kamehameha Schools would like to avoid establishing. However, Kamehameha Schools do not enforce these policies and requirements on applicants *prior* to admission. Adherence to school-established codes of dress, conduct, attendance, etc. are required of current students in order for them to continue enrollment for the next academic term. Accordingly, the policies are conditions *subsequent* which do not affect the status of Kamehameha Schools' gift, and may be used in the renewal of the gift.

A condition subsequent is an occurrence which will bring about an end to a particular situation or action.[199] A gift subject to a condition subsequent is successfully transferred to the donee but will terminate upon the completion of a particularly specified event.[200] In this way, Kamehameha Schools' policies, as conditions subsequent, would operate terminate or divest a transfer in such a way that the part of the gift already given would remain with the donee. The donee, then, could not receive any more of the gift, nor have the gift renewed. The use of conditions subsequent in giving gifts is not in discord with law or policy.[201]

Generally, if a gift is given on terms that it will be renewed or continue until and only until a certain event occurs, then barring invalidity of the condition, the gift will terminate.[202] The Schools, then, retains its right to discipline students for behavioral problems or expel those students who do not meet minimum requirements. In addition, the conditions subsequent enable Kamehameha Schools to comply with the legal conditions placed on educational institutions by the State of Hawai'i.

---

requirement that something happen or begin to happen before the gift is given, or begins to be given. *See, e.g., Ballard v. McCoy*, 443 S.E.2d 146, 148 (1994). Within the context of contract law, the consummation of one party's performance constitutes valid "consideration" which creates a binding contract. *See, e.g., Hargroves v. Cooke*, 15 Ga. 321, 326 (1854) (defining "continuing consideration" as consideration party executed and partly executory).

[199] BLACK'S LAW DICTIONARY 293-294 (6th ed. 1990). *See also*, THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 50 (2d ed. 1984).

[200] RAMJOHN, *supra* note 196, at 80.

[201] Conditions subsequent exist within the law governing wills, trusts, and estates such that the title passes to the grantee or devisee, subject to divestiture on failure to perform a condition. 28 Am Jur. 2d Est. § 132 (2008); 32 Am Jur. 1st L. & T. § 825 (1962); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 30.1, cmt. n (1988).

[202] RESTATEMENT (SECOND) OF TRUSTS §§ 401, 412, 413 (1959). *See also, e.g.*, Dunne v. Minsor, 143 N.E. 842 (Ill. 1924); Donehue v. Nilges, 266 S.W.2d 553 (Mo. 1954).

a. School policies are more than mere conditions

As *a school* Kamehameha Schools has specific obligations to its students and communities that are effectively addressed by policies regarding dress code, attendance, required courses, and student conduct. Hawai'i law requires that, unless excused, a child between the age of six and eighteen is required to attend school.[203] Truancy laws apply equally to both private and public educational institutions. Kamehameha Schools' attendance policies suffice as a single means of accomplishing several ends. Kamehameha Schools ensures acceptance of the gift of education to the students, see to it that the laws of the state are followed, and ensure that dominion and control over the gift is properly transferred. However, Kamehameha Schools also has policies regarding graduation requirements, student conduct, and student uniforms.[204] Graduation requirements and curricula standards serve to define exactly what knowledge and education is being gifted to the students. The additional policies regarding student conduct and dress serve to satisfy the burdens placed on schools to protect children when they in the place of parents under the doctrine of *in loco parentis*.[205] The legal doctrine *in loco parentis* gives schools the inherent right to regulate student conduct and behavior as would a parent.[206] Private schools have been given significantly broader powers in this arena than public schools.[207] In operating *in loco parentis* Kamehameha Schools' policies serve to ensure that its students are well-adjusted, well-rounded individuals who will be able to make a significant contribution to the community at large by being "good and industrious men and women."[208] Kamehameha Schools mission is to educate Native Hawaiian students so as to produce "good and industrious men and women" in accordance with the wishes of its founder. These goals also harmonize the gift of education provided by Kamehameha Schools with the charitable purpose of the trust and the duties acknowledged to the larger community. If Kamehameha Schools stopped charging tuition, it could continue to fulfill its mission to the Native Hawaiian

---

[203] HAW. REV. STAT. § 302A-1132(a) (2009) (requiring attendance at a public or private school for all children ages six to sixteen).

[204] KSBE, *Kamehameha Schools Kapālama High School 2009-2010 High School Student/Parent Handbook* 11-34, *available at:* http://kapalama.ksbe.edu/high/home/academics/files /StuParHandbook0910.pdf.

[205] BALLENTINE'S LAW DICTIONARY 943 (3d ed. 1969).

[206] 67A C. J. S. *Parent and Child* § 346 (2009) ("In loco parentis embodies two ideas: first, the assumption of parental status by one who is not the child's legal parent, and second, the discharge of parental duties.").

[207] *See, e.g.*, Gott v. Berea Coll., 161 S.W. 204 (Ky. 1913) (holding that university had the authority under *in loco parentis to* prescribe admission requirements and student conduct standards).

[208] Will of Bernice Pauahi Bishop, *supra* note 6, at codicil 1, ¶ 13.

community and satisfy its duties as an educational institution while preserving its assets for future generations of Hawaiians.

CONCLUSION

The story of the Native Hawaiian people is a complicated and sad one—it is the story of a great people who have lost much of their ancestors' legacy through no real fault of their own. They are now a people in crisis. However, Native Hawaiians are not without hope. Kamehameha Schools provides justly deserved opportunities for the betterment and advancement of Native Hawaiians. Rooted in a Princess's love for her people, this institution gives back to Native Hawaiians and the community at large by addressing socio-economic disparities through education. Its mission is pure, its goal is untainted, and its vision is unwavering. Kamehameha Schools' ability to have positive effects within the Hawaiian community is in large part due to its admissions preference for Native Hawaiian children. This preference may be compromised by the onslaught of litigation Kamehameha Schools faces based on the simple exchange of tuition for education. Were Kamehameha Schools to stop charging tuition and give the education freely, its approximately 120-year-old Hawaiians-first admissions preference may be protected from judicial intervention. Ninth Circuit Court of Appeals Chief Judge Alex Kozinski made this clear in his dissent to the 2006 *en banc* decision in favor of Kamehameha Schools when he said:

> I write only to point out that the issue we are called on to decide may be a problem of the schools' own making . . . The provision is implicated here *because* the schools charge tuition and must therefore enter into a contractual relationship with each student. I don't believe section 1981 would apply at all if the schools were run entirely as a philanthropic enterprise and allowed students to attend for free.[209]

If Judge Kozinski is right, and the problem essentially stems from Kamehameha Schools charging tuition, then Kamehameha Schools, through the provisions of its founder's will, has the means necessary to avoid further litigation. By eliminating tuition, Kamehameha Schools can retain its current admission policies while fulfilling its obligations to Native Hawaiian children.

---

[209] *Kamehameha*, 470 F.3d at 888-89 (Kozinski, J., dissenting) (emphasis added).

Refereeing the Recruiting Game: Applying Contract Law to Make the Intercollegiate Recruitment Process Fair

Jamie Y. Nomura*

INTRODUCTION

On April 26, 2007, Daniel Smith received a birthday present that most boys only dream about: a scholarship offer to play football for the University of Hawai'i ("UH").[1] All UH asked in return was for Smith to promise that he would not entertain offers from other schools.[2] Overjoyed, Smith eagerly accepted.[3] Although verbal commitments are non-binding,[4] the practice is common within the National Collegiate Athletic Association ("NCAA").[5] Typically, a university will make an offer to a prospective student-athlete ("recruit"), and the recruit will provide a verbal or written acceptance until he or she can finalize the contract by signing a National Letter of Intent ("NLI") on National Signing Day ("Signing Day").[6] Universities and recruits use this

---

* J.D. Candidate 2010, William S. Richardson School of Law, University of Hawai'i at Manoa. Special thanks to Dean Aviam Soifer and Professor Hazel Beh for their guidance, Nicholas K. Lee for making this possible, Julianne Nomura and Janelle Nomura for being the author's inspiration, Mitsuko Takahashi and Kristen A. Yamamoto for their help with editing, and the rest of the author's family and friends for all their love and support.

[1] Andy Staples, *Going to Court Over Commitment*, SPORTS ILLUSTRATED, Feb. 29, 2008, http://sportsillustrated.cnn.com/2008/writers/andy_staples/02/29/hawaii.recruit/ ("Daniel said that on April 26 – his birthday – he received a call from [former UH defensive line coach Jeff] Reinebold, who offered a scholarship.").

[2] *See id.* (statement of Daniel Smith) ("[UH Coach Reinebold] said 'If we offer you a scholarship, we want you to be 100 percent committed to us, and we'll be 100 percent committed to you.'").

[3] *Id.*

[4] National Letter of Intent, Frequently Asked Questions, http://www.ncaa.org/wps/wcm/connnect/nli/Home/ (hyperlink under "Frequently Asked Questions" then follow "general" hyperlink; then follow "10." Can I make a verbal commitment to a school and sign a National Letter of Intent with a different school) (last visited Jan. 19, 2010) ("A verbal commitment, stating publicly one's intentions to attend a certain institution, is a non-binding, oral agreement between you and the institution. The only binding nature of the commitment is your word and the institution's promise.").

[5] BRUCE FELDMAN, MEAT MARKET 6 (2007) ("Some coaches simply call a recruit and tell him he is 'officially' being offered a scholarship to play football.").

