University of Hawai'i Law Review

Volume 33 / Number 1 / Winter 2010

TRIBUTE: CHIEF JUSTICE WILLIAM S. RICHARDSON (1919-2010)

ARTICLES

COMMENTS

CASENOTES

ISSN: 1942-9223

The Law Review dedicates this issue to the memory of Chief Justice William S. Richardson, whose aloha, humility, and vision inspire us to achieve our dreams.

Oli Aloha No William S. Richardson

Kahikino Noa Dettweiler*

The venerable Hawaiian scholar Mary Kawena Pukui reminds us that in Hawaiian tradition, words posses the authority of life.[1] Chief Justice (CJ) William S. Richardson embodied that sentiment through the eloquent power of his jurisprudence. This composition was inspired by the Hawaiian tradition of reverence through crafted words, and I was honored to first present it to CJ at the graduation ceremony of the William S. Richardson School of Law, Class of 2005. It is a celebration of the profound love and respect shared by all those who have benefitted from CJ's rich legacy. Like the single lehua flower that springs forth on a stark lava plain, through perseverance, CJ's dream of providing an accessible, egalitarian, and quality legal education to Hawai'i's sons and daughters has grown to bear in profusion. In realizing CJ's dream, we are also entrusted with a precious charge to uphold the values of equality and justice practiced by our ancestors from time immemorial.

Mōhala mai ka pua lehua
I ka papa weliweli o Pāpa'i
Kahi i ho'olaha 'ia ke kānāwai a ke ali'i
'O Pai'ea Kalaninuimehameha he inoa

Māhuahua ka pua lehua o Hōpoe
Ka wahine 'ami le'a i ke kai o Nānāhuki
'O Puna Kai kuwā, 'o Puna paia 'ala i ka hala

Wehi 'ia ka manawa
I ka nani o ka pua lehua
He pua na'u i wili
A lawa ku'u lei aloha

Eō e nā punahele o ka pua lehua
E kū! E ho'omau!
E pa'a a pa'a i ka hoe māmala a Kaleleiki e!
Ua 'ike a

---

* Class of 2005, William S. Richardson School of Law, University of Hawai'i at Mānoa.

[1] MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS 129 (1983).

The lehua blossoms forth
On the perilous plain of Pāpa'i
The place where the chief proclaimed his law
Pai'ea Kalaninuimehameha is his name

The lehua blossoms of Hōpoe are profuse
Hōpoe, the woman who sways gleefully in the sea of Nānāhuki
Of Puna where the sea roars, Puna of the fragrant pandanus bowers

The fontanel, portal to the ancestors, is adorned
With the beauty of the lehua blossom
The flower that I have woven
Into a cherished lei

Heed the call, those of you who are favored by the lehua blossom
Stand! Persevere!
Hold fast to the splintered paddle of Kaleleiki!
It is known

Ka Lama Kū O Ka No'eau: The Standing Torch of Wisdom

Melody Kapilialoha MacKenzie*

In Hawaiian tradition, admiration for a wise person is expressed using the phrase "ka lama kū o ka no'eau," literally meaning "the standing torch of wisdom."[1] This is indeed a fitting description of former Hawai'i Supreme Court Chief Justice (CJ) William S. Richardson. Here at the law school that bears his name and especially for those of us who have benefited from his decisions—both in his role as a jurist and as a wise mentor and leader—the loss of CJ Richardson's physical presence is deeply felt. Nowhere is CJ Richardson's wisdom expressed with more eloquence and force than in the opinions that he wrote over the course of his sixteen-year tenure on the bench. His opinions reflect his humble background, his commitment to a more open society with equal opportunity for Hawai'i's multi-ethnic population, and his strong belief in looking to Hawai'i's rich past as a source of today's law.[2]

Born into a working-class Hawaiian, Chinese, and Caucasian family, CJ Richardson understood social, economic, and political deprivations, and he committed himself to social justice. A graduate of Roosevelt High School and the University of Hawai'i, CJ Richardson left Hawai'i to attend law school at the University of Cincinnati. After his return from service in World War II, CJ Richardson aligned himself with the revitalized Democratic Party, helping in

---

* Associate Professor of Law and Director of Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law. I am a beneficiary—three times over—of Chief Justice Richardson's vision and commitment to the people of Hawai'i. I graduated in the law school's first class in 1976, clerked for CJ Richardson for four years, and now teach at the law school that bears his name.

In celebration of Chief Justice Richardson's ninetieth birthday in December 2009, and in honor of the significant role he played in shaping Hawai'i's current jurisprudence and legal environment, selected opinions authored by CJ Richardson were gathered into one volume entitled *Ka Lama Kū O Ka No'eau: The Standing Torch of Wisdom: Selected Opinions of William S. Richardson, Chief Justice, Hawai'i Supreme Court, 1966-1982.* This is an expanded version of the introduction to that volume. Dean Avi Soifer contributed to that introduction and has graciously allowed me to expand our work in this essay. I also wish to express my gratitude to Nathaniel T. Noda, Ka Huli Ao Post-JD Research & Scholarship Fellow. Mahalo nunui to 2005 WSRSL graduate, Kahikino Noa Dettweiler, for his beautiful Oli Aloha for CJ Richardson.

[1] MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS 155 (1983).

[2] See generally CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982 (1985) for a detailed biography of Chief Justice Richardson and the factors that influenced his judicial decisions, much of which is referenced in this article.

particular to mobilize the Hawaiian community in support of Democratic candidates. He subsequently served as Chief Clerk of the State Senate and as Lieutenant Governor. In 1966, Governor John A. Burns appointed him Chief Justice of the Hawai'i Supreme Court where he served for the next sixteen years. Throughout his career, CJ Richardson encouraged Native Hawaiians and other under-represented groups to work within the legal system to bring about positive change for all of Hawai'i's people.

CJ Richardson was a staunch advocate of an independent judiciary, even authoring an article in the *University of Hawai'i Law Review* discussing his views on judicial independence.[3] Although he had many friends and colleagues in the legislative and executive branches of government, he fiercely defended the Supreme Court's authority to promulgate rules of practice and procedure for the state courts and to regulate the admission of new lawyers. He fought to ensure that judges were protected from undue political pressures, which in his mind also meant guaranteeing that judges made a decent living. During his tenure, CJ Richardson established a unified judiciary and oversaw the implementation of the 1978 amendments to the Hawai'i State Constitution that created both an Intermediate Court of Appeals and a new judicial selection process.

In addition to his role as a jurist, CJ Richardson was an astute administrator. One of his major efforts was to oversee the funding and construction of new buildings for the judiciary—on O'ahu, Ka'ahumanu Hale to house the circuit courts and Kauikeaouli Hale for the district courts. He also secured funding for new judiciary buildings on the neighbor islands. The project closest to his heart, however, was renovating Ali'iōlani Hale, the current Supreme Court building. CJ Richardson clearly wanted to restore the building to its earlier glory and to reclaim it for Hawai'i's people. After all, Ali'iōlani Hale had been the seat of the Hawaiian Kingdom's Legislative Assembly. Moreover, it was from the steps of Ali'iōlani Hale that the provisional government had declared the abrogation of the Hawaiian monarchy. It was thus particularly fitting that a Native Hawaiian Chief Justice ensured that the building, and in many senses the judiciary itself, would once again belong to the people of Hawai'i.

CJ Richardson mentored countless young attorneys, including the forty law clerks who worked for him during his tenure on the court. As one of his law clerks, I had the privilege of working closely with him for almost four years, staying on past my initial one-year commitment to help with the expanding caseload and as CJ sought to implement changes in the judiciary.

CJ Richardson gave his law clerks wide latitude to freely express their opinions about cases, both before and after oral argument. Once the court had

---

[3] *See* William S. Richardson, *Judicial Independence: The Hawaii Experience*, 2 U. HAW. L. REV. 1 (1979).

met and decided a case, CJ would call one of us into his chambers and say something like, "Well, I think we're going to be in the majority on this one—maybe even a unanimous one." He would outline his thinking on the case and an exchange of ideas would follow; sometimes he would call two of his clerks in to see which one was most interested in writing the decision. And then, armed with general directions and principles, it was up to the law clerk to give those ideas real meat in a decision. If, at any time during the drafting process, a clerk was stuck, felt that perhaps the wrong decision was being made, or found facts in the record that made it impossible to rule as CJ and the court wished, CJ's door was always open. A first draft was often followed by a second and third. You could always feel CJ's calm, but persistent, guidance.

Always generous with his time, CJ Richardson sat and talked to each of us about the more mundane aspects of our lives as well as the big decisions we had to make. CJ also allowed us great flexibility in our schedules. After ensuring that there would be no conflicts, he let me work in my off hours on the defense for those charged with federal trespass on the island of Kaho'olawe and later allowed me to take a leave of absence to work at the 1978 Constitutional Convention. One of my most memorable experiences was when he bundled a group of Supreme Court clerks into his car to go to Ala Moana Park for the first homecoming of the Hawaiian voyaging canoe, Hōkūle'a.

CJ took an ongoing interest in the lives and careers of his law clerks. He was delighted when we succeeded and he comforted us when we did not. When one of the clerks became a judge (as several did), ran for office, became a partner in a law firm, or received recognition for community service, CJ Richardson was there. With a wide grin and a gentle nod of his head, he let us know how much he supported us and how proud he was of our accomplishments.

Nothing is more striking about CJ Richardson's achievements than his longstanding and continuing commitment to opening educational and professional avenues for the islands' most disadvantaged groups. This commitment led to the 1973 establishment of the law school that now bears his name. He understood that those with the greatest stake in building a more just and equitable society were often denied the opportunity to go to law school because of the prohibitive cost and distance. Determined that all in Hawai'i should have the chance to obtain an excellent legal education, he fought an uphill battle over many years to create and help shape Hawai'i's only law school.

Because of CJ Richardson's perseverance, nearly 2500 men and women—many from underrepresented, minority, and Native Hawaiian communities—are now practicing law in the public and private sectors, holding elected office, leading community and legal services organizations, teaching law, and serving in the judiciary.

In 1966, as he was beginning his tenure on the Supreme Court, CJ Richardson reflected on his new role as a jurist:

> The man who is Chief Justice must balance the rules of the past to conform with the state of society today . . . . He must bring the old rules in line with modern times. He must remember that those rules were made under a different structure.
>
> He must live in the past—but not only the past. He must adopt the fundamental principles of the past and bring them into focus with the present. And in Hawaii, the present—like the past—is a time of migration.[4]

For CJ Richardson, the past included more than the principles of Anglo-American law; it also included the principles of Hawaiian custom and tradition. For him, the past, present, and future all encompassed concern for the common person and for the dispossessed and disadvantaged. CJ Richardson understood and accepted, even embraced, his responsibility. He knew that he and his fellow jurists had the opportunity to make major changes, and he grasped that opportunity.

Working closely with the other members of the court, CJ Richardson helped to reincorporate Native Hawaiian tradition and custom into state law and expanded public rights. His decisions show his successful efforts to balance competing factors: the past and the future; Western law and Hawaiian law and tradition; the rights of the individual and the rights of the collective; and public and private interests.

At times, this new yet old way of thinking drew criticism from government officials and the legal profession, but it has become recognized as an enlightened approach for our distinctive, multi-cultural homeland. Recently, CJ Richardson reflected on his court's approach:

> Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai'i's territorial period, the decisions of our highest court reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai'i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai'i. The result can be found in the decisions of our Supreme Court beginning after Statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases—and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to

---

[4] Gene Hunter, *Democrat Richardson Has His Heart in Hawaii*, HONOLULU ADVERTISER, Feb. 26, 1966, at A1.