[6] *See generally* National Letter of Intent, http://www.ncaa.org/wps/portal/nli (last visited Jan. 19, 2019) (providing internet links to information on the National Letter of Intent.).

system as a safety net to secure their players and spots until Signing Day arrives. Until then, the university normally calls the recruit on a periodic basis to ensure that the recruit has not changed their position.[7]

This is what UH did in the ten months following Smith's verbal acceptance.[8] Thus, it is hardly surprising that Wanda Smith was shocked and outraged when she received a phone call from UH, less than a month before National Signing Day, informing her that UH Head Coach June Jones had left the program and that all previous scholarship offers, including her son's, had been revoked.[9]

Daniel Smith's story exposes universities' ability to exploit recruits. Universities have the resources to maintain back-up plans, while recruits often rely on the university's offer to their serious detriment. Because there are more prospective athletes than there are scholarships available, the recruit will often find that other, previously offered scholarships, have already been given away. Furthermore, it is easy for a university to find a comparable athlete, while a jilted recruit will have a difficult time finding a comparable university and athletic program. A university may lose some revenue when they lose a star recruit, but a recruit may lose irreplaceable educational and athletic opportunities.

These lost opportunities have an impact on the recruit for more than the five years of collegiate athletic eligibility, and they also can affect the recruit's professional and academic aspirations as well.

Smith's story is not uncommon.[10] Due to the imbalanced relationship between the university and the recruit, high school seniors are inherently at a severe disadvantage in the recruiting process. Coaches have more experience and knowledge regarding NCAA recruiting regulations and loopholes. Recruits are often young, inexperienced, and overly-trusting. When courting a recruit, a coach can make promises that he or she has no intention of keeping. A recruit will often rely on a coach's word when making the decision of which school to sign with. This occurs because a recruit often communicates solely with a university's coaching staff during the entire recruiting process.[11] Thus, a

---

[7] *See* Andy Staples, *Eliminate Signing Day Entirely*, SPORTS ILLUSTRATED, June 6, 2008, http://sportsillustrated.cnn.com/2008/writers/andy_staples/06/05/early.signingday/index.html (suggesting that following the current recruitment process, coaches must baby-sit committed players until National Signing Day arrives).

[8] Staples, *supra* note 1 ("In monthly conversations, Daniel said, Reinebold assured him the scholarship was his.").

[9] *Id.* ("On Jan. 11, the Smiths say that Reinebold called them to say that because of Jones' departure to SMU, all previous scholarship offers had been revoked.").

[10] *Id.* ("Every year, thousands of athletes find themselves scrambling for scholarships after coaching changes or after coaches simply rescind non-binding scholarship offers because they found more talented players.").

[11] Interview with Janelle Nomura, basketball scholarship recipient, California State University at Northridge, in Northridge, Cal. (Mar. 7, 2009); *see also* Michael J. Cozzillio, *The*

recruit may sign with a university based on what he or she has been promised, while the coach knows that any promise disappears if and when the recruit agrees to the standardized language of the NLI.[12]

Additionally, recruits have more to lose by relying on the promises of the coaches. If a recruit commits to a university, but decides to sign with another school, the coach can simply offer the scholarship to another recruit. However, if a university has made more verbal offers than they can accommodate, or if a better recruit becomes available at the last minute, the university can rescind its offers and the out-of-luck recruits are severely disadvantaged. Despite the frequent occurrence of recruits finding themselves in Daniel Smith's position, Smith's lawsuit could set an important precedent as the first of its kind to be decided in court.[13]

This paper argues that the NCAA should impose stricter regulations on the recruitment process. First, in order to avoid confusing and misleading recruits, the NCAA should rename the recruiting term "commitment." Second, to reduce proof issues and promote uniformity, the NCAA should mandate that all scholarship offers be in writing. Third, to level the bargaining power between the contracting parties, the NCAA should limit the number of scholarship offers a coach can make every year to the number of scholarships available. Fourth, the NCAA should require that recruits have an official representative working on their behalf, provided either by universities or high schools. Fifth, until courts recognize universities as fiduciaries to their recruits, the NCAA should acknowledge the special relationship by drafting a code of ethics for the recruitment process that incorporates the duty to negotiate in good faith. Sixth, the NCAA should eliminate the practice of National Signing Day, allowing recruits to sign an NLI at any time, thereby making the non-binding commitment period leading up to Signing Day unnecessary.[14] Finally, should Daniel Smith's case proceed to trial, the court should recognize the injustice Smith suffered by granting him relief under the doctrine of promissory estoppel.

Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name, 35 WAYNE L. REV. 1275, 1288 (1989).

[12] *See* Ross v. Creighton Univ., 957 F.2d 410, 416-17 (7th Cir. 1992) ("To state a claim for breach of contract, the plaintiff must . . . point to an identifiable contractual promise that [the university] failed to honor."); *see also* Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41, 62 (2006) (Reasoning that the holding in *Ross* "implicitly requires the student-athlete to bargain for specific contractual terms, a practice simply not allowed within the NCAA contractual documents pertaining to student-athletes' athletic scholarships.").

[13] Staples, *supra* note 1 ("Sports law scholars will watch this case closely, because it could set a legal precedent. If a school must pay after revoking a scholarship offer it may force schools to fundamentally chance [sic] the process by which they offer scholarships.").

[14] *Staples*, *supra* note 7.

Part I describes the college sports recruitment process. Part II discusses the relevant theories of contract law that apply to the university-recruit relationship, and argues for the recognition of a fiduciary or quasi-fiduciary relationship. Part III proposes solutions to the problems inherent in college recruiting, as regulated by the NCAA, and suggests potential remedies in contract law for athletes, such as Daniel Smith, who have been victimized by current recruiting practices.

I. BACKGROUND

A. The National Letter of Intent

The NLI is an agreement, drafted by the Collegiate Commissioners Association ("CCA"), that provides an athletic financial aid award to a recruit for one academic year, provided he or she is admitted to the institution and qualifies for aid under NCAA guidelines.[15] The CCA provides governance oversight over the NLI program, while the NCAA Eligibility Center manages the program's daily operations.[16] Although the CCA governs the NLI, several NLI provisions require compliance with NCAA rules and regulations, thus incorporating the NCAA into the program.[17] The rest of the recruiting process, apart from the NLI, is run by the NCAA.[18]

Beginning in 1964, the NLI was designed to "reduce and limit recruiting pressure on student-athletes; and [t]o promote and preserve the amateur nature of collegiate athletics."[19] Prior to the NLI, recruiting was not thoroughly regulated[20] and collegiate coaches took advantage of the situation. The larger the university, the more emphasis it placed on recruitment.[21] Furthermore,

---

[15] National Collegiate Athletic Association, *About the National Letter of Intent (NLI)*, http://www.ncaa.org/wps/wcm/connect/nli/NLI/About+the+NLI/ (last visited Jan. 19, 2010).

[16] *Id.*

[17] *See National Collegiate Athletic Association, NLI Provisions*, http://www.ncaa.org/wps/wcm/connect/nli/NLI/NLI+Provisions/ (last visited Jan. 19, 2010); *see, e.g.*, National Collegiate Athletic Association, NLI Provisions', Recruiting Ban After Singing, http://www.ncaa.org/wps/wcm/connect/nli/NLI/NLI+Provisions/Recruiting+Ban+After+Signing (last visited Jan. 19, 2010).

[18] *National Collegiate Athletic Association, 2009-10 Guide for the College-Bound Student-Athlete*, http://www.ncaastudent.org/NCAA_Guide.pdf [hereinafter *NCAA 2009-2010 Guide*].

[19] Stacey Meyer, *Unequal Bargaining Power: Making the National Letter of Intent More Equitable*, 15 MARQ. SPORTS L.J. 227, 227-28 (2004).

[20] Michael J. Riella, *Leveling the Playing Field: Applying the Doctrines of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. REV. 2181, 2185 (2002).

[21] *Id.*

without any regulations, coaches could use "sales pitches"[22] to entice recruits to play for their program. The NLI was created in response to the dire situations involving vulnerable recruits and ruthlessly aggressive coaches.[23]

The NLI was designed to "accommodate the concerns of *all* parties."[24] The recruit gains an assurance of financial aid and a spot on a team in exchange for her commitment to attend the university and participate in intercollegiate athletics for one full academic year.[25] The NLI was created to be a contract between the parties, executed in writing, in an attempt to give both parties peace of mind. Its ultimate purpose was to provide certainty in the recruiting process.[26]

Courts have recognized the contractual nature of the NLI.[27] For example, the court in *Jackson v. Drake University* acknowledged that "the financial aid agreements entered into by [the recruit and the university] constitute valid contracts."[28] Courts have determined that the contract consisted of the NLI and the financial aid agreement.[29] In *Fortay v. University of Miami*, the federal district court redefined the contract to include various recruiting letters, in addition to the NLI and the scholarship agreement.[30] Thus, the binding nature of a signed NLI and accompanying financial aid award is generally recognized.

B. The Offer and Commitment

The practice of obtaining verbal commitments from recruits prior to National Signing Day evolved in response to the creation of the NLI. When a coach

---

[22] *Id.*

[23] Cozzillio, *supra* note 11, at 1289.

[24] *Id.* at 1292 (emphasis added).

[25] *Id.* at 1290.

[26] Riella, *supra* note 20, at 2185.

[27] *Id.* at 2195-96 (stating that courts have held that the NLI is a contract and the judicial recognition of the contractual nature of the athlete-institution relationship has spawned numerous actions by athletes who allege that their chosen university has in some way breached a contractual promise).

[28] Jackson v. Drake Univ., 778 F. Supp. 1490, 1493 (S.D. Iowa 1992) (holding that the financial aid agreement between a university and a recruited student-athlete do not implicitly contain a right to play basketball, and therefore no breach of contract occurred).

[29] Hanlon, *supra* note 12, at 63 (citing Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1144 (1997)).

[30] *See* Order Granting in Part and Denying in Part Defendant Motion. to Dismiss at 2, Fortay v. Univ. of Miami, (S.D. Fla. Nov. 22, 1994) (No. 94-0385-CIVMORENO) (rejecting plaintiff's argument that the contract between a university and a recruited student-athlete gives rise to implied contractual duties); *see also* James Kennedy Ornstein, *Broken Promises and Broken Dreams: Should We Hold College Athletic Programs Accountable for Breaching Representations Made in Recruiting Student-Athletes?*, 6 SETON HALL J. SPORT L. 641 (providing a thorough account of *Fortay*, 778 F.Supp. 1490).

takes notice of a recruit, he or she will begin the recruiting process with numerous letters and phone calls.[31] If a coach is serious about a recruit, he or she will invite the recruit on an official visit to the university.[32] If a coach is impressed with a recruit, he then gives the recruit either a verbal or written scholarship offer.[33] This offer is typically informal, does not include the terms of the NLI, and is considered non-binding by the NCAA.[34] Furthermore, because the NCAA does not regulate how scholarships are offered, this practice varies among universities. Due to the lack of regulation, a coach may impose an arbitrary deadline for commitment. A coach may threaten to revoke a scholarship offer from one recruit, while giving another, more prized recruit, all the time he needs to make a decision. Once a recruit accepts an offer and verbally commits to a coach, the media notifies the nation of the recruit's decision. From then on, contact between a coach and a committed recruit occurs more sporadically. Coaches want to keep tabs on their committed recruits, but also need to focus their attention on other recruits and their current team.

Because the NCAA imposes specific periods each year during which a recruit can sign the NLI,[35] coaches will continue to communicate with their committed recruits until the applicable signing period approaches. Shortly before the signing period begins, the university will send the recruit the NLI and financial aid award.[36] Once a recruit receives the NLI, it is relatively uncommon for a coach to revoke the offer due to the bad publicity that would result:

> For a school to "drop" a player at the last minute after accepting a verbal commitment, it is almost sure political suicide. The player and his parents are usually upset and certainly his high school coach is upset. Many times the high school coach will verbally ban a school from coming back to recruit future prospects.[37]

However, in theory, a coach may theoretically revoke an offer at any time before a recruit signs the NLI without breaking any NCAA rules or suffering

---

[31] NCAA 2009-2010 Guide, *supra* note 18.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] National Collegiate Athletic Association, Frequently Asked Questions: When is the permissible time period for signing a Letter of Intent?, http://www.ncaa.org/wps/wcm/connect/nli/NLI/Frequently+Asked+Questions/Signing+National+Letter+of+Intent/When+is+the+permissible+time+period+for+signing+National+Letter+of+Intent (last visited Jan. 19, 2010).

[36] *Id.*

[37] Randy Rogers, *Inside the Verbal Commitment Circle*, Rivals.com, http://studentsports.rivals.com/content.asp?CID=504616 (last visited Jan. 19, 2009).

any disciplinary consequences.[38] The commitment is not finalized and binding until the recruit signs the NLI, signs the financial aid agreement, and returns both to the university.[39]

Despite the good intentions of the NLI, the verbal commitment practice continues to exploit recruits. It allows coaches to "provide answers which are motivated by their desire for the high school athlete to matriculate and participate in intercollegiate competition at a particular school, but which fail to comport with reality."[40] This often results in coaches informing their recruits that they are the only ones being recruited for their respective positions, or that the program absolutely needs the particular recruit. However, in reality, a coach is likely recruiting several recruits for the same position, giving them all similar praise, and possibly making verbal offers as well.[41]

The recruitment process is a game of chance. Coaches know that highly sought-after recruits often talk to numerous universities at once. Thus, it is common practice for a coach to make more verbal offers than she actually has scholarships to give.[42] Usually the numbers will work out so that a coach gets fewer commitments than there are scholarships to offer. However, there are occasions when a coach receives more verbal commitments than he has scholarships to give. Because the NCAA has consistently regarded verbal commitments as unrecognized, non-binding agreements,[43] a coach can legally rescind a verbal or written offer at any time before a recruit signs and returns the NLI.

A recruit may un-commit, as well. Some recruits, who know that relying on a coach's non-binding promises may be detrimental, commit to one university while continuing to talk to other universities. A university may be abandoned by a committed recruit as late as Signing Day, leaving the athletic program

---

[38] NCAA Guide 2009-2010, *supra* note 18, at 18.

[39] *Id.*

[40] Timothy Davis, *Student-Athlete Prospective Economic Interests: Contractual Dimensions*, 19 T. MARSHALL L. REV. 585, 601 (1994).

[41] *See id.* at 601-02 ("For instance, a coach may inform a student-athlete that he is the only one being recruited to fill a particular position when the college may be recruiting several other high school athletes for the same position.").

[42] Andy Staples, *Brown Saga Reveals Recruiting Flaws; Here's How to Fix Them*, SPORTS ILLUSTRATED, March 16, 2009, http://sportsillustrated.cnn.com/2009/writers/andy_staples/03/16/brown-tennessee/index.html ("Some [coaches] offer more than 200 players for a 25-man class.").

[43] *See* NCAA 2009-2010 Guide, *supra* note 18; National Collegiate Athletic Association, Frequently Asked Questions: Can I make a verbal commitment to a school and then sign a National Letter of Intent with a different school?, http://www.ncaa.org/wps/ wcm/ connect/NLI/Frequently+Asked+Questions/General/Can+I+make+a+verbal+commitment+to+a +school+and+sign+a+National+Letter+of+Intent+with+a+different+school (last visited Jan. 19, 2010).

scrambling for a comparable athlete to fill the spot. This "phenomenon of being committed while looking elsewhere is relatively new to the recruiting world,"[44] and angers universities and the media.

Alternatively, a recruit may keep the lines of communication with other universities open until he or she actually decides which university's NLI to sign. The privilege of remaining uncommitted up until National Signing Day belongs exclusively to the most sought-after recruits. All other recruits are given a short acceptance period in which to make one of the most important decision of their lives.[45] It is understandable that a recruit may back out of an initial commitment, having to make such an important decision at such a young age. Sports Illustrated sportswriter Andy Staples suggests that coaches are to blame. By treating offers as meaningless, coaches give recruits the idea that their commitments are meaningless as well.[46]

Because recruiting efforts are increasingly competitive, universities are making verbal scholarship offers to recruits as young as thirteen years old, as is the case with Michael Avery.[47] Before entering high school, Avery verbally committed to the University of Kentucky.[48] Although eighth graders should not be allowed to make such an important decision at such an early age, Avery could do so without hesitation because of the non-binding nature of the verbal commitment. Throughout high school, Avery may receive offers to play basketball for better schools than the University of Kentucky, or may simply change his mind for various personal reasons. Therefore, if Avery changes his mind in the next four years, which he likely will, he can back out of his commitment to Kentucky without suffering any consequences. While this could leave the university with a spot to fill and no one to fill it, such is the nature of the recruiting game. Also likely is the possibility that the University of Kentucky will lose interest in Avery in the following four years. However,

---

[44] Manny Navarro, *The Lesson Bryce Brown Taught Us*, MIAMI HERALD, Feb. 27, 2009, http://miamiherald.typepad.com/umiami/2009/02/the-lesson-bryce-brown-taught-us.html (internal quotations omitted).

[45] Interview with James O'Fallon, University of Oregon, NCAA Faculty Athletic Representative (March 28, 2009) ("I believe that it is common for schools to use a short acceptance period for all but the most attractive recruits.").

[46] Andy Staples, *Oregon Pulls Written Offer, an Unsavory Move That's Common*, SPORTS ILLUSTRATED, June 23, 2008, http://sportsillustrated.cnn.com/2008/writers/andy_staples/06/20/notebook.0620/index.html ("[Todd Therrien is] exposing the single biggest problem in the current system of offers and commitments—that an offer doesn't mean anything. And college coaches wonder why players have started to believe that their commitments don't mean anything, either.").

[47] Andy Staples, *The Trend of Players Choosing a College Before a High School*, SPORTS ILLUSTRATED, May 6, 2008, http://sportsillustrated.cnn.com/2008/writers/andy_staples/05/06/kentucky.0506/.

[48] *Id.*

the University of Kentucky knows that it has four years to take back the offer. Thus, Kentucky's coaches can offer Avery a scholarship as easily as they could offer him a business card because they know that neither is legally binding. As a result, both can enter into the so-called "commitment" without any qualms because both parties know it is an illusory agreement.

II. LEGAL ANALYSIS

Because the NLI is a contract between a university and a recruit,[49] the theories of contract law should be applied to the entire recruitment process.

A. The Doctrine of Unconscionability

Some experts argue that the NLI is an unconscionable contract.[50] Restatement (Second) of Contracts § 208 fails to define what constitutes unconscionability. Rather, courts have defined unconscionability as being some combination of two elements: 1) procedural unconscionability and 2) substantive unconscionability.[51]

Procedural unconscionability focuses on oppression, evidenced by inequality in bargaining power, and unfair surprise, evidenced by hidden or concealed terms.[52] The gross inequality of bargaining power between the university and the recruit is apparent. The standard language in the NLI and the financial aid award is evidence of the recruit's lack of power: The recruit "has no opportunity to negotiate, change, or delete any provisions."[53] The NLI is a classic example of an adhesion contract, containing "one-sided, take-it-or-leave-it express terms."[54] Recruits are "not afforded the freedom to engage in a meaningful exchange with university officials because of the virtually universal use of the NLI, and NCAA regulations that prohibit altering the document or the terms contained therein."[55] Due to the "virtually universal use of the

---

[49] *Jackson*, 778 F. Supp. at 1493.

[50] *See* Riella, *supra* note 20, at 2207-14 (asserting that the unconscionable nature of the NLI may be an avenue for judicial relief when a coach departs subsequent to a recruit signing an NLI); *see also* Hanlon, supra note 12, at 64-74 (discussing the unconscionability of the NLI and the NCAA regulations contained therein).

[51] Hanlon, *supra* note 12.

[52] *Id.* at 68.

[53] *Id.* at 70 (citing National Letter of Intent, NLI Text, *available at* http://www.ncaa.org/wps/wcm/connect/nli/NLI/NLI+Provisions (last visited Jan. 19, 2010)).