> the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.[5]

The decisions of the Richardson court relating to water are undoubtedly the most widely known and the most controversial. CJ Richardson did not write the seminal water rights opinion, *McBryde Sugar Co. v. Robinson*,[6] but he was in strong agreement with the majority and defended and reaffirmed this earlier decision in subsequent opinions. In *McBryde*, the court clarified Hawai'i law and held that water flowing in natural watercourses belongs to the State. The court concluded that in the Māhele—the conversion to fee simple titles in the mid-1800s—King Kamehameha III intended to reserve the right to use water to himself as sovereign for the common good.[7] No right to private ownership of water had been conveyed with any land title grants.[8] Therefore, the State, as successor to the king, owned all waters flowing in natural watercourses and held water in trust for the people.[9] The *McBryde* decision also pointed to the 1850 Kuleana Act, which allowed native tenants to obtain fee simple title to land. The Kuleana Act, the court stated, guaranteed the right to "drinking water and running water," thereby giving riparian water rights to land owners adjoining natural watercourses.[10]

In 1982, in *Robinson v. Ariyoshi*,[11] CJ Richardson responded to six questions certified by the Ninth Circuit Court of Appeals in appeals related to the *McBryde* decision. *Robinson* provided important clarifications regarding water law in Hawai'i, including strongly reaffirming the role of the public trust doctrine in both traditional Hawaiian and modern usage. *Robinson* reiterated that the *McBryde* decision *clarified* ambiguous aspects of Hawai'i water law and did not depart from settled legal principles.[12] It was also instrumental in affirming the role of the riparian doctrine in Hawai'i water law.

CJ Richardson decided a second important water rights case the same year. *Reppun v. Board of Water Supply*[13] involved a dispute over the water in Waihe'e Stream on O'ahu and the impact of the Board of Water Supply's wells on the rights of downstream kalo (taro) farmers. The court's opinion helped

---

[5] William S. Richardson, Spirit of Excellence Award Acceptance Speech at the ABA Spirit of Excellence Awards Luncheon (Miami, Fla., February 10, 2007).

[6] 54 Haw. 174, 504 P.2d 1330 (Abe, J.), *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam).

[7] *Id.* at 185-87, 504 P.2d at 1338-39.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 191-99, 504 P.2d at 1341-45.

[11] 65 Haw. 641, 658 P.2d 287 (1982).

[12] *Id.* at 673-76, 658 P.2d at 309-12.

[13] 65 Haw. 531, 656 P.2d 57 (1982).

explain the doctrines of appurtenant and riparian rights, including whether such rights may be transferred or extinguished.

CJ Richardson has identified *In re Ashford*[14] as the decision of which he was most proud and the one that he believed had the most significant impact. In *Ashford*, the court was called upon to determine the boundary between public beaches and private property. At issue was an original grant from the Māhele describing the shoreline boundary using the phrase "ma ke kai," or "along the sea."[15] The meaning of this term was established in *Ashford*, when the court allowed kama'āina witness testimony[16] on the location of shoreline boundaries according to ancient Hawaiian tradition, custom, and usage. The court then determined that based on Hawaiian custom and usage, seaward boundaries described as "ma ke kai" are located along the upper reaches of the wash of waves, as evidenced by the edge of vegetation or line of debris left by the wash of waves.[17]

In two subsequent cases, *County of Hawaii v. Sotomura*[18] and *In re Sanborn*,[19] the court affirmed and refined the *Ashford* decision. In *Sotomura*, the court applied the *Ashford* standard to property that had been registered in Land Court and also determined that where seaward boundaries are evidenced by both a debris line and a vegetation line lying further mauka, or inland, the boundary is presumed to be at the vegetation line.[20] This meant that more of the beach would be available for public use and the court specifically noted that "[p]ublic policy . . . favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[21] In *Sanborn*, another case involving property registered in Land Court, the Hawai'i Supreme Court reaffirmed its earlier holdings and also ruled that in construing land court decrees, natural monuments such as "along the high water mark" are controlling over azimuth and distance measurements.[22] Citing *Sotomura*, the court stated, "land below high water mark is held in public trust by the State, whose ownership may not be relinquished, except where relinquishment is consistent with certain public purposes."[23]

---

[14] 50 Haw. 314, 440 P.2d 76 (1968).

[15] *Id.* at 314, 440 P.2d at 77.

[16] In a footnote, the court quoted an earlier Hawai'i case to define a kama'āina witness as "a person familiar from childhood with any locality." *Id.* at 315 n.2, 440 P.2d at 77 n.2 (quoting *In re* Boundaries of Pulehunui, 4 Haw. 239, 245 (1879)).

[17] *Id.* at 315, 440 P.2d at 77.

[18] 55 Haw. 176, 517 P.2d 57 (1973).

[19] 57 Haw. 585, 562 P.2d 771 (1977).

[20] *Sotomura*, 55 Haw. at 182, 517 P.2d at 62.

[21] *Id.* at 189, 517 P.2d at 66.

[22] *Sanborn*, 57 Haw. at 590, 562 P.2d at 774.

[23] *Id.* at 593-94, 562 P.2d at 776 (quoting *Sotomura*, 55 Haw. at 183-84, 517 P.2d at 63).

In another landmark case, *State ex rel. Kobayashi v. Zimring*,[24] the court was called upon to resolve a dispute over whether new lands created by a lava flow were public or private property. After a detailed examination of the Māhele and the State Admission Act, as well as Hawaiian precedent, to determine how lava extensions were treated under Hawaiian custom and applicable law, CJ Richardson held that lands created by lava extensions are owned by the State of Hawai'i.[25] Finding no prior Hawaiian custom or judicial precedent, he reasoned that "equity and sound public policy demand that such land inure to the benefit of all the people of Hawaii, in whose behalf the government acts as trustee . . . . Thus we hold that lava extensions vest when created in the people of Hawaii, held in public trust by the government for the benefit, use and enjoyment of all the people."[26]

Two other decisions further demonstrate the Richardson court's view that resources should be held for the benefit of the public. In the 1966 case *In re Robinson*, the court held that a reservation of the government's rights to "all mineral or metallic mines, of every description," in a royal patent controlled even where the original Land Commission Award did not contain the reservation.[27] Two years later, the court decided *In re Kelley*, holding that a private road, abandoned to the government prior to an 1892 act designating all trails, roads and highways as public, automatically became a public highway upon passage of the act—even without formal acceptance by the government.[28]

It would be a mistake to conclude, however, that the Richardson court always acted to give resources to the public. In the 1978 case *In re Kamakana*, the justices looked to Hawaiian practice and custom to determine that the grant of an ahupua'a, a traditional Hawaiian land unit, would naturally include the fishpond attached to the ahupua'a.[29] The court reasoned that because Hawaiians viewed fishponds in the same way that they viewed 'āina or land, the private claimant, not the State, owned a Moloka'i fishpond.[30] In another case decided the same year, *United Congregational Churches v. Kamamalu*, the court established that continuous occupation of state lands by the churches afforded them an equitable right to use the property, until abandoned, for those purposes.[31]

---

[24] 58 Haw. 106, 566 P.2d 725 (1977).

[25] *Id.* at 124-25, 566 P.2d at 736-38.

[26] *Id.* at 121, 566 P.2d at 735 (citations omitted).

[27] 49 Haw. 429, 440-41, 421 P.2d 570, 577-78 (1966).

[28] 50 Haw. 567, 579-80, 445 P.2d 538, 546-47 (1968).

[29] 58 Haw. 632, 640-41, 574 P.2d 1346, 1350-51 (1978).

[30] *Id.* at 638-41, 574 P.2d at 1349-51.

[31] 59 Haw. 334, 341-43, 582 P.2d 208, 213-14 (1978).

CJ Richardson also expressed concern for the loss of Hawaiian lands through adverse possession. In *Yin v. Midkiff*[32] and *City and County of Honolulu v. Bennett*,[33] his court determined that a co-tenant must show good faith in adversely possessing property. In most instances, CJ Richardson noted, the requirement of good faith in turn mandates that the tenant acting adversely must *actually notify* co-tenants of the claim against them.[34] The court acknowledged that there may be exceptional circumstances where good faith is satisfied by less than actual notice,[35] but this basic good faith requirement has remained the standard for adverse possession claims against co-tenants in Hawai'i.[36]

In another key decision, CJ Richardson set forth the standard by which state actions should be judged when dealing with beneficiaries of the Hawaiian Homes Commission Act,[37] a law establishing homestead lands for Native Hawaiians of not less than fifty percent Hawaiian ancestry. In *Ahuna v. Department of Hawaiian Home Lands*, the court drew the analogy between the federal government's relationship with Native American peoples and the State's relationship with Hawaiian home lands beneficiaries, declaring that the State must "adhere to high fiduciary duties normally owed by a trustee to its beneficiaries."[38] CJ's opinion added that the State should thus be judged by "the most exacting fiduciary standards."[39] These duties included the duty to act solely in the interests of the beneficiaries and to exercise reasonable care and skill in dealing with trust property.[40]

The lasting value of the *Ahuna* court's explication of these trust duties is evident in current Hawai'i case law. The Hawai'i Supreme Court has adopted the *Ahuna* standard in two landmark cases[41] related to the public land trust, the former Hawaiian Kingdom Government and Crown Lands ceded to the United States by the Republic of Hawai'i in 1898 and then transferred to the State of Hawai'i in the 1959 Admission Act. The court has applied these same strict

---

[32] 52 Haw. 537, 481 P.2d 109 (1971).

[33] 57 Haw. 195, 552 P.2d 1380 (1976).

[34] *Id.* at 209-10, 552 P.2d at 1390.

[35] *Id.*

[36] *See* Wailuku Agribusiness Co. v. Ah Sam, 114 Haw. 24, 34, 155 P.3d 1125, 1135 (2007); Morinoue v. Roy, 86 Haw. 76, 82-83, 947 P.2d 944, 950-51 (1997); Hana Ranch v. Kanakaole, 66 Haw. 643, 645-46, 672 P.2d 550, 551-52 (1983).

[37] 42 Stat. 108 (1921), *reprinted in* 1 HAW. REV. STAT. 261 (2009).

[38] 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982).

[39] *Id.* at 339, 640 P.2d at 1169 (quoting Seminole Nation v. United States, 316 U.S. 286, 297 (1942)) (emphasis omitted).

[40] *Id.* at 340, 640 P.2d at 1169.

[41] Pele Def. Fund v. Paty, 73 Haw. 578, 605 n.18, 837 P.2d 1247, 1274 n.18 (1992); Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 117 Haw. 174, 195, 177 P.3d 884, 905 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).

fiduciary standards to the State's dealings with public trust lands, stating that "such duty is consistent with the State's obligation to use reasonable skill and care in managing the public lands trust" and that the State's conduct should be judged "by the most exacting fiduciary standards."[42]

CJ Richardson once again looked to early Hawaiian law and custom in *Palama v. Sheehan*.[43] In *Palama*, his opinion found a right of access to a kuleana parcel based, in part, on language in early Hawai'i deeds reserving the rights of native tenants as well as the 1850 Kuleana Act's provision reserving the "right of way" on all lands granted in fee simple.[44] The decision also relied on kama'āina testimony in the trial court showing that the road was an ancient Hawaiian right of way.[45]

Turning to Hawaiian custom and practice again, and bolstered by a 1978 amendment to the Hawai'i State Constitution, CJ Richardson's 1982 decision in *Kalipi v. Hawaiian Trust Co.*,[46] dealing with Native Hawaiian gathering rights, broke new ground. The court stated that pursuant to article XII, section 7 of the amended constitution, courts are obligated "to preserve and enforce such traditional rights."[47] Recognizing that gathering rights are protected by three sources in Hawai'i law—Hawai'i Revised Statutes (H.R.S.) sections 1-1 and 7-1, and article XII, section 7 of the Hawai'i State Constitution—the court determined that lawful residents of an ahupua'a may, for the purpose of practicing Native Hawaiian customs and traditions, enter undeveloped lands within the ahupua'a to gather the items enumerated in H.R.S. section 7-1.[48] The court further stated that H.R.S. section 1-1 ensures the continuation of Native Hawaiian customs and traditions not specifically enumerated in H.R.S. section 7-1 that may have been practiced in certain ahupua'a "for so long as no actual harm is done thereby."[49] It noted that the "retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area."[50]

The *Kalipi* decision set the foundation for more recent cases affirming traditional and customary rights. Ten years after *Kalipi*, the Hawai'i Supreme Court, in *Pele Defense Fund v. Paty*, recognized that "native Hawaiian rights

---

[42] *Office of Hawaiian Affairs*, 117 Haw. at 195, 177 P.3d at 905 (internal quotation marks omitted).