[54] Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 200 (2000).

[55] Riella, *supra* note 20, at 2211; *see also* NCAA, 2009-10 NCAA Division 1 Manual 13.02.10

NLI,"[56] a recruit is not afforded the opportunity to shop around to find an NLI with more favorable terms. Diverse NLI's do not exist.

Refusing to sign an NLI is an unrealistic option. Should the recruit choose not to bind himself to the terms of the NLI, he is also choosing not to bind himself to the university. There is no guarantee that a recruit in that position will have a scholarship, a spot on the team, or even an acceptance to the university. Most, if not all, recruits refuse to engage in this kind of gamble with such high stakes. The NLI's standardized provisions, combined with a recruit's lack of meaningful choice, put universities in a far superior bargaining position.

A contract of adhesion is, "not necessarily a fatal flaw, especially when there is no element of surprise in the terms."[57] The NLI contains the element of unfair surprise because recruits expect coaches' promises to be incorporated into the NLI. Coaches do not just recruit recruits, they court them. A coach may promise playing time, a starting position, a scholarship for all four years, or some other form of special treatment. While coaches know that these are empty, unenforceable promises, a naïve recruit may expect these promises to be incorporated in the NLI. Furthermore, the NCAA regulations to which the NLI refers are often hidden in the standard language of the contract.[58] Unless a recruit researches every referenced regulation, he will not understand exactly what he is agreeing to. Most recruits simply lack the sophistication and knowledge of contract law to realize that the research should be done. Even most parents lack the ability to comb through the terms of the agreement to decipher the true meaning of each provision.[59] Thus, many terms of the NLI may come as a surprise to recruits and to their parents post-signing.

Like contracts of adhesion, courts applying the doctrine of unconscionability look to the contractual terms to determine "if the terms are unreasonably

---

[56] Riella, *supra* note 20, at 2211.

[57] *Id.* at 2209 (citing Weaver v. Am. Oil Co., 276 N.E.2d 144, 148 (Ind. 1971)).

[58] *See* Hanlon, *supra* note 12, at 71 ("Both the National Letter of Intent and the Statement of Financial Aid incorporate NCAA legislation by reference. In so doing, the most important terms affecting the lives of student-athletes are not only hidden in these documents, but are totally concealed. The NCAA Manual is a 460-page document containing rules often found to be difficult and convoluted."); *see also* 2009-10 NCAA Division 1 Manual Constitution, Operating Bylaws, Administrative Bylaws art. 15.3.4.2, at 182 (NCAA ed., 2009), http://www.ncaapublications.com/uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf.

[59] *See id.* at 71-72 ("Accordingly, student-athletes and their parents are not given a reasonable opportunity to read and understand the NCAA terms of the athletic scholarship contract. Moreover, even if the NCAA terms were conspicuously placed on the documents to be signed by the student-athlete and their parents, it is not reasonable to believe that an understanding of those rules would occur.") (citing Woodhaven Apartments v. Washington, 942 P.2d 918, 925 (Utah 1997); Vahe Gregorian, *The NCAA Honor System*, ST. LOUIS DISPATCH, Jul. 20, 2003, at D1).

favorable to the more powerful party."[60] The terms of the NLI that incorporate NCAA regulations make the contract unreasonably favorable to the more powerful party: the university. The NLI imposes numerous restrictions on recruits,[61] which are mostly beneficial to universities. Regulations prohibit universities from merely changing the terms of the NLI[62] and having a representative present when a recruit signs.[63] The NLI is overwhelmingly favorable to universities, leaving recruits with a take it or leave it, you play by our rules situation. This situation is further exacerbated by the previously discussed lack of meaningful choice for recruits.

Despite the claims of legal scholars and wronged recruits, courts have not found the contract between a university and a student to be unconscionable.[64] Rather, "courts seldom consider the youthful immaturity, economic status, or lack of education of students except in the proprietary school cases."[65] Thus, although the NLI embodies many aspects of an unconscionable contract, it is unlikely that it will be recognized as such because of judicial reluctance.[66] This rigid approach "uses contract[s] as a means of maintaining the powerlessness of student-athletes,"[67] and should be changed to protect recruits instead of punishing them.

B. Incapacity of Minors

The Restatement (Second) of Contracts recognizes that a contracting party may lack the legal capacity to incur contractual duties.[68] One such limitation is infancy.[69] According to the Restatement (Second) of Contracts § 14, "a natural person has the capacity to incur only voidable contractual duties until the

---

[60] *Id.* at 68 (citing 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE OF THE LAW OF CONTRACTS § 18: 10 (4th ed. 1998)).

[61] The full text of the NLI is no longer available to view. *See, e.g.*, Riella, *supra* note 20, at 2214 nn.176-182 (referring to the NLI ¶ 2(a) (prohibiting athletes from signing a professional sports contract), ¶ 3 (prohibiting athletes from leaving their chosen university before completing one full year), ¶ 8 (prohibiting athletes from signing more than one NLI), ¶ 12 (prohibiting athletes from falsifying any part of the NLI), ¶ 15 (prohibiting athletes from adding or deleting terms to the NLI), ¶ 19 (prohibiting athletes from terminating the NLI before matriculating at the institution due to a coach's departure)).

[62] *Id.* at 2214 n. 182, NLI ¶ 15.

[63] *Id.* at 2214 n. 183, NLI ¶ 20.

[64] *See* Beh, *supra* note 54, at 200 n.80.

[65] *Id.* at 200.

[66] *Id.*

[67] Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1145 (1997) (citing Amy H. Kastely, *Coy or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 Nw. U. L. Rev. 132, 165 (1995)).

[68] RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981).

[69] *Id.* § 14.

beginning of the day before the person's eighteenth birthday."[70] The contract made by the minor is voidable, not void, but only at the option of the minor.[71] Minors may disaffirm their contracts "during their minority or within a reasonable time after emancipation."[72] Although jurisdictions may have statutes providing otherwise, this is the generally accepted rule.[73]

Most recruiting occurs before a recruit attains the age of majority. While a recruit may achieve the age of majority by the time he or she must sign an NLI, the recruiting process typically begins long before that. While a minor recruit's parents must co-sign the NLI,[74] parents usually play a relatively small role in the recruiting process overall. Parents, at most, may meet a particular coach if he or she chooses to make a home visit. Parents may also take it upon themselves to establish a relationship with a coach. Overall, however, a coach will only communicate with a recruit. All recruiting letters are addressed to the recruit, and written with the recruit as the intended audience. All phone calls are made directly to a recruit's phone. If the recruit does not have a cellular phone, a coach calling a home line will ask to speak directly to the recruit. Only the recruit is invited on an official visit.[75] Parents are welcome to tag along, but they must pay their own way. Coaches invite players for official visits to establish and solidify a relationship with the recruit. They are recruiting players, not parents.

Despite the fact that significant negotiation does not actually occur, intercollegiate coaches are essentially negotiating with minors in whatever negotiations do occur.[76] While coaches cannot bargain for specific provisions or details to add to the NLI,[77] they are negotiating with minors to persuade them to attend their university.[78] Coaches are making representations and promises to recruits in order to separate themselves from their competition. A coach may praise the school and the athletic program, tell the recruit that he or she is at the top of the recruiting list, promise the recruit a specific amount of playing time,

---

[70] *Id.*

[71] Donald T. Kramer, *Legal Rights of Children, Part III. Substantive Laws and Concepts Affecting Children, Chapter 10. Children and the Law of Contracts, § 10:1 The Right of a Child to Make Contracts and Disaffirm Them*, 1 CHILD. LEGAL RTS. J. 2D § 10:1 (2008).

[72] *Id.*

[73] RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

[74] *See* Cozzillio, *supra* note 11, at 1326 ("[T]he [National Letter of Intent] has attempted to intercept the potential problems in the student-athlete's capacity to sign by insisting upon cosignature by the parent or guardian.").

[75] NCAA 2009-2010 Guide, *supra* note 18.

[76] *See* Davis, *supra* note 40 ("Due to the high school athlete's professional aspirations and the college coach's desire to field a winning team, the recruitment process has been defined as a negotiation.").

[77] Hanlon, *supra* note 12, at 71.

[78] Davis, *supra* note 40.

or make various other statements to induce the recruit to sign.[79] While some of these representations may be true, and others may be mere puffery, other representations and promises may be false, misleading, or unenforceable. It is difficult enough for adults to sense a dishonest party, but it is even more difficult for minors to determine if and when they are being exploited. Minors are usually inexperienced with negotiations, and have often been taught to give deference to authority figures. As one recruited student-athlete put it,

> My parents had to step in a lot at [the home visit] because [the coach] was pressuring me to make a decision right then and there. I felt confused at first because I didn't expect to be pressured. Then I felt disrespected because I already told him on the official visit that I wasn't ready to make a decision . . . . I felt too pressured to even talk to him.[80]

Luckily, that recruit had her parents step in when she was no longer sophisticated enough to proceed with the negotiation. Not all recruits are that fortunate, and some end up being exploited or succumbing to the pressure. Thus, a minor is likely to be victimized by the imbalance in bargaining power created by the current recruiting procedures and inherent positions of authority.

The infancy doctrine does not apply to the NLI because recruits have either attained the age of majority prior to signing day, or have their NLI co-signed by a parent or guardian.[81] However, the purpose of the infancy doctrine should not be forgotten. The protection afforded to minors is "given for policy reasons. Infants, as with other classes of disabilities, are presumed to be insufficiently mature or experienced to effectively bargain with those who have attained legal age."[82] The NCAA should offer recruits protections in order to equalize the parties' bargaining power, and remedies should be available for recruits who are taken advantage of in the process.

The need to protect minors who deal with adults is based on "the presumption that unequal bargaining power always exists between the two, with the power, and therefore, the potential for overreaching, inuring to the adult."[83] By regulating recruiting to protect minors, the NCAA could help remedy the imbalanced recruit-university relationship, and alleviate the recruit's inherent disadvantage in the recruiting process. Furthermore, such regulation would further the purpose of the infancy doctrine, "which is to protect minors from their lack of judgment and from squandering their wealth through improvident contracts with crafty adults who would take advantage of

---

[79] *See id.*

[80] Interview with Janelle Nomura, *supra* note 11.

[81] Cozzillio, *supra* note 11, at 1326.

[82] Mitchell *ex rel* Fee v. Mitchell, 963 S.W.2d 222, 223 (Ky. Ct. App. 1998) (finding that a minor's emancipation does not take away his privilege of avoiding contract).

[83] John Hopkins Hosp. v. Pepper, 697 A.2d 1358, 1364 (Md. 1997).

them in the marketplace."[84] Inexperienced recruits are being taken advantage of by crafty coaches throughout the many stages of recruiting. Courts have employed the infancy doctrine to afford greater protection to minors, and the NCAA should be obliged to do so as well. Not only should the NCAA "protect the inexperienced and improvident minor from the consequences of dealing with others,"[85] but swindled minors in the university-recruit context should also be afforded legal remedies, even if courts tend to be reluctant to intervene.

C. The Duty of Good Faith and Fair Dealing

The implied duty of good faith and fair dealing is the crux of Daniel Smith's argument,[86] and it provides a framework for adjudicating future university-recruit disputes. An integral part of the law of contracts is the concept that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[87] While the definition of good faith and fair dealing has yet to be defined by the Restatement (Second) of Contracts, it is generally accepted that the doctrine is a tool "to prevent one party from engaging in conduct which undermines the spirit of the bargain, either by trying to actualize opportunities implicitly surrendered at the time of contract formation or by unfairly preventing the other party from actualizing the gains reasonably contemplated at the time of contract formation."[88] Professor Timothy Davis summarizes the concept:

> In sum, the good faith doctrine insulates the parties' bargain from attempts by one party or the other to evade or undermine it. It imposes upon the parties an obligation to cooperate in achieving the benefits that they expected to flow from the bargain. The doctrine thus protects and promotes the contracting parties' expectations by implying into the contract an affirmative duty to cooperate, which goes beyond, but is consistent with, the express terms of the contract.[89]

---

[84] Dodson v. Shrader, 824 S.W.2d 545, 547 (Tenn. 1992) (holding that contracts with infants "are not void but only voidable and subject to be disaffirmed by the minor either before or after attaining majority appears to have been favored.") (internal quotation marks omitted).

[85] *Cf.* Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150, 153 (N.D. Ill. 1997) (holding that a minor who contracts for employment cannot disaffirm an arbitration agreement clause in the employment application).

[86] *See generally* Plaintiff Daniel Smith's Memorandum in Opposition to Defendant Jeffrey D. Reinebold's Motion for Judgment On the Pleadings as to Counts II and IV of Plaintiff's Complaint, Smith v. Univ. of Haw., No. 08-1-0250-02, 2008 WL 4273152 [hereinafter Smith's Memorandum].

[87] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

[88] Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743, 776 (1991).

[89] *Id.*

Davis proposes that the doctrine of good faith and fair dealing is "conceivably available as a mechanism for explicitly defining the institution's unexpressed, yet implicit obligations to student-athletes."[90]

At the initial contract formation stage, "good faith and fair dealing compels honesty and the avoidance of fraud and misrepresentation."[91] Misrepresentation is a false assertion,[92] while fraud is an intentional misrepresentation made to induce a party to manifest assent.[93] Professor Hazel Glenn Beh acknowledges, "the university-student relationship is one filled with promises and representations by the institution and by student expectations."[94] Largely unregulated, fraudulent statements and misrepresentations occur frequently in the recruiting process. Such promises include playing time, living conditions, and academic help. As a result, a coach can promise almost anything to a recruit in order to induce acceptance, without being bound to those pre-contractual promises.[95]

If the doctrine of good faith and fair dealing compels honesty, then coaches should be held to that standard when courting recruits. Coaches should not be allowed to make promises they know they cannot or will not keep, nor should they be allowed to intentionally mislead recruits. There have been several cases of recruits suing universities trying to enforce promises made to them during the recruiting process.[96]

However, courts have typically held that such promises are not enforceable because they merge with the contract when the recruit signs the NLI.[97] Unfortunately for recruits, the NLI is a standard form contract.[98] Therefore, promises made to recruits will never be incorporated into their contracts. Recruits may or may not be aware of this when they commit to a school. Thus, a recruit may unknowingly commit to a school based on a coach's empty

---

[90] Davis, *supra* note 40, at 617.

[91] Beh, *supra* note 54, at 216.

[92] RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981).

[93] *Id.* § 162.

[94] Beh, *supra* note 54, at 199.

[95] Riella, *supra* note 20, at 2187.

[96] *See, e.g., Ross*, 957 F.2d at 412 (alleging breach of oral promises made by Creighton during recruitment that Ross would "receive a meaningful education"); *see also* Order Granting in Part and Denying in Part Defendant Motion to Dismiss, *supra* note 30, at 2-3 (alleging breach of oral promises made by Miami during recruitment regarding playing time and development into a first round draft pick).

[97] *See* Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, *supra* note 30, at 2 (finding that Fortay must point to a specific contract provision supporting his claim, and the NLI he signed was "devoid of any express or even implied provision that [he] would be starting quarterback.").

[98] *See* Riella, *supra* note 20, at 2215 ("The NLI is a contract of adhesion that, by its terms, restricts the athlete's ability to negotiate and enter a true bargained-for agreement.").

promise, taking the coach at her word. Coaches frequently take advantage of the situation because they know that their pre-contractual promises are unenforceable. Coaches can continue to make representations "which are motivated by their desire for the high school athlete to matriculate and participate in intercollegiate competition at a particular school, but fail to comport with reality."[99] Indeed, "[u]nder this system, the coach has little incentive to avoid promising the recruit things he or she may not be able to deliver."[100]

Another problematic situation occurs when a coach offers one scholarship to two recruits. Sports Illustrated sportswriter Andy Staples mocks this common practice:

> The NCAA allows schools to bring in 25 new scholarship football players a year, but some coaches hand out between 200 and 300 written offers a year. In other words, a written scholarship offer is about as valuable as a buy-one-get-one-free coupon from Wendy's. Check that. With the coupon, at least you know you're getting a burger.[101]

The problem arises when a recruit bases his or her decision on the idea that he or she is at the top of a coach's recruiting list, when that may be far from the truth. A coach will make every recruit feel like his number-one pick, which is the nature of the recruiting game.

Coaches understand that no recruit wants to feel like someone's third choice. The feeling of being necessary to the team can be so important that it becomes the main reason a recruit commits to a school. As one recruit put it, "To me, I don't really see a scholarship as getting a free education and helping my parents out. At least that's not what I see initially. I see a scholarship as a form of being wanted."[102] Imagine the disappointment a recruit may feel when he or she chooses a university based on the feeling of being wanted, only to be rejected later for another athlete. Additionally, a recruit could be left in a dire situation if he has lost other scholarship opportunities because of a university's nondisclosure or misrepresentation of his ranking in a university's recruiting class.

Although it could have the same effect, nondisclosure is not equivalent to dishonesty. Generally, nondisclosure is acceptable in arm's length contract negotiations.[103] Nondisclosure in recruiting, however, can have devastating effects. A recruit could commit not knowing that the coach is planning on

---

[99] Davis, *supra* note 40, at 601.

[100] Meyer, *supra* note 19, at 234.

[101] Staples, *supra* note 46.

[102] Interview with Janelle Nomura, *supra* note 11.

[103] *See* RESTATEMENT (SECOND) OF CONTRACTS § 161 cmt. a (2007) ("Non-disclosure without concealment is equivalent to a misrepresentation only in special situations.").

leaving or that the coach has ulterior motives. One solution is to impose a duty to negotiate in good faith when negotiating recruiting contracts.

D. The Duty to Negotiate in Good Faith

It is widely accepted that there is no duty to negotiate in good faith for basic, arm's length transactions.[104] However, certain contracting parties such as "those who, because of a special relationship (fiduciary or confidential) between them, are not deemed to deal at arm's length."[105] In these special relationships, the law imposes a heightened duty upon one party and affords heightened protection for the other.[106] This heightened duty requires the "utmost good faith and full and fair disclosure."[107] The duty to disclose arises even "where a party is not, strictly speaking, a fiduciary,"[108] if he stands "in such a relation of trust and confidence to the other as to give the other the right to expect disclosure."[109]

Because most recruiting contacts occur between coaches and minor recruits, a special relationship often results.[110] The relationship is unique. "Because of the dynamics of the recruiting process, a relationship of trust and dependence often develops that is not present in the relationship between lay students and universities."[111] Former Marquette University basketball coach Kevin O'Neil acknowledges the importance of building a close relationship with recruits. "You have to get to the *kid*. You have to make him trust you. If a *kid* trusts you, you have a good chance."[112] Other coaches intentionally abuse the close relationship, preying on the trusting nature of young recruits. One such coach described his exploitation of recruits

> You become his best friend, and he gets hooked, like a junkie . . . the secret is controlling the product early . . . and you know the saddest part? The kids don't even know. It's like a pervert offering a kid some candy to get in his car.[113]

---

[104] E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 239 (1987).

[105] Robert S. Adler & Richard A. Mann, *Good Faith: A New Look at an Old Doctrine*, 28 AKRON L. REV. 31, 33 (1994).

[106] *Id.* ("In such relationships the law imposes additional duties beyond those required in an arm's length transaction upon one of the parties resulting in 'heightened' protection for the other party.").

[107] RESTATEMENT (SECOND) OF CONTRACTS § 161 cmt. f (1981).