[43] 50 Haw. 298, 440 P.2d 95 (1968).

[44] *See id.* at 300, 440 P.2d at 97.

[45] *Id.* at 301, 440 P.2d at 97-98.

[46] 66 Haw. 1, 656 P.2d 745 (1982).

[47] *Id.* at 4, 656 P.2d at 748.

[48] *Id.* at 7-8, 656 P.2d at 749.

[49] *Id.* at 10, 656 P.2d at 751.

[50] *Id.*

protected by article XII, section 7 [of the Hawai'i Constitution] may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[51] The court explained that although Kalipi had gathering rights under H.R.S. section 7-1 limited to the ahupua'a in which he lived as a native tenant, H.R.S. section 1-1's "'Hawaiian usage' clause may establish certain customary Hawaiian rights beyond those found in section 7-1."[52] In 1995, in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (PASH)*, the court rejected the argument that gathering rights disappear when an owner develops land, holding instead that the State is obligated to protect the reasonable exercise of traditional and customary rights to the extent feasible.[53] The court based its decision on H.R.S. section 1-1, tracing its origins to an 1847 law authorizing the adoption of common law principles "not in conflict with the laws and usages of this kingdom."[54] The *PASH* court further stressed, "the precise nature and scope of the rights retained by [H.R.S.] § 1-1 . . . depend upon the particular circumstances of each case"[55] and noted that *Kalipi* specifically refused to decide the "ultimate scope" of traditional rights under that statute.[56]

Two decisions of the Richardson era illustrate the court's general approach to public education. In *Spears v. Honda*, a 1968 case, the court ruled that the State lacked the constitutional authority to use public funds to provide bus transportation subsidies for sectarian and private school students.[57] In *Medeiros v. Kiyosaki*, decided in 1970, the court found that the use of a family life and sex education film series in a non-compulsory state sex education program did not contravene the right of privacy and autonomy claimed by parents.[58]

The court was frequently called upon to decide cases relating to the rights of the electorate. In the 1969 case *Akizaki v. Fong*, the court determined that the commingling of valid and invalid absentee ballots invalidated the election results for a representative to the State House, necessitating another election.[59] In *County of Kauai v. Pacific Standard Life Insurance Co.*, the court resolved "a conflict between the private interest of the landowners to develop their

---

[51] 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992).

[52] *Id.* at 618, 837 P.2d at 1275 (citing *Kalipi*, 66 Haw. at 9-10, 656 P.2d at 750).

[53] 79 Haw. 425, 448-49, 903 P.2d 1246, 1269-70 (1995) (holding that "common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state") (citation and internal quotation marks omitted).

[54] *Id.* at 437 n.21, 903 P.2d at 1258 n.21 (internal quotation marks omitted).

[55] *Id.* at 438, 440, 903 P.2d at 1259, 1261 (citing Pele Def. Fund v. Paty, 73 Haw. at 619, 837 P.2d at 1271) (internal quotation marks omitted).

[56] *Id.* at 439, 903 P.2d at 1260.

[57] 51 Haw. 1, 15-16, 449 P.2d 130, 139 (1968).

[58] 52 Haw. 436, 438-41, 478 P.2d 314, 315-17 (1970).

[59] 51 Haw. 354, 360, 461 P.2d 221, 224-25 (1968).

property and the public interest of the electorate to effectively determine . . . land use policy."[60] The court held for the electorate and determined that zoning estoppel does not apply where certification of a prohibiting referendum precedes final discretionary action by the government.[61]

The Richardson court also opened the way for greater public access to both the administrative process and the courts. In *Life of the Land v. Land Use Commission*[62] and later in *Akau v. Olohana*,[63] the court adopted progressive standing requirements, allowing organizations and individuals to challenge land use decisions and to assert environmental and other important public rights. Since their initial adoption, the Hawai'i Supreme Court has consistently reaffirmed these standing requirements in cases involving environmental and public rights.[64]

Consistent with CJ Richardson's concern for working people, his court liberally interpreted the statutory presumption in favor of a causal connection between employment activity and an employee's death in *Akamine v. Hawaiian Packing & Crating Co.*[65] According to CJ Richardson, it was legally irrelevant that an employee's heart attack, which occurred at work, could just as easily have occurred when the employee was not working: "The only [legal] consideration should have been whether the attack in fact was aggravated or accelerated by . . . work activity."[66]

Finally, in another important series of cases, the Hawai'i Supreme Court examined negligent infliction of emotional distress claims. In the 1970 case *Rodrigues v. State*, the court had to decide if the plaintiff could recover for emotional distress when his newly-built house was flooded after the State failed to clear a drainage culvert.[67] The court determined that "the interest in freedom from negligent infliction of *serious* mental distress is entitled to independent legal protection"[68] and held that "there is a duty to refrain from the negligent infliction of serious mental distress."[69] The duty, however, runs "only to those

---

[60] 65 Haw. 318, 323, 653 P.2d 766, 771 (1982).

[61] *Id.* at 335-36, 653 P.2d at 778-79.

[62] 61 Haw. 3, 594 P.2d 1079 (1979).

[63] 65 Haw. 383, 653 P.2d 1130 (1982).

[64] Cases citing *Life of the Land* include *E & J Lounge Operating Co. v. Liquor Commission of City & County of Honolulu*, 118 Haw. 320, 346, 189 P.3d 432, 458 (2008), and *Ka Pa'akai O Ka 'Aina v. Land Use Commission*, 94 Haw. 31, 43, 7 P.3d 1068, 1080 (2000); cases citing *Akau* include *Office of Hawaiian Affairs v. Housing & Community Development Corp. of Hawai'i*, 121 Haw. 324, 331, 219 P.3d 1111, 1118 (2009), and *Sierra Club v. Department of Transportation (Superferry I)*, 115 Haw. 299, 314, 167 P.3d 292, 321 (2007).

[65] 53 Haw. 406, 495 P.2d 1164 (1972).

[66] *Id.* at 413, 495 P.2d at 1169.

[67] 52 Haw. 156, 157-61, 472 P.2d 509, 512-14 (1970).

[68] *Id.* at 174, 472 P.2d at 520 (emphasis added).

[69] *Id.*

who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous."[70]

Four years later, in *Leong v. Takasaki*, by looking to the concepts of 'ohana (extended family) and ho'okama (a form of customary adoption), CJ Richardson found that a blood relationship may not be necessary in order to recover for emotional distress caused by seeing a step-grandmother hit by a car.[71] His opinion stated: "Hawaiian and Asian families of this state have long maintained strong ties among members of the same extended family group. The Hawaiian word ohana has been used to express this concept."[72] In 1975, CJ Richardson dissented in *Kelley v. Kokua Sales*,[73] another case involving the bounds of liability in negligent infliction of serious mental distress cases. He argued eloquently against the majority's retreat from the precedent set by *Rodrigues*.[74]

Necessarily, any review of CJ Richardson's judicial opinions can give only a hint of his enormous influence. It does not begin to touch upon the extraordinary personal qualities—his optimism, his empathy, his uniquely generous blend of heart and spirit and head, his warmth and humor, and his rare common sense—that are so securely anchored in the land and people of Hawai'i. It also cannot convey how CJ Richardson's many deeds, stretching far beyond his judicial opinions, have greatly influenced and improved Hawai'i as well as the world beyond our shores.

For the law school's 2005 graduation ceremony, graduate Kahikino Noa Dettweiler wrote and presented an Oli Aloha, a chant honoring CJ Richardson.[75] As Noa explained, the chant compares CJ Richardson to the lehua blossom, a poetic reference for a person of profound skill and wisdom.[76]

The Oli Aloha alludes to Kamehameha's Law of the Splintered Paddle, the law that declared: "Let the old men, the old women and the children go and sleep by the wayside; let them be not molested."[77] Although there are several versions of the mo'olelo (story) about this law,[78] they all recount that some of

---

[70] *Id.* at 174, 472 P.2d at 521.

[71] 55 Haw. 398, 410-11, 520 P.2d 758, 766 (1974).

[72] *Id.* at 410, 520 P.2d at 766.

[73] 56 Haw. 204, 532 P.2d 673 (1975).

[74] *See id.* at 210-14, 532 P.2d at 677-79 (Richardson, C.J., dissenting).

[75] *See* Kahikino Noa Dettweiler, *Oli Aloha No William S. Richardson*, 33 U. HAW. L. REV. 1 (2010).

[76] *Id.*

[77] PUKUI, *supra* note 1, at 35.

[78] *See* SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAII 125-26 (rev. ed. 1992); W.D. WESTERVELT, HAWAIIAN HISTORICAL LEGENDS 162-175 (1923); JULIE STEWART WILLIAMS, KAMEHAMEHA THE GREAT 58-59, 86-87 (rev. ed. 1993); *see also* STEPHEN L. DESHA, KAMEHAMEHA AND HIS WARRIOR KEKŪHAUPI'O 205-16 (Frances N. Frazier trans., 2000), for a complete account of one version of the mo'olelo along with a summary of several other

the common people of Puna were fishing when the young chief Kamehameha came upon them.[79] Knowing only that a stranger and a chief approached, the men feared trouble and fled; Kamehameha pursued. When Kamehameha's ankle was caught in a lava crevice, Kaleleiki, one of the fishermen, turned back and with his paddle, hit Kamehameha on the head, splitting the paddle in two.[80] Years later, when Kaleleiki and his companions were brought before Kamehameha for punishment, instead of putting them to death, Kamehameha recognized his own responsibility in causing the incident.[81] He proclaimed the Law of the Splintered Paddle, protecting even the most defenseless from oppression by those with more power and authority.[82]

Thus, in Noa's tribute to CJ Richardson, I was reminded that the law school's graduates fulfill CJ Richardson's highest aspirations for us when we protect those who are powerless from those who have power, when we fight for those who lack economic security and life's basic necessities, and when we seek justice for Hawai'i's native people and, indeed, for all people in our homeland.

But for CJ Richardson's endeavors, so many of us would have lacked the opportunity to learn the law and to seek justice through its practice. Without our beloved CJ, we would have had no such compelling embodiment of a life well lived—and lived with exemplary grace and humble nobility.

Ka Lama Kū O Ka No'eau—the standing torch of wisdom. Indeed!

---

versions.

[79] DESHA, *supra* note 78, at 206-07; WESTERVELT, *supra* note 78, at 167-68; WILLIAMS, *supra* note 78, at 58.

[80] DESHA, *supra* note 78, at 208-09.

[81] WESTERVELT, *supra* note 78, at 174-75; WILLIAMS, *supra* note 78, at 86-87.

[82] WILLIAMS, *supra* note 78, at 86-87; DESHA, *supra* note 78, at 216.

For CJ Richardson: Hawai'i's Bold and Gentle Dreamer

Aviam Soifer*

In February 2008, chaos reigned at the Mānoa Elementary School Democratic Party caucus. Long lines of people snaked around outside and one woman even held a flashlight as she diligently tried to check precinct records. Many hundreds waited happily to vote in what seemed like a raucous but very friendly giant block party—as well as a huge celebration of the improving chances for Hawai'i's own Barack Obama to become president. Mānoa is home to many University of Hawai'i faculty and staff members, and several of them jumped on tables to try to funnel the exuberant crowd and to make sure that everyone ultimately got to vote. Soon all the ballots were gone, however, and voters received pieces of paper ripped on the spot as ballots. Future Governor Neil Abercrombie and others shouted directions, only to countermand what they had said minutes before.

A very handsome man sat beaming at the edge of this electoral scrum. CJ Richardson was overjoyed at the scene. After all, this was democracy in action, spelled with either a capital or a small "d," and the state he dearly loved seemed poised to provide the entire world with a leader steeped in Hawai'i's unique cultural fluency. CJ was among friends. Then again: CJ was among friends wherever he went.

To walk into a Zippy's restaurant or the Hawai'i State Capitol or anywhere else with CJ was to witness an outpouring of affection that genuinely came from everyone he encountered, from the busboys and custodians to the elected leaders of the state. CJ always seemed to know a parent or a cousin of anyone who grabbed his hand or patted him gently on the back, and he conversed quietly, directly, and with unhurried and unflappable genuine warmth.

I am hugely blessed, as well as greatly honored, to have been given the chance to talk and write about our beloved CJ Richardson in the days and months after his death. But it remains very humbling to be an inadequate representative for so many others who also loved him. Others loved to talk

---

* Dean and Professor, William S. Richardson School of Law, University of Hawai'i at Mānoa. A few parts of this eulogy appeared in my earlier tributes to CJ Richardson published in *Pacific Business News* on June 25, 2010, *available at* http://pacific.bizjournals.com/pacific/stories/2010/06/28/editorial3.html, and in the *Honolulu Star-Advertiser* on July 4, 2010, *available at* http://www.staradvertiser.com/editorials/20100704_Another_founders_Fourth_of_July.html.

about the time they played ball together, or the Filipino unit with which he served in the South Pacific during World War II, or the struggle to transform the Territory of Hawai'i into a state with very different politics. Some were teammates who swam with him when he was the captain of the University of Hawai'i swimming team in 1938, and many were accustomed to cheering with him regularly for the Wahine Volleyball team or for the women law students and alumnae teams in the annual Ete Bowl's vigorous flag football contests.

The chance to get to know this remarkable man and to witness and enjoy his humble greatness close up has been one of the greatest treats in my life. After we made sure that CJ had an office at the law school, our entire community got to hang out with him and to listen and learn first-hand about law and the history of Hawai'i. We were boosted regularly by his infectious enthusiasm. This great but very gentle man personally bridged the period beginning not many years after the overthrow of the Hawaiian Kingdom through the election of a United States president from Hawai'i—and he personally greatly influenced the shape of Hawai'i from the years before statehood into the future.

Many people are lucky to be described as "beloved" when they die, and most of them were in fact beloved by at least small groups of people in addition to their families. But William S. Richardson—widely known as "CJ" ever since he served as Chief Justice of the Hawai'i Supreme Court from 1966 to 1982—truly has been beloved over many years by multitudes of people reaching far beyond his family and even beyond the large community that is proudly connected to him through the law school that bears his name. A rainbow of connecting circles radiated from this extraordinary man.

This is in large measure because CJ knew who he was and was very comfortable within himself. We truly loved him for that. I have asked many people over the years, but no one could remember ever seeing him angry. In fact, none of us knows anyone who came close to CJ in melding genuine greatness and remarkable humility in such a cheerful, graceful package. It can truly be said that they did not, do not, and will not make any like him. And CJ proved repeatedly that even extremely nice guys can and do sometimes finish first.

Whenever in a tough spot or in doubt, many people will still try to figure out what CJ would have done. Because of him, there is now an entire law school 'ohana—an 'ohana made up of people who more likely than most do the right thing. That is because he exemplified the importance of saying or doing the right thing naturally, in any particular context.

In trying to find the right words to describe such an indescribably gracious man, I remembered that CJ often relied on the wisdom of his wife, Amy, and other women close to him—and so I thought to do the same.

My mother, for example, is a rather critical sort of person who did not know CJ well, but she was entirely charmed each time that she talked with the man she called "the Silver Fox." After his passing, my mother wrote: "He was always so charming and courteous, always with a twinkle in his eye, and with an alert, knowing, and engaged awareness of the nuances of whatever was occurring, both immediately and long range."

My wife, Marlene Booth, with her documentary filmmaker's exceptionally perceptive eye and ear, also loved CJ. She pointed out that the wonderful, ebullient photograph of CJ at his ninetieth birthday—the one in which he is standing in front of the "Realizing the Dream" banner with his arms stretched wide and his amazing smile appearing to be even wider than usual—actually encapsulates some of CJ's greatest gifts.

Standing there, CJ seems to embody a bridge stretching back to his beginnings—a time when Queen Lili'uokalani, whom his grandfather officially represented in Washington, had been gone only two years. CJ liked to talk about hearing whispered conversations about Hawaiian sovereignty that he did not wholly understand when he was a young boy. He recalled the details of hawking newspapers during the 1931-32 Massie trials and how it was important that these sensational trials were good for business because it was during the Depression, and CJ's family was so hard-pressed that he would not go home until he had sold every last paper. He never dwelled on his somewhat threadbare childhood on Fifth Avenue in Kaimukī except to recount how it featured a shared poi bowl with enough for everyone and wonderful nights of music, when the great mixture of neighbors joined in and sang all kinds of different songs.

But that ninetieth birthday photograph also shows that, even at ninety years old, CJ vigorously reached forward, connecting with joyous ease to the future. He never tired of trying to help us all—and those lucky enough to be part of his law school in particular—to move ahead and to continue to realize his dream.

This connectedness helps explain how CJ accomplished so many important things in his unusually gentle and upbeat way. He vigorously fought for the law school that would not exist but for him. In his last years, he regularly came to the law school, sat in on classes, and talked to students and faculty and staff members about anything and everything. Through the law and the legal training that CJ brought about, those who follow him will look out for the entire community, not least the little guy downstream and the powerless who still desperately need legal protection.

To know this "Everyman" and to begin to grasp his uncommon gifts stretched us all in the very best way. His family members, who clearly take after him in wonderful ways, also generously stretched to share him with us all. Thanks to CJ, there are marvelous opportunities for many people that were unimaginable not many years ago.

CJ's grandchildren recently described their "Puna" as "cool and contemporary," and that he surely was. But he was also a dreamer: the rare kind of dreamer who managed to realize dreams anchored both in great joy in the moment and in significant efforts to improve the future. And anyone who witnessed CJ's particular joy in singing with the law school's Casualettes—or in singing with anyone, for that matter—experienced CJ's amazing grace in connecting to others and his deep affection for life's simple pleasures.

How did a soft-spoken, genuinely humble man reach so many and accomplish so much? More specifically, how did a Hawai'i Supreme Court chief justice—occupying a position more elevated and more isolated from everyday life than practically any other—connect with and affect so many different people? Undoubtedly, in the words of Hawai'i's wonderful columnist Lee Cataluna, it was in large measure because the theme of CJ's entire legal career was "that the law should be used to protect and fight for people who don't have the power to fight for themselves."[1] Throughout his career, both on and off the bench, CJ was an exemplary down-to-earth dreamer. He saw the law as a promising mixture of fairness and opportunity. His judicial decisions did not forget those without access to justice, the people below the battles between big corporations and other powerful entities, or those excluded from beaches that his opinions made public. And his successful efforts to offer opportunity to those who otherwise could not go to law school created a remarkable legacy.

Today the sobriquet "activist judge" has virtually lost all meaning. "Activist" now serves almost exclusively as a pejorative word, used to condemn any decision one does not like. The current United States Supreme Court and its immediate predecessor led by Chief Justice Rehnquist have combined to invalidate a remarkable number of federal laws and regulations.[2] Yet the justices in the majority on these very activist

---

[1] Lee Cataluna, *Isles' 'Little People' Kept Closest To Judge's Heart*, HONOLULU STAR-ADVERTISER, June 22, 2010, http://www.staradvertiser.com/columnists/20100622_isles_little_people_kept_closest_to_judges_heart.html.

[2] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (invalidating provisions of the Bipartisan Campaign Reform Act and overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), and McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), on the grounds that the First Amendment does not permit Congress to suppress speech based on corporate identity); District of Columbia v. Heller,

courts are unusually conservative as well.[3] Nonetheless, it is still meaningful to describe and applaud Chief Justice Richardson's court as an activist court in much the same way that the United States Supreme Court led by Chief Justice Earl Warren was activist. Both courts demonstrated a basic commitment to justice for all, and not least for the dispossessed, in very specific and practical ways, even if it meant shaking up the patterns of entrenched power.

William S. Richardson's Supreme Court was uniquely activist in another way as well, however. It recognized that Native Hawaiian law and tradition could and should play a major role in developing the new state's common law. CJ and his fellow justices asked repeatedly, in essence, "Why follow only Anglo-American law when Hawai'i has its own traditions, customs, and usages?" CJ's opinions managed to blend generous aloha with the eternally tough search for justice. This was so, for example, whether a case involved the intricacies of gathering rights,[4] beach access,[5] or water rights.[6]

---

554 U.S. 570 (2008) (invalidating the District of Columbia's ban on handgun possession in private residences by finding an individual Second Amendment right to possess firearms); United States v. Morrison, 529 U.S. 598 (2000) (finding insufficient congressional authority to promulgate the civil damages provision of the Violence Against Women Act because cumulative noneconomic activity is not a sufficient basis for Congress to exercise its Commerce Clause power nor may Congress appropriately use its authority under Section 5 of the Fourteenth Amendment); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that the abrogation of sovereign immunity in the Patent Variety Protection Remedy Clarification Act, derived from Congress' Article I powers, is invalid); Printz v. United States, 521 U.S. 898 (1997) (regarding the Tenth Amendment as a limitation on congressional power and invalidating the Brady Handgun Violence Prevention Act for impermissibly commandeering state officials); United States v. Lopez, 514 U.S. 549 (1995) (limiting Congress's power to enact the Gun-Free School Zones Act under the Commerce Clause). *See generally* Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555 (2010); Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009); Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567 (2007).

[3] *See, e.g.*, THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY (2004); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005); Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1.

[4] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982) (recognizing traditional gathering rights if exercised in the ahupua'a in which one lives).

[5] *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968) (allowing public access to beaches "according to ancient tradition, custom and usage" and finding that "the location of a public and private boundary dividing private land and public beaches was along the upper reaches of the waves as represented by the edge of vegetation or the line of debris").

[6] Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982) (holding that the Kingdom of Hawai'i reserved title to all waters when the land passed from the Kingdom to private owners).

This unique blend goes far to explain why Hawai'i Supreme Court Associate Justice Simeon R. Acoba, Jr., who long ago served as one of CJ's law clerks, recently described CJ's time on the bench as "the Golden Age of Law in Hawai'i."[7]

CJ was, in fact, a quintessential activist for the good. One may define "activist" as: "1. In action, moving; 2. Causing or initiating change; 3. Engaging, contributing, participating."[8] And one basic definition of "the good" is: "CJ William S. Richardson."

CJ's most enduring qualities were deeply rooted in the land and people of Hawai'i. Yet CJ uniquely blended head, heart, and spirit with unfailing ebullience and warmth, low-key humor, and exquisitely attuned common sense. This, too, remains a crucial part of his living legacy.

In CJ's memory, we remain deeply committed to realizing his dream of offering a first-rate legal education to all who qualify and to serving Hawai'i and the world beyond our shores. We do so in the spirit of someone who was truly beloved—a remarkably gentle man who was also a rare sort of gentleman.

On the occasion of CJ's ninetieth birthday celebration in December 2009, the law school compiled and published a book of his selected judicial opinions. In the Introduction in which I joined—but whose words were mainly written by Professor Melody Kapilialoha MacKenzie, an alumna of our first graduating class in 1976 and one of CJ's law clerks—we described CJ as a "compelling embodiment of a life well lived—and lived with exemplary grace and humble nobility."[9] We tried to express our gratitude and deepest aloha to him "for standing as a torch of wisdom for us all."[10] These words might seem a bit flowery. As we thought and talked about CJ, however, we came to believe that we had understated what he accomplished and what his legacy will continue to be.

As a veteran of World War II in the South Pacific and as a key player in the rugged political battles that followed in Hawai'i, CJ obviously understood the importance of fighting for principles. Yet for CJ and his colleagues—and for several thousand alumni of his law school—those ideals included an abiding public commitment to open up access to the kind

---

[7] Mary Vorsino & Ken Kobayashi, *A Legal Giant: Decades-long legacy of mentorship had a major influence on students and education*, HONOLULU STAR-ADVERTISER, June 22, 2010, http://www.staradvertiser.com/news/hawaiinews/20100622_a_legal_giant.html.

[8] STUDS TERKEL, HOPE DIES LAST xvi (2003).