[108] *Id.*

[109] *Id.*

[110] Davis, *supra* note 88, at 787.

[111] *Id.*

[112] ALEXANDER WOLFF & ARMEN KETEYIAN, RAW RECRUITS 136 (1990) (emphasis added).

[113] *Id.* at 184-85.

Universities actively recruit student-athletes; they do not actively recruit lay students. Universities, through their coaches, actively try to gain the trust and confidence of their recruits, not their parents.

While the doctrine of *in loco parentis*, standing in place of a parent, no longer represents the relationship between university and student,[114] a special trust relationship still exists between a university and its recruits. Legal scholars argue that the position of recruits in relation to universities supports defining the relationship as fiduciary or at least quasi-fiduciary.[115] A fiduciary relationship "arises where one person reposes trust or confidence or reliance in another and where there is established an inequality of footing between the parties. In these situations, courts feel justified in holding the more powerful party to a higher standard of care."[116] In the university-recruit context, the more powerful party is the university. Universities have the resources to maintain their superior bargaining position, the power of controlling the offer, and the ability to control the lives of their recruits once they are enrolled in their institution. Recruits, on the other hand, place a great deal of trust, confidence, and dependence on universities.

A recruit may trust that a coach will keep the promises she made during recruiting, or that a coach will genuinely honor a recruit's commitment with an NLI. While some recruits make the conscious decision to trust a coach, others are duped into the trust relationship. Legal scholars recognize that although universities no longer "stand in place of the students' parents, they are in a position of power over students."[117] Because of the university's position of superiority, "students are not completely at arm's length from the university . . . ."[118]

In *Kleinknecht*, the court realized that the relationship between recruited student-athletes and universities was special for tort purposes.[119] In that case, the parents of a recruited student-athlete, who collapsed and died from cardiac arrest during lacrosse practice, brought a negligence action against the university.[120] The Third Circuit Court of Appeals rejected the school's argument that it owed no duty to the student, and instead "relied upon the

---

[114] K.B. Melear, *The Contractual Relationship Between Student and Institution: Disciplinary, Academic, and Consumer Contexts*, 30 J.C. & U.L. 175 (2003).

[115] Davis, *supra* note 40, at 618-19 (internal quotations omitted).

[116] Alvin L. Goldman, *The University and the Liberty of Its Students – A Fiduciary Theory*, 54 KY. L. J. 643, 855-56 (1966).

[117] Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 154 (2002).

[118] *Id.* at 178.

[119] Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1367 (3d Cir. 1993).

[120] *Id.* at 1362.

concept of a special relationship as providing the theoretical basis for imposing a duty of care on the school."[121]

In reaching the conclusion that the school owed a duty to the recruited student-athlete, the court focused on the distinction between lay students and recruited student-athletes.[122] By doing so, the court recognized the unique and special relationship that exists between an intercollegiate athlete and the college that "actively sought his participation in that sport."[123] One scholar thus concluded that if courts were to find that this special relationship places recruits other than at arm's length from universities, then establishing a fiduciary or quasi-fiduciary duty is not so far-fetched.[124]

Applying the duty to negotiate in good faith to the recruitment process would be in accordance with public policy by ensuring that the process is fair for both parties. Good faith in the recruitment process would level the playing field and produce less conflict than the current recruiting procedures. If universities are forced to be honest with recruits' about their standing, recruits in turn should be honest about their situation. If a recruit is considering or accepting offers from more than one university, then the recruit should be forthright with that information.

The duty promotes cooperation rather than competition. Not only would it increase fairness, but it would also promote judicial economy. Dissatisfied recruits would be less likely to file complaints against universities for broken promises and revoked scholarships. If courts recognized a fiduciary or quasi-fiduciary relationship between universities and their recruits, both parties would benefit.

III. PROPOSED SOLUTIONS

A. The Verbal Commitment Process Should be Regulated by the NCAA

Legal scholars and sports writers agree that the NCAA needs to be accountable for the recruiting process by playing a more active role as a regulator. Legal scholars argue that the NLI and NCAA regulations are overwhelmingly favorable to universities.[125] As if universities did not have

---

[121] Davis, *supra* note 40, at 623.

[122] *Kleinknecht*, 989 F.2d at 1368 (noting the difference between "a student injured while participating as an intercollegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests" and reasoning that this distinction "serves to limit the class of students to whom a college owes the duty of care . . . .").

[123] *Id.*

[124] Weeks, *supra* note 117, at 178 ("[I]f it is clear that students are not completely at arm's length from the university – then establishing fiduciary duties should not be too difficult.").

[125] Hanlon, *supra* note 12, at 44 (stating that "current NCAA legislation gives NCAA

enough of an advantage, coaches continue to use the lack of regulation to their benefit.[126] This current lack of regulation by the NCAA invites the following questions: (1) To whom does the NCAA owes its allegiance? (2) Does the NCAA owe a duty to the recruits or to the member institutions that comprise the NCAA's primary constituency?[127]

1. The commitment practice should be renamed and required to be conducted in writing

The biggest problem seems to be the failure to honor verbal commitments. Because the NCAA explicitly provides that verbal commitments are nonbinding agreements, coaches and recruits sometimes fail to honor those commitments when a better option comes along. Thus the unenforceability of verbal commitments promotes double-dealing until a binding NLI is signed. While coaches have sufficient experience and sophistication to understand the illusory promise contained in the verbal commitment, recruits can easily be confused by the paradoxical practice. The current practice, abused by coaches and recruits alike, has rendered the term "commitment" meaningless in this context.[128] To restore honor and integrity to the word "commitment" and eliminate further confusion, the NCAA should address the practice and rename it.

Sports Illustrated columnist Andy Staples suggests calling verbal commitments "reservations."[129] Like a dinner reservation, recruits would be able to reserve their scholarships. This gives recruits and coaches the assurance of some minimal intent to commitment without misleading either party to believe that the other is actually committed. It is widely understood that restaurant reservations are easily canceled because restaurants overbook their capacity and patrons are fickle. The same goes for recruiting; coaches tend to over-recruit and recruits are notoriously capricious. However, unlike the university-recruit relationship, restaurants do not coax their patrons into a special trust relationship. Furthermore, the term "reservation" does not connote

---

member institutions tremendous leverage over student-athletes . . . [and] the language of the [NLI] disproportionately favors the NCAA and its member institutions.").

[126] Andy Staples, *A History of Recruiting: How Coaches Have Stayed a Step Ahead*, SPORTS ILLUSTRATED, June 23, 2008, http://sportsillustrated.cnn.com/2008 /writers/andy_staples /06/19/recruiting.main/index.html (statement of Conference USA Commissioner Britton Banowsky) ("Interpreting the letter of the rule is fine, but you can't throw the whole intent and spirit of the rule out of the window when you do it.").

[127] *See* David A. Skeel, Jr., *Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA*, 1995 WIS. L. REV. 669, 684 (1995).

[128] Staples, *supra* note 42.

[129] *Id.*

the implied sense of dedication and exclusivity that the term "commitment" connotes.

Requiring scholarship offers to be in writing would be a way to ensure uniformity and compliance. This would help solve the problems of proof that arise with verbal offers when the only evidence of the offer is the coach's word against the recruit's.[130] Written offers cannot later be denied as long as a recruit can produce the document. Furthermore, coaches will not be able to deny any additional, special conditions attached to their offers. If a coach adds a special provision to a written offer, the language of the document will so reflect.

This procedure will also clarify any misunderstandings between written and verbal offers. There is a misconception that written offers are more binding than verbal offers.[131] Thus, a university will be more likely to settle out of court when it rescinds a written offer.[132] In order to avoid liability, universities now include disclaimers in their written offers.[133] These disclaimers explain the nonbinding nature of the document.[134] Verbal offers, on the other hand, are unaccompanied by explicit explanations. As a result, recruits who receive verbal offers do not receive warnings of the nonbinding nature of their commitment. By regulating the contents of written offers and eliminating verbal offers, the NCAA could ensure that all recruits receive the same information. Additionally, recruits will not be misled into thinking that their offer will not be revoked if it is in writing. Each recruit should receive his or her offer in the same format, accompanied by the same disclaimer. This would make the system more uniform, and hopefully more just.

---

[130] *See* Katherine Sulentic, *Running Backs, Recruiting, and Remedies: College Football Coaches, Recruits, and the Torts of Negligent and Fraudulent Misrepresentation*, 14 ROGER WILLIAMS U. L. REV. 127, 144 (2009) (noting that because many conversations between coaches and recruits occur in private, there may be proof problems at trial).

[131] Staples, *supra* note 46 ("'We're finding out written offers don't mean anything,' said [High School Football Coach Todd] Therrien . . . . 'That's just crazy.'").

[132] Andy Staples, *A Closer Look at the Small and LARGE Print of Recruiting* Letters, SPORTS ILLUSTRATED, April 15, 2008, http://sportsillustrated.cnn.com/2008/writers/andy_staples/04/15/forcier.0415/ ("The basketball programs at Davidson and Northwestern got burned by written offers; the schools had to settle out of court with prospects who sued after the programs reneged on written offers.").

[133] *Id.* ("[T]o avoid any messy legal squabbles, schools now try to include some kind of disclaimer in their offer letters.").

[134] *Id.* (citing Letter from Rich Rodrigues, Coach, University of Michigan, to prospective recruits (NEED DATE) (on file with author) "This letter remains viable until such time as NCAA Rule 15.5.5 regarding squad limits (85 total) would appear to be compromised . . . . Therefore, as a necessary consequence, grants may only be awarded on availability.").

2. The NCAA should limit the number of scholarship offers a coach can make per year

Another significant flaw in the recruiting process that gives an unfair advantage to universities is the unlimited number of offers coaches can make each year. Several sports writers have mocked the generosity with which coaches offer scholarships. The worst offenders make hundreds of offers each year,[135] some to players who have not yet reached high school.[136] A coach should not make an offer unless he is absolutely serious about having a recruit play for him. Scholarships have great financial and personal value to recruits, and should not be used merely as bait. Coaches are using scholarships to bait as many recruits as they can, only to throw back half the catch at their discretion. This gives coaches an immense amount of bargaining power.