[9] Melody Kapilialoha MacKenzie & Aviam Soifer, *Introduction* to KA LAMA KŪ O KA NO'EAU: THE STANDING TORCH OF WISDOM: SELECTED OPINIONS OF WILLIAM S. RICHARDSON, CHIEF JUSTICE, HAWAI'I SUPREME COURT, 1966-1982, at xiv (2009).

[10] *Id.*

of legal education that would be most likely to produce the right kind of lawyers.

Within CJ's vision, such lawyers must be able to combine outstanding craftsmanship with kind yet determined advocacy. They should demonstrate unusual empathy for others, particularly those in need, as well as substantial devotion to the public interest and great appreciation for fun. That the very diverse but also very cohesive William S. Richardson School of Law strives to realize CJ's dream suggests that it is still possible to stand for principles and to advocate for ideals as well as to enjoy life fully. In Hawai'i, that dream remains inextricably linked for all time to the life and legacy of CJ—a determined visionary who, with humble nobility and generous humanity, sought to secure rights and opportunities for all.

We already miss CJ hugely, but there is considerable comfort in knowing that we are part of his legacy, even if we will no longer see his exuberant yet dignified wave. In all future Ete Bowls, we will save his favorite spot on the grass, where he cheered for the women on both sides, and we will be sure that he keeps his rightful place at graduation. His gentle but bold vision will continue to launch just the right kinds of leaders. Our search for justice still will emulate CJ's unequaled blend of commitment and vision and of thoughtfulness, optimism, and aloha.

Aloha palena 'ole.

William S. Richardson: A Leader in Hawai'i's Successful Post-WWII Political and Judicial Revolution

James S. Burns*

Chief Justice William S. Richardson. Although my family and I knew him as "Bill," he was more popularly known as "CJ." CJ is proof of Nelson Mandela's assertion that "[a] good head and a good heart are always a formidable combination."[1] CJ had both in abundance.

Born in Hawai'i in December of 1919, CJ was a mix of Chinese, Hawaiian, and Caucasian blood. At the time, Hawai'i was a "territory" of the United States. The governor and the justices of the Hawai'i Supreme Court were appointed by the President, with the consent of the United States Senate. Only U.S. citizens who were twenty-one years and older and who were able to speak, read, and write in English or Hawaiian were eligible to vote. The voters elected a delegate as a non-voting member of the United States House of Representatives.[2]

Relatively few individuals controlled most of Hawai'i's economy and wealth. They did so through the "Big Five" companies: Alexander & Baldwin, American Factors, Castle & Cooke, C. Brewer & Co., and Theo H. Davies & Co., as well as through a sixth company, Dillingham Corporation. Predictably, the Big Five also controlled the legislative, executive, and judicial branches of the territorial government. They operated this oligarchy as members of the Republican Party.

It was amid this background that CJ grew up. Unlike most of his friends and Roosevelt High School classmates, CJ continued his education and graduated from the University of Hawai'i (UH) with a degree in business and economics.[3] CJ once remarked that after graduating, he "faced what everybody else faced that wasn't in on the Big Five or didn't have any of the connections into good jobs—probably like all the other Hawaiians, I was just destined to become a high-class clerk someday and that was it."[4]

---

* Chief Judge, Hawai'i Intermediate Court of Appeals (retired).

[1] *See* FATIMA MEER, HIGHER THAN HOPE: THE AUTHORIZED BIOGRAPHY OF NELSON MANDELA 407 (1990) (quoting letter from Nelson Mandela to Fatima Meer (Dec. 1, 1975)).

[2] Organic Act, ch. 339, 31 Stat. 141 (1900).

[3] Stuart Brown et al., John A. Burns Oral History Project, Phase I: Interviews with William Richardson 1-2 (Feb. 2, 1976) (unpublished interviews) (on file with author) [hereinafter Oral History I].

[4] *Id.* at 2.

Fortunately, one of CJ's UH professors talked him into going to law school at the University of Cincinnati.[5] At a great sacrifice to his family, CJ commenced his law school education in September 1941 and received his law degree in 1943.[6] His legal career, however, would not begin until after World War II. After graduating from law school, CJ enlisted in the Air Force and was soon transferred to the Army.[7] He served as an infantry officer in the Philippines and was involved in combat.[8] After the war, CJ completed his military service and began a private law practice in Hawai'i.[9] In 1947, he married the love of his life and his soul-mate, Amy Ching.[10]

A Political Revolution

By the end of the war, my father, John A. "Jack" Burns, vehemently opposed the oligarchy then ruling Hawai'i and wanted it replaced by a democracy that would provide equal rights and opportunities to all of Hawai'i's people. In 1946, my father began organizing a political and judicial revolution. His goals included obtaining control of the Democratic Party of Hawai'i, electing a Democratic majority in the Hawai'i Legislature, and electing a Democrat as governor. He also wanted the appointment of a Hawai'i Supreme Court that would author a judicial revolution. In my father's view, these goals were achievable with the involvement and support of the labor unions, especially the International Longshoremen's and Warehousemen's Union,[11] the veterans of World War II,[12] and their families, friends, associates and supporters.

The need for a political and judicial revolution was not lost on CJ. He once noted that even when Hawai'i's government officials were appointed by Presidents who were Democrats (Roosevelt and Truman),

> it was obvious that the appointments were being dictated by the Big Five, and the appointees were going to be those who had friends in the U.S. Senate and that was so with the Governorship and the Secretaryship and all of the judges—which was the first thing that got me really feeling that this couldn't do. I couldn't live my whole life under this kind of set-up. I had the choice to either try to change the system or join the system . . . .[13]

---

[5] *Id.*

[6] *Id.*

[7] *Id.* at 3.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] DAN BOYLAN & T. MICHAEL HOLMES, JOHN A. BURNS: THE MAN AND HIS TIMES 67 (2000).

[12] Oral History I, *supra* note 3, at 8.

[13] *Id.* at 4.

CJ and Amy decided to actively participate in organizing the Democratic Party[14] and persuaded their relatives, friends, and others to join them.[15] In the early 1950s, CJ was also a member of a small group of individuals called the "Cell Gang." The group met every Tuesday afternoon at my father's office to study and learn and to plan the political revolution. Matsuo "Matsy" Takabuki, a World War II veteran and University of Chicago Law School graduate, was a frequent participant.[16] Takabuki wrote:

> During those meetings we articulated our hopes and aspirations for greater opportunities for all people, particularly the local 'have-nots,' and for lessening the power of the 'haves' on Merchant Street. Quite frankly, we wanted to break the economic stranglehold of the Big Five in Hawai'i.[17]

CJ's and Amy's involvement continued to grow, as did progress toward a "revolution." In 1952, CJ was elected president of a Democratic Party precinct club,[18] and Amy was elected delegate to the Hawai'i Democratic Party convention.[19] At the 1952 convention, the faction of Democrats led by my father won control of the Democratic Party of Hawai'i.[20] CJ was elected its secretary.[21] That same year, CJ ran unsuccessfully for the Honolulu Board of Supervisors (now known as the City Council), an experience that led CJ and Amy to decide that although they would continue their serious involvement with Democratic Party politics, CJ would never again run for public office.[22]

Two years later, in what is now known as the historic Democratic Revolution of 1954, the Democrats won a majority of seats in the House and the Senate of Hawai'i's Legislature. The momentum continued in 1956, when my father was elected Hawai'i's delegate to Congress. CJ succeeded my father as chair of the Democratic Party of Hawai'i[23] and led the territory-wide effort to recruit members and candidates and to organize and manage the campaign for the election of Democratic candidates.

In 1959, the same year Hawai'i became the fiftieth state of the United States, my father lost the election for governor. Three years later, in 1962, my father again sought to be elected governor. CJ still had no desire to run for elected office. He "had seen Jack [Burns] come up and get knocked down and all the

---

[14] *Id.* at 6-7; BOYLAN & HOLMES, *supra* note 11, at 99.

[15] Oral History I, *supra* note 3, at 7.

[16] *Id.* at 6.

[17] MATSUO TAKABUKI, AN UNLIKELY REVOLUTIONARY 63 (Dennis M. Ogawa ed., 1998).

[18] Oral History I, *supra* note 3, at 7.

[19] *Id.* at 8.

[20] *Id.* at 9.

[21] *Id.* at 12.

[22] *Id.*

[23] BOYLAN & HOLMES, *supra* note 11, at 134.

abuses that a politician took,"[24] and wanted to return to practicing law. But my father and others decided that CJ should be the Democrats' candidate for lieutenant governor. CJ and Amy reluctantly agreed. They were willing to set aside their personal desires to help complete the Democratic political revolution that they had spent more than a decade of their lives pursuing. According to CJ, Amy said to my father: "Jack, okay so he runs to help you. That's all."[25] CJ shared her view.

The 1962 Democratic primary election for lieutenant governor was a close contest; CJ defeated Ernest Kai by 970 votes.[26] In the general election, the Burns-Richardson team was victorious.[27]

While they were in office, my father and CJ worked closely together. Each had complete trust in the other's integrity, loyalty, commitment, ability and judgment. Conversations like this—in CJ's words—demonstrate the trust each had for the other:

> Governor Burns: "I have to go to the mainland."
> CJ: "What do you want [me] to do?"
> Governor Burns: "Well, carry on as if I were there."[28]

My father also had a special friendship with Amy.[29] In CJ's words, my father "listened a lot to [Amy;] she was a woman of great judgment."[30] My mother and Amy were close friends as well. They spent much time with each other and often worked on events and projects together. Both were talented ladies of good character and substantial fortitude.

A Judicial Revolution

On January 6, 1966, less than a year prior to the end of my father's and CJ's first term in office, Hawai'i Supreme Court Chief Justice Wilfred C. Tsukiyama

---

[24] Stuart Brown et al., John A. Burns Oral History Project Phase II: Interviews with William Richardson 13 (Jul. 28, 1977) (unpublished interview) (on file with author) [hereinafter Oral History II].

[25] *Id.* at 30.

[26] BOYLAN & HOLMES, *supra* note 11, at 181.

[27] During the 1962 campaign, one of the promises my father and CJ made to the voters was that they would substantially improve the quality of the University of Hawai'i. Included within this promise was a commitment that the University of Hawai'i would have both a quality law school and a quality medical school. There was so much opposition to both schools that it took them eleven years to fulfill their commitment. The law school, named after CJ, was established in 1973. The medical school, named after my father, started its four-year degree granting program in 1973.

[28] Oral History II, *supra* note 24, at 19.

[29] *Id.* at 30.

[30] Oral History I, *supra* note 3, at 20.

died.[31] The resulting vacancy afforded the Democrats who controlled the legislative and executive branches of Hawai'i's government the opportunity to significantly influence the direction of its judicial branch.

Mindful of the goal he set in 1946 for a judicial revolution, my father carefully considered each potential nominee. CJ recognized that my father "could see down the road what the problems were going to be on who was going to be lieutenant governor, so he could have easily gone to somebody else and it would have been so much easier on him."[32] Ultimately, however, my father decided that CJ was the person he wanted as the chief justice to lead Hawai'i's judicial revolution. My father asked CJ whether he wanted to continue as lieutenant governor or be chief justice. Without any hesitation, CJ responded that he would rather be chief justice. When my father presented the question to Amy, she responded that she wanted her husband out of politics and would be "glad to have him as the Chief Justice."[33]

On February 25, 1966, CJ became the Chief Justice of the Hawai'i Supreme Court. During his sixteen years as chief justice, CJ led the Hawai'i Supreme Court away from favoring the interests of those who had previously controlled most of Hawai'i's wealth and economic activities and toward a more balanced favoring of the interests of all of Hawai'i's people. CJ is well known for authoring court opinions pertaining to the public's rights to Hawai'i's beaches and fresh water. In a 1982 interview with *Honolulu Magazine*, CJ remarked:

> I just cannot see [Hawai'i] without free beaches. I can't see my children and yours not being able to use the beaches of [Hawai'i]. . . . I think water is the same as light and air. It belongs to everybody. You take it for granted that you have some right to the air out there, and you have the same right to light. I extend it to water. I say, "You have the same rights to water. It's ours."[34]

CJ has noted that when he authored many of the Hawai'i Supreme Court's landmark decisions, he "balanced the rules of the past to conform with the state of society today."[35] In CJ's view,

> Hawaii has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained.
>
> During the years after . . . 1893 and through Hawaii's territorial period, the decisions of our highest court reflected a primarily Western orientation and

---

[31] MEN AND WOMEN OF HAWAII: A BIOGRAPHICAL DIRECTORY OF NOTEWORTHY MEN AND WOMEN OF HAWAII 512 (Gwenfread E. Allen ed., 1966).

[32] Oral History II, *supra* note 24, at 34.

[33] *See* Oral History I, *supra* note 3, at 20; Oral History II, *supra* note 24, at 32.

[34] Dan Boylan, *William Richardson*, HONOLULU, Sept. 1982, at 47, 54.

[35] Susan K. Sunderland, *Well Done, Sir!*, MIDWEEK, Feb. 10, 2010, at 49.

> sensibility that wasn't a comfortable fit with Hawaii's indigenous people and the immigrant population . . . .
>
> Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases—and consistent with Hawaiian practice.[36]

As chief justice, CJ was directly involved in another significant change in Hawai'i. In 1968, one of the five Bishop Estate trustee positions became vacant.[37] The Bishop Estate (now known as Kamehameha Schools) was established by the will of Hawai'i's Princess Bernice Pauahi Bishop, who died in 1884. Under her will, the Bishop Estate was managed by a five-member board of trustees appointed by the justices of the Hawai'i Supreme Court acting in their individual capacities.[38]

Prior to the 1970s, the Bishop Estate—despite being the largest private property owner in Hawai'i[39]—was managed in a way that generated relatively little income.[40] After considering all possible persons to fill the trustee vacancy, my father, CJ, and the other justices all agreed that Takabuki was the person who, as trustee, would lead a successful effort to maximize the value and income of Bishop Estate. They recognized, however, that the appointment of a person of Japanese ancestry would be highly controversial. They decided to gently open the door to the appointment of an Asian by appointing Hung Wo Ching, a person of Chinese ancestry and a successful businessman. As expected, Ching's appointment was relatively uncontroversial.[41]

In 1971, another Bishop Estate trustee position became vacant.[42] Having already opened the door to the appointment of a person of Asian ancestry, CJ and the other justices appointed Takabuki to fill the vacancy.[43] The resulting protests, which focused on Takabuki's Japanese ancestry and "political insider" background rather than on his ability and intent to accomplish the mission of the Bishop Estate, were swift, loud, persistent, and pervasive.[44] His

---

[36] *Id.* at 49-50.

[37] BOYLAN & HOLMES, *supra* note 11, at 241.

[38] Kekoa v. Supreme Court, 55 Haw. 104, 105-07, 516 P.2d 1239, 1241-42 (1973).

[39] BOYLAN & HOLMES, *supra* note 11, at 199.

[40] *Id.* at 292.

[41] *See id.* at 242.

[42] SAMUEL P. KING & RANDALL ROTH, BROKEN TRUST: GREED, MISMANAGEMENT AND POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST 65 (2006).

[43] The authors of *Broken Trust* stated that "in 1971, Richardson and the other justices [Masaji Marumoto, Kazuhisa Abe, Bert Kobayashi, Bernard Levinson] did as [Governor] Burns asked: they chose Takabuki as a trustee." *Id.* at 65-66. But CJ and the other justices were not puppets; they knew that Takabuki was the best person to fill the vacancy. The only hesitancy in making the appointment was based on considerations of the predictable opposition to Takabuki's appointment by political opponents and those who otherwise objected to the appointment of a person of Japanese ancestry.

[44] *Id.* at 66-68.

appointment was unsuccessfully challenged in court.[45] All involved—especially CJ and Takabuki—withstood public animosity and criticism and threats of physical harm.[46]

As time passed, however, critics' lack of success in challenging Takabuki's appointment plus the quality of Takabuki's performance as a trustee quieted the opposition to his being a trustee. For more than twenty years, as the lead trustee for asset management and investment,[47] Takabuki not only led the modernization of Bishop Estate's economic operations, but he also led Bishop Estate into business structures, arrangements, deals, and transactions that resulted in a tremendous increase in Bishop Estate's income and value and its ability to fund its mission.[48]

In 1982, after retiring as chief justice, CJ was appointed to be a trustee himself and served in that capacity until he retired in 1992.

A Personal Influence

CJ greatly influenced my career. But for him, I would not have been a judge. In the early 1970s, during my father's third term as governor, CJ often sought to appoint me as a district court judge. I refused because my father was governor. But in 1976, a year after my father died, I decided to give it a try, and CJ appointed me to be a part-time state district court judge. It soon became clear to me that I was more suited to facilitating settlements and adjudicating cases than I was to being an advocate for one side. A year later, in 1977, Governor George Ariyoshi appointed me as a circuit court judge.

In 1980, when the Intermediate Court of Appeals (ICA) was established, CJ insisted that I apply for one of its two associate judge positions. I resisted. I had no interest in being an appellate court judge. CJ, however, persuaded me to apply by reminding me how he had set aside his personal desires when he became my father's running mate in 1962. Following my appointment by Governor Ariyoshi, I served as an ICA judge for twenty-seven years, twenty-five of those as the ICA's chief judge.

A Model For All To Thank, Remember, and Emulate

CJ was a remarkable and unique person. Amy's death in 1975 caused CJ serious grief and suffering. Typical of CJ, however, he never let that devastating personal loss change him or his positive view of life and the future.

---

[45] Kekoa v. Supreme Court, 55 Haw. 104, 516 P.2d 1239 (1973).

[46] TAKABUKI, *supra* note 17, at 96-99.

[47] KING & ROTH, supra note 42, at 69.

[48] TAKABUKI, *supra* note 17, at 102-20; BOYLAN & HOLMES, *supra* note 11, at 292.

I often think of CJ. At all times and in all ways, he was a true gentleman. He treated everyone with respect and courtesy and was approachable by all. Conversations with him about experiences, thoughts, hopes, and dreams were always enjoyable and enlightening.

CJ was never harsh, vitriolic or combative. His disagreements were subdued. He rarely talked about whom or what he disliked. He was often passionate and persistent, yet he always acted calmly, peacefully, and gracefully.

Being lieutenant governor, acting governor, chief justice, and a Bishop Estate trustee never changed CJ. Although he held positions of prestige and power and his accomplishments and contributions were extraordinary, he did not brag. In fact, he rarely talked about himself. A person could have a long conversation with him and never hear of his significant influence and positive impact in Hawai'i.

It has been said that there is no limit to what a man can do when he does not care who gains the credit for it. These words describe the life of our cherished friend, Chief Justice William S. Richardson. He was a true son of Hawai'i who devoted his life to improving it for the benefit of all, then, now and in the future. Although we all miss him, his vast and inspiring legacy endures for us and future generations to enjoy.

William S. Richardson: Developing Hawai'i's Lawyers and Shaping the Modern Hawai'i Court System

Robert G. Klein*

There can be no doubt that with the passing of former Hawai'i Chief Justice (CJ) William S. Richardson last year, an unparalleled era in the development of Hawai'i's legal system came to a symbolic end. Under his leadership, the state judiciary, from case processing to courthouse development, was modernized, and would-be attorneys were re-routed to the fledgling William S. Richardson School of Law, the product of Richardson's visionary thinking. As Chief Justice he navigated brilliantly between the powerful political, legal, and bureaucratic forces of the status quo to rejuvenate Hawai'i's legal system. Richardson, a part-Hawaiian, was personally knowledgeable in both Hawaiian and Western legal principles. He fully embraced the two, which he viewed as a means of achieving social justice in a diverse society.

This article will attempt to recount some of the important achievements of Chief Justice Richardson from the perspective of one of his law clerks and judges. Several writers have analyzed his legal opinions, his politics, and his personality in the annals of this publication and others. I will not attempt to cover the same ground except as it is necessary to illustrate Richardson's monumental accomplishments.

1. Adapting Hawai'i's Customs and Traditions

The history-, custom-, and tradition-based common law of Hawai'i was never more prominent than in the opinions authored by CJ Richardson and some of his colleagues on the Hawai'i Supreme Court in the 1960s and 1970s. As he once explained to me, the statutory law of the State of Hawai'i authorized the modification of English and American common law precedents by, among other sources, Hawaiian judicial precedent and usage. He cited Hawai'i Revised Statutes sections 1-1[1] and 7-1[2] to provide explicit modern-day support

---

* Robert G. Klein was a law clerk for Chief Justice Richardson from 1972 to 1973 and has served the state judiciary as a District Court Judge, Circuit Court Judge, and Associate Justice of the Hawai'i Supreme Court. Since 2000, he has been a partner in private practice with McCorriston Miller Mukai MacKinnon LLP in Honolulu.

1 The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the

for decisional law based upon ancient Hawaiian precedents and usage. These statutes re-kindled an interest in Hawai'i's legal history, customs, and traditions that began to inform CJ Richardson's property law cases almost as soon as he became CJ. He was able to make the ancient wisdom of Hawai'i relevant once again. These opinions have been analyzed often and have become synonymous with the "Richardson Years," as one writer has noted.[3]

"Hō mai ka 'ike nui, ka 'ike iki" was the ancient prayer CJ Richardson invoked in his introduction to the first issue of the *University of Hawai'i Law Review*, completed in 1979; the prayer blesses the work as a whole and the craftsmanship behind it.[4] It is very apropos to CJ's vision of the law as a combination of the wisdom of modern and ancient Hawai'i—uniquely Hawaiian law. Where else but in Hawai'i would we ever read an introduction to a law review like this one?

CJ Richardson was proud of his Hawaiian heritage, and he did not hesitate to rely upon ancient customs and traditional practices, as set forth in nineteenth-century legal precedents, to resolve modern legal clashes. Hawaiian ways were featured in shoreline access cases,[5] boundary disputes,[6] land ownership claims,[7] and kuleana[8] and water rights struggles.[9] He believed strongly that the court should take notice of ancient practices, learn and understand Kingdom

---

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.

HAW. REV. STAT. § 1-1 (2009).

2

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, 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. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

HAW. REV. STAT. § 7-1 (2009).

3 *See* CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982 (1985).

4 "Grant knowledge of the great things, and of the little things." William S. Richardson, *Ka 'ike nui, ka 'ike iki*, 1 U. HAW. L. REV. vii, vii (1979). "Ka 'ike nui referred to knowledge of the work as a whole, while ka 'ike iki referred to knowledge of the details of the materials and technique which a good artisan should thoroughly understand." *Id.*

5 *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968); Cnty. of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 17 (1973).

6 State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977).

7 *In re* Sanborn, 57 Haw. 585, 562 P.2d 771 (1977).

8 Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968).

9 McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330, *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam); Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 87 (1982).

precedents, and apply Hawaiian customs and practices in modern legal contexts. In this way CJ Richardson invoked the wisdom of the past and gave it new meaning and life. While he was chided in some circles for his "activist" judicial philosophy and court, today we could describe him as a kind of supreme textualist who honored past legal precedents and customary usage (although no one would ever confuse him with an Antonin Scalia).

As his law clerk, I found it interesting to read very old Hawai'i cases to understand where the boss was coming from. These were not cases students learned about in law school, at least any law school then in existence. But even that was going to change if CJ had his way—which he usually did.

2. CJ as Outlier

In his 2008 book *Outliers: The Story of Success*, William Gladwell describes people who achieved high levels of success and the factors that influenced them.[10] He notes that just being born at the right time can give competitors a measurable edge in sports, and that practicing for 10,000 hours on a musical instrument or at programming a computer can produce extremely high achievements.[11] Clearly, the proper blend of personal circumstances, timing, and hard work will often positively affect personal success as illustrated by Gladwell. If so, CJ Richardson was an outlier of the first degree. He came to be chief justice from the office of lieutenant governor in 1966, appointed by the top Democrat in the state, Governor John A. Burns. The timely political connection with Burns, which grew out of the 1954 political "revolution," and CJ Richardson's savvy in dealing with the Hawai'i State Legislature served the judiciary extremely well during Richardson's sixteen-year tenure. Nationally, the 1960s was a progressive era even at the United States Supreme Court level where the Warren Court inspired many state supreme courts with its liberal interpretation of the Bill of Rights. Overlapping state and national trends helped CJ Richardson to invigorate the local legal community into supporting his forward-looking initiatives. No other chief justice could have commanded the respect and trust of the legislature while at the same time setting a fresh course for the judiciary. CJ Richardson was the right man, with the right plan, at the right time.