In order to level the bargaining positions of the parties, Sports Illustrated sportswriter Andy Staples proposes that the NCAA should limit the number of scholarship offers a coach can make per year.[137] If a coach were limited to making no more offers than the number of scholarships she has available, it would be more difficult for her to recruit a player for a position that is already filled. If a coach has commitments from twenty-five recruits for twenty-five available scholarships, it would be extremely difficult for her to continue recruiting better players. A coach in that position would have to revoke a scholarship offer from a committed recruit before offering it to another recruit. That is a huge gamble to make because the better recruit may not accept the offer. Thus, it would prevent coaches from double-dealing behind recruits' backs.

Under the current system, coaches can freely offer as many scholarships as they like, while recruits are not afforded the same freedom.[138] A recruit cannot be committed to numerous schools at once. A recruit who did that would be

---

[135] *See* Staples, *supra* note 42 ("Some coaches pass out written scholarship offers like free hamburger coupons. Some offer more than 200 players for a 25-man class.").

[136] *See* Andy Staples, *Eighth-Grader Receives Offer from Hawaii Before Ever Putting on Pads*, SPORTS ILLUSTRATED, January 3, 2009, http://sportsillustrated.cnn.com/2009/writers/andy_staples/01/03/koehler.hawaii/index.html ("[Reeve] Koehler, the 13-year-old brother of Arizona freshman offensive lineman Solomon Koehler, impressed Hawaii coach Greg McMackin so much during drills at the school's camp this past summer that McMackin extended a scholarship offer.").

[137] *See* Staples, *supra* note 42 ("The NCAA already limits the number of official visits each school can offer. Why not cap the amount of written offers?").

[138] *See* Andy Staples, *Coaches Play the Curious Game of Oversigning in College Football*, SPORTS ILLUSTRATED, Feb. 25, 2009, http://sportsillustrated.cnn.com/2009/writers/the_bonus/02/24/oversigning/index.html; Meyer, *supra* note 19, at 228-29 ("Once a prospect signs the NLI, he or she is bound to that institution, the recruiting process ceases, and all other institutions are barred from contacting or recruiting the prospect.").

seen as dishonest and untrustworthy; the recruit would be highly criticized by universities, coaches, media, and peers.[139] The media sharply criticizes committed recruits who continue to go on official visits to other universities.[140] The media would crucify a recruit for making multiple, simultaneous commitments. Coaches, on the other hand, simply do not receive the same scrutiny for accepting more commitments than they have scholarships for. This gives coaches a significant advantage in the recruiting process. Limiting the number of offers a coach can make would take away that advantage.

This change would also reduce legal claims by discouraging universities from revoking an offer right before Signing Day. Often, when a coach revokes a scholarship offer at the last minute, it is because he has a better recruit who has decided to commit at the last minute. A coach is less likely to drop a committed recruit for an uncommitted, undecided recruit the closer it is to Signing Day. Just as a recruit does not want to be without a scholarship on Signing Day, a university does not want to be left with an extra scholarship and no one to sign.

3. The NCAA should mandate that high school recruits have an official representative

Because many recruits are too inexperienced and too immature to effectively bargain with coaches, recruits need a representative on their behalf to guide them through the process. While some recruits are lucky enough to have their high school coaches handle their recruitment, other recruits hire handlers or agents to manage the entire process for them.[141] Unfortunately, not every recruit can afford such an expensive service or has parents who are capable of adequately assisting their child. Recruits who have indifferent coaches and unhelpful parents are left to negotiate for themselves.

As previously stated,[142] to effectuate the purpose of the minority doctrine, adults should refrain from negotiating with minors. However, because some recruits have no one to handle their recruitment on their behalf, they are forced to do it on their own. Coaches who negotiate with unrepresented recruits are

---

[139] *See, e.g.*, Staples, *supra* note 42 (Bryce Brown, a highly sought after recruit in the 2009 recruiting class, received harsh criticism from sports columnists after committing to the University of Miami, but then continued to go on official visits to other schools, making it apparent that his college search was not yet over).

[140] *Id.*

[141] *See id.* ("Many prospects have unstable families or coaches who aren't helpful, so they gravitate toward street agents or scam artists.").

[142] *See Dodson*, 824 S.W.2d at 547 (The purpose of the minority doctrine "is to protect minors from their lack of judgment and 'from squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace.'").

essentially bargaining with minors. Thus, recruits need help that is free and accessible to all. High school students have college counselors, so why do recruits not have recruitment counselors?

The NCAA could achieve this through two methods: by requiring high schools to provide counseling or by requiring universities to provide counseling.

Sports Illustrated sportswriter Andy Staples suggests requiring every university to counsel their recruits prior to Signing Day.[143] According to Staples, recruits should be required to visit their chosen school before they sign an NLI.[144] At the official visit, recruits should meet with the school's compliance office.[145] Compliance offices would be given the task of explaining the NLI to recruits.[146] Staples also suggests that universities pay for a recruit's parent or guardian to accompany him on his official visit.[147] This would help ensure that recruits are sufficiently informed.[148] While this would be a great help to uninformed recruits, it does not provide them with an easily accessible source of guidance. Additionally, a university's compliance office will not be concerned with the best interest of recruits. Thus, placing the burden on universities will not provide recruits with an adequate advocate.

Another option for the NCAA is to encourage high schools to provide students with a recruitment advisor. This work could be done by high school coaches or athletic directors. Essentially, the high school's recruitment advisor would provide potential recruits with information regarding NCAA regulations and the applicable rules of recruitment. The advisor would also be available to aid recruits throughout the recruitment process, similar to the duties of college counselors. The advisory role would not include bargaining for the recruits. Furthermore, having a recruitment advisor would ensure that all recruits have an adult, concerned about the recruits' best interests, aiding them throughout the process.

---

[143] *See* Staples, *supra* note 7 (suggesting that prospects should be required to take an official visit to their chosen school prior to signing an NLI, and that the school's compliance office spend at least two hours during the visit explaining the NLI).

[144] *See id.* ("[P]rospects would be required to take an official visit to their chosen school before signing a Letter of Intent.").

[145] *See id.* ("During [a recruit's] visit, the school's compliance office would be required to spend at least two hours explaining the Letter of Intent.").

[146] *See id.*

[147] *See id.* ("[D]on't just allow but require that schools pay for one parent or guardian to visit with the prospect.").

[148] *See id.* ("That way, they [sic] prospect can't plead ignorance if he changes his mind.").

4. The NCAA should impose a code of ethics that compels honesty and full disclosure by both parties

If courts were to recognize a fiduciary relationship between universities and recruits, the parties would be held to a duty of negotiating in good faith. However, until the recognition of a fiduciary relationship is achieved through the courts, the NCAA should take the lead by enacting a code of ethics that imposes the duties of honesty and full disclosure on universities and recruits.

College admission counselors are governed by a code of ethics that "precludes false and deceptive recruiting practices and encourages providing accurate and truthful information to applicants."[149] As explained by Professor Beh, the code was designed to ensure ethical admission procedures:[150]

> Originally promulgated by the National Association for College Admission Counseling (NACAC) to promote ethics in recruiting, a joint Code of Ethics was developed by the NACAC, the American Association of Collegiate Registrars and Admission Officers, The College Board and endorsed by the American Council on Education, the National Association of Secondary School Principals, the National Student Association, and the American School Counselor Association.[151]

NACAC recognized the superior position of admission counselors, and the need to protect students, by requiring ethical practices in college admission counseling.

Coaches act similarly to college admission counselors when they recruit athletes to play for their university. For recruits, the university's coaching staff is his main source of college admission information. Coaches provide recruits with information ranging from the quality of their facilities to the availability of academic services.

Because coaches are forced to make representations about their university, coaches should be held to similar code of ethics similar to that of admission counselors. The NCAA should promulgate a similar code of ethics for collegiate coaches requiring them to "speak forthrightly, accurately, and comprehensively in presenting their institutions to counseling personnel, prospective students, and their families."[152] Thus, the NACAC code of ethics demands honesty and full disclosure, so too should a similar code enacted by the NCAA.

---

[149] Beh, *supra* note 54, at 192.

[150] *Id.*

[151] *Id.*

[152] National Associationn for College Admission Counseling, Statement of Principles of Good Practice Interpretations of Mandatory Practices 9 (2009), http://www.nacacnet.org/AboutNACAC/ Policies/Documents/SPGP.pdf.

Honesty and full disclosure require that coaches tell committed recruits when they are continuing to recruit others for the same position. Such a code would require coaches to be honest and genuine about their intentions. In addition to the named parties, the NCAA should extend the duty to protect parties who represent recruits, negotiating on their behalf. This modification would include high school coaches and hired handlers, thus reflecting the current recruitment practice.

Because the recruit-coach relationship is different from the lay student-university relationship, the NCAA could also impose a code of ethics on recruits. Recruits do not choose a university the same way that lay students do. Furthermore, the decision of a recruit to attend a particular university includes more risk to a university than the decision of a lay student.

Because recruits bargain with universities, they should be held to a higher standard of ethics than lay students. Therefore, the NCAA should also impose the duties of honesty and full disclosure on recruits. If a committed recruit wants to continue to go on official visits to other universities, he should be required to disclose that information to the university to whom he is committed. If the NCAA requires coaches to abide by a code of ethics, then recruits should be held to the same standard.