3. Non-pareil Administrator

When I became a district court judge in 1978, the district court was a court of record and the entire court system was fully integrated. Even a traffic ticket

---

[10] WILLIAM GLADWELL, OUTLIERS: THE STORY OF SUCCESS (2008).

[11] *Id.* at ch. 2.

conviction could be appealed directly to the Hawai'i Supreme Court. The days of trial de novo in the circuit courts were long gone, but what remained were courthouses that had become obsolete and dated administrative processes. There was one secretary for a dozen or so district judges. Several court reporters scribbled notes of court sessions in their own shorthand style. Anyone could walk into the courthouses; there was no entry security. Judges parked in an open lot right outside their courthouse. The courthouse itself groaned with age, overuse, and inattention. The Circuit Court of the First Circuit was combined with the Supreme Court at Ali'iōlani Hale, the last seat of government of the Hawaiian Kingdom. The entire aged system had not been conducive to dispensing justice until CJ Richardson began a long fight for improvements.

His primary plans included a new district court building, a new circuit court building, a refurbished Ali'iōlani Hale, an Intermediate Court of Appeals, and a law school. His ambitious master plan to overhaul the entire state judiciary also included improvements to neighbor island courthouses and upgrades to courtroom communications, budgetary systems, record keeping, personnel training and management, and security. While legal opinions are properly regarded as the measure of a court, the dull and difficult task of modernizing court facilities to allow the courts to fulfill their constitutional duties always goes unappreciated. Appreciated or not, in this area there is no doubt that CJ Richardson relished his monumental challenges. He excelled at reaching out to knowledgeable sources like the National Center for State Courts for the most current studies and expertise in courthouse planning and architecture. CJ was inclusive, surrounding himself with business, legislative, and community leaders from all segments of society in order to gain consensus for his plans, which he consistently achieved. During a time of controversy, when the issue of electing—rather than appointing—judges arose, he privately said it would make no difference to him. He felt very strongly about his electability, no doubt due to his great political pedigree and charming personality.

CJ Richardson, himself a strong administrator, could also rely upon two key officials to spearhead the judiciary's plans at the legislature. Both Lester Cingcade, the Administrative Director of the Courts, and Tom Okuda, his deputy, must be credited with shrewdly and capably working with legislators, often tirelessly and selflessly, to achieve CJ's vision. CJ Richardson's strong political background and the respect and trust that came with it have never been duplicated. The combination of these personal factors cannot be gainsaid when it comes to assessing the abilities and accomplishments of CJ Richardson.

4. The Dream School

In addition to a solid and relentless administrative team, CJ Richardson took great advantage of his Judicial Council, which he activated in 1966. This fifteen-member citizen advisory group helped CJ Richardson build broad support for his ambitious plans and was instrumental in fueling community backing for the law school. Its special Subcommittee on Legal Education, consisting of influential community leaders, examined the issues associated with establishing a law school at the University of Hawai'i. While the issue bubbled through the legal and political communities, CJ and his Council gained momentum and the support of influential people, including future Governor George Ariyoshi, Hawai'i State Bar Association President William Fleming, University of Hawai'i President Thomas Hamilton, and, of course, Governor John Burns. The idea made perfect sense. It was based on providing would-be lawyers with an opportunity to go to a local school that they could afford. CJ Richardson believed very strongly that lawyers performed a valuable community service because of their special legal training and exclusive access to the courts. He believed that the credentials of a University of Hawai'i Law School-trained lawyer would be just as admired as a degree from any mainland law school. Today, the William S. Richardson School of Law provides an exceptional legal education at a very reasonable price, just as it was envisioned to do. Moreover, the scholars and professors attracted to the school have proven invaluable to the local legal community by training law graduates, by assisting lawyers in specialized cases, and by writing about the unique subject of Hawaiian law, and have thus given the school prominence and vitality.

5. Legacy

During CJ Richardson's tenure we saw the district courts become courts of record and move from Merchant and Bethel Streets into a brand new courthouse on Alakea Street. We saw the First Circuit Court move from Ali'iōlani Hale to Punchbowl Street into a new, modern building, and we saw the restoration of the Supreme Court to reflect its historical significance. We also saw the creation of Hawai'i's first and only law school. Even one of these accomplishments standing alone is monumental, but when considered together, one sees what true vision and determination CJ Richardson possessed.

CJ Richardson's legacy is not the bricks and mortar of the judiciary's buildings or the eponymous institution that is the William S. Richardson School of Law; it is today's law students and those who preceded and will follow them. What they do for our community, for those in need of legal services, for our system of justice, and for our government is what would make CJ Richardson most proud. He launched many careers, mine included, and the law school he

spearheaded has launched many more. CJ's life's work—from the William S. Richardson School of Law to his many legal opinions—truly leaves a legacy that has and will continue to endure.

A Beloved Teacher Whose Vision Had No Boundaries

Ivan M. Lui-Kwan*

On his passing, Hawai'i's major newspaper, the *Honolulu Star-Advertiser*, referred to Chief Justice (CJ) William S. Richardson as a legal giant: "The most towering figure in Hawai'i's legal system in the past century, [he] put into law the principle that the islands are unique in historically requiring that natural resources be shared by the general public."[1] In awarding the Herbert Harley Award[2] to Chief Justice Richardson in 2007, the American Judicature Society printed on the plaque bestowing its highest state honor:

> Few people have advocated and contributed to the state of the judiciary in Hawai'i as Chief Justice Richardson. While chief justice, he authored a plethora of decisions in the areas of shore line boundaries, beach access, water rights and konohiki[3] rights, which still make a lasting impact today. Chief Justice Richardson impacted the citizens of Hawai'i with his vision of a law school. That school has provided access to legal education and to the law profession for many Hawai'i residents. Most importantly, his demeanor

---

* Mr. Lui-Kwan was born and raised in Hilo. He attended St. Joseph High School, St. Martin's University, B.A., and Rutgers University, M.A. and J.D. He was a law clerk for Hawai'i Supreme Court Chief Justice William S. Richardson from 1971 to 1972 and is currently a director at the Starn O'Toole Marcus & Fisher law firm. He served for sixteen years on the Disciplinary Board of the Hawai'i Supreme Court, is on the national board of directors of the American Judicature Society and is vice-chair and board member of the Hawaii Chapter, has served as Executive Vice President and Chief Operating Officer of The Queen's Health Systems and Director of Budget and Fiscal Services for the City and County of Honolulu, and is managing member of Hokukahu, LLC, which is majority owned by Hokupili Foundation, a 501(c)(3) entity and Native Hawaiian Organization.

[1] Editorial, *Richardson's Legacy Huge*, HONOLULU STAR-ADVERTISER, June 23, 2010, *available at* http://www.staradvertiser.com/editorials/20100623_Richardsons_legacy_huge.html; *see also* Mary Vorsino & Ken Kobayashi, *A Legal Giant*, HONOLULU STAR-ADVERTISER, June 22, 2010, *available at* http://www.staradvertiser.com/news/hawaiinews/20100622_a_legal_giant.html.

[2] "The Herbert Harley Award is the premier state award of the American Judicature Society reserved for individuals whose outstanding efforts and contributions substantially improve the administration of justice in their state." *AJS – Herbert Harley*, AMERICAN JUDICATURE SOCIETY, http://www.ajs.org/ajs/awards/harley/harley-richardson.asp (last visited Oct. 8, 2010).

[3] "Headman of an ahupua'a land division under the chief[.]" MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 166 (rev. ed. 1986).

> exemplifies judicial temperament, and his character serves as a model for behavior to others in the legal community and beyond.[4]

CJ Richardson was a beloved teacher whose vision had no boundaries. His teachings were about delivering justice in Hawai'i Supreme Court opinions that respect the rights of all of Hawai'i's people, bringing about change to improve people's lives through trust, perseverance, and compassion, impacting society in significant ways with genuine humility, and interacting with people on a personal level to enable all to retain dignity.

CJ Richardson created major societal impacts through his supreme court opinions and through his establishment of the law school at the University of Hawai'i. Both activities involved major change, which most people fear. He was blessed with a rare gift immersed in genuine humility that enabled him to comfort affected constituencies and guide them through a sea of change. Simply stated, people trusted him and were moved by his compassion.

On the Hawai'i Supreme Court, he was just one of five justices. He needed to convince a majority of the court that it was necessary to change precedent because established precedents in certain areas of the law were not workable and not appropriate for the changes taking place in Hawai'i after statehood. William S. Richardson School of Law Professor Jon Van Dyke commented that at the time, circumstances in Hawai'i had changed and CJ Richardson found unworkable certain precedents that had been decided by justices who were placed on the Supreme Court by governors appointed from Washington D.C. and had little connection to Hawai'i.[5] These justices had little awareness of Hawai'i's indigenous culture and the law operating in Hawai'i prior to Western contact. CJ Richardson employed his scholarship of and connection to native Hawaiian principles to persuade a majority of the court. His writings persuaded the majority that principles of Hawaiian law that predated Western contact were operative, and that justice would be served through opinions that resulted in preservation of natural resources for the common people with respect to shore line boundaries, beach access, water rights, and konohiki rights.

Establishment of the William S. Richardson School of Law is another accomplishment that highlighted CJ Richardson's genius in managing change to create greater societal good. Prior to the establishment of the law school, a large majority of Hawai'i's bar strongly opposed its creation. The

---

[4] This quotation is printed on the plaque dated September 28, 2007 and given by the American Judicature Society in awarding the Herbert Harley Award to CJ Richardson.

[5] *See* DVD: CJ Richardson – Recipient of the American Judicature Society's Herbert Harley Award (American Judicature Society, Hawai'i State Chapter 2008) (on file with author).

State Legislature was reluctant to fund it. The CJ's mastery of diplomacy and perseverance nevertheless eventually prevailed. Today, the law school, with values rooted in Hawai'i, is a vehicle that has made a major footprint in enriching the delivery of justice in Hawai'i. The law school's graduates make public policy as legislators and highly placed government officials. Currently, thirteen members of the Hawai'i State Legislature, three senators and ten representatives, are Richardson graduates. Hawai'i County's current Mayor and the former President of the State Senate (now United States Congresswoman) are Richardson graduates. Richardson law school graduates deliver justice as judges. Currently, twenty-six Richardson graduates serve as full-time judges, twenty-three in Hawai'i (including three on the Intermediate Court of Appeals, and one on the Hawai'i Supreme Court). Sixty-nine Richardson alumni have served as judges, including administrative law judges and per diem judges. Approximately 340 Richardson graduates have enforced the law as government attorneys for the United States, the State of Hawai'i, and the respective counties. Richardson graduates serve as county prosecutor for Kaua'i County and as corporation counsel for Maui County. They are among the best trained lawyers in Hawai'i's private firms. All of these graduates were students at the school established by the beloved teacher whose vision had no boundaries.

CJ's law clerks are among the most passionate disciples of this master teacher. These law clerks, who were his paddlers in the historic sixteen-year journey that was the Richardson years, embraced an 'ōlelo no'eau composed by one of CJ's law clerks and his kumu hula wife. This proverb expresses to CJ our deep affection for him as he passed to the spiritual world: "Mahalo e kaupili haku o palena'ole ka'ike."[6]

For me, clerking for CJ Richardson was both a joy and an extraordinary learning experience. Having just returned from the dehumanizing grind of law school in New Jersey, it was pure joy to work at Ali'iōlani Hale with its historic mana and among the Supreme Court 'ohana. Hai Kamakau, CJ's administrative assistant, was a woman with special grace and stunning cultural, spiritual, and physical beauty.[7] CJ trusted her unconditionally. Les Cingcade, the Judiciary Administrator, was the epitome of efficiency and compassion. The Supreme Court personnel were unbelievably

---

[6] Roughly translated, "Thank you, beloved friend and teacher of limitless knowledge."