B. Alternatively, Signing Periods Should be Eliminated Completely

Sports Illustrated sportswriter Andy Staples also suggests eliminating Signing Day entirely.[153] Instead, coaches would be able to have recruits sign their NLIs at any time throughout the year.[154] Doing so would "force coaches to exercise more caution lest they gamble away an entire recruiting class."[155] Under this theory, coaches could continue to accept commitments from thirteen-year-old recruits. However, coaches would be bound to their offers. Should a recruit commit, a coach would have to send him an NLI. Should a recruit sign it, a coach then has one fewer scholarship that year. Staples' explanation of this concept seems places the risk on coaches:

> Want to offer a high-school freshman? Go ahead. But you can't send him some empty promise. You have to send him a national Letter of Intent. If he signs, you promise one of your 85 scholarships to him for at least a year, and he promises to attend your school for at least a year, whether you're there or not.[156]

Staples implies that many of the problems with the recruitment process are the result of overly competitive coaches, comparing them to Lotharios who "say 'I

---

[153] Staples, *supra* note 7.
[154] *Id.*
[155] *Id.*
[156] *Id.*

love you'—even if they only kind of mean it—to court a woman."[157] Thus, Staples' suggestion would place the burden on coaches to use more discretion and caution when offering recruits scholarships. Doing so would reduce much of coaches' bargaining power because "if college football coaches knew the acceptance of their offer would immediately cost them one scholarship, they wouldn't hand out 200 offers for a 25-man class."[158]

While this theory would effectively reduce the number of frivolous offers coaches make, it gives recruits the upper-hand in the process. Staples' theory seems to allow recruits to back out of their commitments by choosing not to sign the NLI.[159] Coaches, however, are stuck sending recruits NLIs once they make their offers. This does not leave coaches any room to correct their recruiting mistakes. It is unlikely that the NCAA will enact a policy that gives recruits such a huge advantage over universities.

C. Promissory Estoppel Should be an Option for Potential Relief

Because the NCAA has been consistently reluctant to take responsibility for regulating recruitment, the courts should initiate change. One tool available to courts is the doctrine of promissory estoppel. Promissory estoppel would benefits recruits such as Daniel Smith, who suffered significant detriments as a result of reliance on a coach's promises and representations.

The Restatement (Second) of Contracts defines the doctrine:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[160]

Comment b of Section 90 acknowledges the flexibility of the promissory estoppel doctrine: a promisor is only affected by "reliance which he does or should foresee, and enforcement must be necessary to avoid injustice."[161] Inherent in the doctrine is that enforcement of promissory estoppel must be in accordance with public policy. The Hawai'i Supreme Court acknowledged this, declaring that "[t]his court will refuse to enforce promises that are against public policy."[162]

Daniel Smith has a good chance of setting legal precedent because his situation satisfies the elements of promissory estoppel. UH's coaches should

---

157 *Id.*

158 *Id.*

159 *Id.*

160 RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

161 *Id.* § 90 cmt. b (1981).

162 Gonsalves v. Nissan Motor Corp. in Haw., Ltd., 58 P.3d 1196, 1212 (Haw. 2002).

have reasonably foreseen that Smith would follow their instructions to stop communicating with other schools. Smith could have reasonably interpreted UH's request as a condition of receiving the scholarship offer. UH would offer Smith a scholarship if, and only if, Smith stopped talking to other universities and took himself off the recruiting market. Thus, Smith relied on UH's promise to offer him a scholarship in exchange for his exclusive commitment. This was, or should have been, foreseeable by UH. Promising one hundred percent commitment in exchange for one hundred percent commitment cannot be interpreted any other way.[163] Unlike other recruiting transactions, in Smith's case, UH asked for his absolute commitment and promised absolute commitment in return. The promise was clear and the reliance was reasonable and could be expected.

Finally, enforcement of UH's promise is necessary to avoid injustice. Smith suffered great detriment due to UH's actions. He lost his only plan for college that year, in addition to other scholarship offers as a result of relying on UH's promise.[164] To some recruits, a scholarship offer is worth more than just the free education. It is impossible to put a price on the honor of playing for a particular university.

Similarly, it is just as impossible to predict what opportunities a recruit may lose by not attending a particular university. Some injustices can never be remedied. In Smith's case, he did not have any back-up scholarships and he missed out on "the most important day of his high school career: []Signing Day."[165] However, the closest replacement to participating in Signing Day would have been to receive a scholarship offer from UH. Therefore, injustice cannot be avoided by anything but the enforcement of the promise.

Should Smith prevail, his case will set a precedent for future recruits to rely upon. Legal scholars and sports writers acknowledge that "both universities and student-athletes are showing manifest disregard for their promises-almost as if the entire process is entered with fingers crossed, destined to remain vital only so long as the parties are willing participants."[166] Although both parties have the ability to break their commitment, more recruits suffer as a result; "[e]very year, thousands of athletes find themselves scrambling for scholarships after coaching changes or after coaches simply rescind non-binding scholarship

---

[163] *See* Staples, *supra* note 1 (explaining the statement of Daniel Smith that "[UH Coach Reinebold] said If we offer you a scholarship, we want you to be 100 percent committed to us, and we'll be 100 percent committed to you.") (internal quotation marks omitted).

[164] *See* Smith's Memorandum, *supra* note 86, at 2 (claiming that Daniel Smith declined a written scholarship offer from Portland State University and passed up on potential scholarship opportunities).

[165] *Id.* at 2.

[166] Cozzillio, *supra* note 11, at 1280.

offers because they found more talented players."[167] Universities face this situation less often and even when they do, they have the resources to exhaust all available alternatives. Universities also have more options, even at the eleventh hour: there are always more recruits desperate for scholarships than there are athletic scholarships available.[168]

Most important, promissory estoppel as a remedy for jilted parties is in accordance with public policy.[169] Courts should recognize that coaches and recruits both have a lot at stake when scholarships are offered. Some detriment is quantifiable: it is easy to calculate the monetary value of tuition or money spent in reliance on the commitment. Some detriment, however, is not so easy to calculate or replace: it is impossible to quantify the value of wearing a certain university's jersey, the level of competition inherent in playing within a certain conference, the chance of playing for an NCAA championship, or the professional opportunities that flow from playing for top schools. Because these lost opportunities are unquantifiable and possibly irreplaceable, promissory estoppel is an appropriate remedy. Applying promissory estoppel would not only police parties from making reckless promises during the recruiting process, but also approach replacing the irreplaceable.

Although most recruits would rather have a spot on the team instead of a reimbursement check for the cost of tuition, specific performance is an unrealistic solution. Smith himself admits, "I'm not trying to get any money. I'm just trying to get my scholarship that I was promised 10 months ago."[170] While this may have been true for Smith a year ago, the value of a UH scholarship has significantly diminished: this ordeal has ruined Smith's opinion of UH, lessening his desire to play for the university.[171] While it may be too late for Smith to reap the benefit of specific performance, should he prevail on the basis of promissory estoppel, the recruitment process will forever be changed. Universities will be more likely to uphold their offers and provide recruits with the scholarships they want rather than a meaningless payout.[172]

The biggest problem Smith faces is proving the existence of his verbal offer.[173] However, "[t]he media reports confirmed that a scholarship

---

[167] Staples, *supra* note 1.

[168] *See* Staples, *supra* note 42 (noting that the practice of college coaches oversigning recruits is common practice).

[169] Cozzillio, *supra* note 11, at 1351-52.

[170] Staples, *supra* note 1.

[171] Telephone Interview with Mark G. Valencia, Associate, Case, Lombardi & Pettit, in Honolulu, Haw. (April 22, 2009).

[172] *Id.* (Daniel Smith's attorney, Mark G. Valencia, hopes Smith's lawsuit will (1) change the way that UH does its business and (2) make sure this never happens again to other recruits.).

[173] Staples, *supra* note 1 ("According to the Smiths' complaint, Wanda Smith received a call from [UH] offensive coordinator Ron Lee 'on or about Jan. 19' in which Lee told Wanda that Hawaii had never made a scholarship commitment to Daniel on [sic] Jan. 28.").

commitment had been made by UH."[174] If the reports were untrue, UH would have issued a public statement declaring the falsity of the news articles. Furthermore, the proof issue merely highlights the pressing need for the NCAA to require all scholarship offers to be in writing. An additional problem for Smith is the fact that an assistant coach, rather than a head coach, made the scholarship offer.[175] However, "while most schools require the head coach to sign off on any scholarship offer, UH's assistants under [June] Jones sometimes did offer scholarships on their own. Greg Brown . . . said [that assistant coach Rich] Miano offered his son, Corbin, a scholarship last year."[176] Although UH's uncommon recruitment practices will make it difficult for Smith to prove the existence of his verbal offer, the problem highlights the need for NCAA to regulate the recruiting process.

IV. CONCLUSION

Following the current recruitment procedure, both parties are forced to negotiate in bad faith or rely with crossed fingers on empty commitments. As a result, lots of time, money, and dreams are lost every year. Inexperienced minors are losing out to savvy university recruiters, while hopeful universities are losing out to fickle recruits. With so much riding on the decision, universities will always try to get the best recruiting class and recruits will always try to get into the best university. Both parties will always approach the process with their own interests in mind; such is human nature. However, the NCAA can regulate the process to level the parties' bargaining power and encourage good faith negotiation, while the courts can acknowledge the potential of promissory estoppel to discourage bad faith behavior.

Every sports game needs regulations and a referee to enforce the rules. The recruiting game is no different. The NCAA needs to take accountability and set the rules and regulations for recruiting. The courts need to referee the process by penalizing parties who refuse to play by the rules. All sports recognize the importance of fair play. Changes must be made to make the recruiting game fair as well.

---

[174] Smith's Memorandum, *supra* note 86, at 3 (stating that Daniel Smith claims Steven Tsai confirmed his commitment in a Honolulu Advertiser newspaper article. Smith also claims his commitment was confirmed by Rivals.com, ESPN, and local Hawai'i blogs such as Warrior Insider).

[175] Staples, *supra* note 1.

[176] *Id.*