[7] When Hai retired from the judiciary, she relocated to Napo'opo'o, Hawai'i. One of the most memorable of the annual CJ birthday celebrations (which the law clerks all attended) was in Kailua-Kona at the Hulihee Palace where Hai was investing much of her time. When she passed away in Napo'opo'o, I recall being at her service in South Kona. CJ was stricken with the same grief one would suffer at the loss of immediate 'ohana. I felt as though one of my own sisters had passed on.

supportive of the novice behavior and work product of us law clerks. The law clerks regularly had lunch together under the coconut trees on the lawn of 'Iolani Palace, which frequently involved arguing the legal positions of our respective justices. In our group of six law clerks,[8] Helen Gillmor and Steve Levinson went on to become judges themselves. The individual justices—CJ Richardson, Justice Kazuhisa Abe, Justice Bert Kobayashi, Justice Bernard Levinson, and Justice Masaji Marumoto—personified Hawai'i's rich cultural diversity. Each justice had a unique personality, professional and political background, judicial approach, and philosophy. It was fascinating to watch how CJ navigated this eclectic environment and interacted with each of the justices individually to achieve consensus, particularly on the landmark decisions of the Richardson years.

In the midst of this idyllic environment, learning under the master teacher CJ Richardson was extraordinary. Those lessons carved, in a very significant way, the pathway for our young lives. Although CJ's law clerks can share many lessons that enriched their lives, I will share three that stand out for me.

My most valuable lesson is about the Richardson leadership model. The person at the top of the pyramid sets the tone for all of the occupants in the organization. CJ's calm, graceful, and caring demeanor seemed to flow through and influence the behavior of all personnel in the judiciary, including judges, administrators, clerks, secretaries, and librarians.

Another lesson from CJ is that fairness is at the core of the justice system and at the heart of all successful relationships. CJ never had to tell us law clerks that it is important to be fair. He simply embodied fairness. In his wayfinding of a case, he was not looking for balls or strikes—he was looking for fairness. For example, his moral compass, which has fairness at its soul, would have dismissed the judicial certainty of *Plessy v. Ferguson*[9] in favor of the fairness of *Brown v. Board of Education*.[10] It was that moral compass that guided him in deciding such landmark cases involving public ownership of and access to Hawai'i's shoreline,[11] public

---

[8] The chief justice had two law clerks and each associate justice had one. I served as CJ Richardson's law clerk for the 1971-1972 term.

[9] 163 U.S. 537 (1896).

[10] 347 U.S. 483 (1954).

[11] *See In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968); Cnty. of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973); *In re* Sanborn, 57 Haw. 585, 562 P.2d 771 (1977).

rights to access newly-created lands and other natural resources,[12] and public ownership of riparian rights.[13]

A final lesson from CJ is that seemingly incompatible character traits formed his genius and enabled him to leave such a large mark on Hawai'i's societal landscape. A clear example is his establishment of the University of Hawai'i School of Law. He deployed his easygoing consensus-building skills in concert with unyielding determination and strength—seemingly incompatible character traits. The large majority of the Hawai'i bar and state legislators opposed funding the law school. Most casual observers could see how CJ used his diplomatic skills to advocate the social benefits of providing education in the law to Hawai'i's common people. We law clerks knew that it was his will of steel which drove his vision of achieving that mission.

At our annual law clerk gatherings to celebrate CJ's birthday, he would frequently tell us in his gentle manner the criteria he used in selecting us as his law clerks: "I was looking for people who would come back to Hawai'i to make Hawai'i a better place for Hawai'i's people."[14] He would then go on to comment on how pleased he was about the contributions made by his law clerks. Some are now judges for the United States District Court, Hawai'i Supreme Court, and Hawai'i Family Court. Some are current and former elected officials, including a United States Congressman, Honolulu mayor, and state legislators. Some are dedicated government officials at the State of Hawai'i Department of Health, the United States Attorney's Office, and the State Attorney General's Office. Some are accomplished educators at the William S. Richardson School of Law and at Hawai'i Pacific University. Some have been senior managers of large organizations like The Queen's Health Systems and Kamehameha Schools, and others are highly successful entrepreneurs. Many are very sophisticated private law practitioners, some in smaller practices, and others in large law firms as senior partners.

Although very different as individuals, these law clerks have a common bond: all were taught at the knee of their master teacher and beloved friend, and all are committed as he was to make Hawai'i a better place for the people of Hawai'i. All have been impacted by the teachings of their

---

[12] *See In re* Robinson, 49 Haw. 429, 421 P.2d 570 (1966); *In re* Kelley, 50 Haw. 567, 445 P.2d 538 (1968); State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977).

[13] *See, e.g.*, Reppun v. Bd. of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982); Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982).

[14] Many of us were graduates of mainland law schools. CJ had been chief justice for ten years before the William S. Richardson School of Law produced its first graduating class.

kaupili haku.[15] One law clerk, later to become a U.S. District Court Judge, commented that not a day goes by that she does not think of CJ and his teachings. While Chief Judge of the United States District Court for the District of Hawai'i, she frequently drew upon the example set by CJ in order to resolve difficult personnel matters. CJ was masterful in his interpersonal communications and always respected the dignity of all with whom he dealt.

For CJ's eightieth birthday, the law clerks drafted personalized messages to CJ often referring to the cases each clerk worked on. The following are some of those messages:

> What I recall with greatest fondness are your smile and twinkling eyes, and your compassion. Law school drills us on analysis and argument, but you reminded me of the human dimension of cases, particularly for the ordinary citizen.
>
> I am still striving to follow your wonderful way of making people feel comfortable and cared about.
>
> By watching you and how you treat others with love and respect, I return that love and respect . . . . You will always be my model husband, father, statesman, and friend.
>
> His teachings do live on
> In those who know him well
> He gave the base it's up to us
> Our stories we need tell
>
> Your guidance to us as law clerks and genuine caring about many people and issues of public importance still have a compelling influence upon me. You continue to inspire our best efforts to define the law and be mindful of the need for a compassionate yet rational justice.
>
> You taught me the value of practical insight, sensitivity to the things that make Hawai'i special and the value of close relationships. I will keep these with me forever.
>
> To be pono is to master the art of happiness. The Dalai Lama preaches that one's purpose in life is to eliminate the suffering of others and to make life better for others. To act toward advancement of a better life for others creates a state of happiness for ourselves. CJ, you have made life better for so many others. You have definitely brought happiness into their lives and our lives. Mahalo nui for showing us the path to be pono!
>
> The *Sotomura* decision[16] represented CJ at his finest: an opportunity to integrate Native Hawaiian principles with Western common law . . .

---

[15] "Beloved teacher and friend." *See supra* note 6 and accompanying text.

[16] *Sotomura*, 55 Haw. 176, 517 P.2d 57.

> Still, I sometimes wonder whatever happened to the person, Candy Clark. Did she turn her life around, get off the streets, have kids, find happiness? Or is she still there, an aging hooker, caught up in drugs and abuse, living at the bottom. I hope for her the former but, regardless, she will always have one thing: an obscure decision in 65 Hawai'i with her name on it[17] saying that we all, no matter what station in life, are entitled to some basic protection and dignity, and we will collectively assure it. I owe that reflection to CJ.
>
> *Sotomura*[18] and the earlier *McBryde*[19] case are examples of decisions that showcase the willingness of the court, under the leadership of CJ Richardson, to define customary rights and incorporate them into case law. The philosophy of preserving beach access, scarce resources, and fragile customs permeates the cases of that day.
>
> Your personal legacy to me was to enable and inspire me to make a commitment to a career in the Judiciary, and to carry on the Richardson tradition of public service.
>
> You almost never directly criticized—you simply sent the opinion back for further development. In fact, I remember one opinion being sent back three times before I finally realized that maybe my thinking wasn't so brilliant after all.
>
> Thank you for your confidence in me and your support throughout the years. I cannot conceive of a greater way to have begun my legal career. My clerkship with you has been the most significant factor in my decision to choose judging and in the appointments which followed.
>
> That skill also involved knowing how far any new idea could be taken. Because those decisions had not only an intellectual base, but a 'people' base, those decisions will stand the test of time.
>
> I don't know if I actually produced any decent work for you, but I know you gave me a priceless gift. You are an example of how to be a wonderful human being and make a positive difference in the world. It has been almost thirty years since I met you and I have not encountered anyone else with your ability to inspire people to do their best.

Chief Justice Richardson was truly a beloved friend and master teacher.

Mahalo e kaupili haku o palena'ole ka'ike.

---

[17] State v. Clark, 65 Haw. 488, 654 P.2d 355 (1982).

[18] *Sotomura*, 55 Haw. 176, 517 P.2d 57.

[19] McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330, *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam).

William Shaw Richardson's Contributions to the Legacy of a Princess

Neil J. Kaho'okele Hannahs*

I am humbled and grateful to have this opportunity to share a remembrance of William Shaw Richardson's ten years of service as a trustee of Kamehameha Schools (the Schools). In deference to his distinguished career as Chief Justice of the Supreme Court of Hawai'i, we referred to him with respect and affection as "CJ."

First Impression

I have had many opportunities to gain insight into CJ's perspectives and values during his tenure as Kamehameha Schools trustee from 1982 to 1992. My first encounter, however, was not upon his appointment as trustee, but rather a decade earlier when my wife and I prepared for our wedding in 1973.

I proposed to Mariane while enrolled at Stanford University, where we came to know and befriend CJ's daughter, Bebe. Because she could not attend our wedding in Hawai'i, Bebe called upon her dad to deliver our wedding gift. So one day, when CJ had completed his duties of dispensing judicial wisdom, he drove his car to suburban Kaimukī, parked near Ali'iolani Elementary School and walked, gift in hand, along busy 6th Avenue until he found the humble home of a bride-to-be who was awestruck to find the chief justice of Hawai'i on the other side of her screen door. On our first encounter, CJ left us a gift and a harbinger of things to come.

CJ's Appointment to the Board

When CJ came to Kamehameha Schools in 1982, he proved an easy fit with trustees Matsuo Takabuki, Richard Lyman, Jr., Myron "Pinky" Thompson, Frank Midkiff, and Henry Peters, who was appointed trustee upon Midkiff's retirement.

Hawaiian leaders and others extolled his virtues. Winona Rubin thought that CJ would bring "experience, insight and dignity" to the job.[1] Gard

---

* Director, Kamehameha Schools Land Assets Division.

[1] Gerald Kato & Ken Kobayashi, *Bishop Trusteeship Goes to Richardson*, HONOLULU ADVERTISER, Nov. 9, 1982, at A4.

Kealoha called him a "fine man" who was "well liked in the Hawaiian community."[2] The *Honolulu Advertiser* editorialized that CJ "brings to the position many qualities, among them the wide respect of the community, a reputation for absolute integrity and a commitment to the well-being of the people and state of Hawaii."[3]

CJ understood the significance of his appointment. At a ceremonial welcome, he called the trusteeship "a great privilege" and said, "The greatest thing a Hawaiian can do is to assist the entire race to rise to a position of esteem and greatness in the world."[4]

CJ also realized that the policy decisions he would make in his governance of the Schools' land-rich endowment would be as important as those he would make in regard to educational services. He grasped the issue of sustainability long before it became a mainstream concern and understood that trustees of a perpetual Hawaiian trust must be advocates for generations yet unborn. In a 1989 interview with Kamehameha Schools' leadership to discuss his research of founder Bernice Pauahi Bishop's Will and Codicils, CJ said: "Conservation of natural resources is becoming increasingly important to Hawaiians and non-Hawaiians alike. Trustees must be knowledgeable semi-futurists, able to envision what land should be used for 100 years in the future."[5]

CJ emphasized the need for trustees to be "well-rounded": capable of governing the Schools' education program and scrutinizing every investment opportunity and land development proposal.[6] "Not only do they have to generate income for the Schools, but they must preserve resources for its perpetuity," CJ said. "Finally, they must have a 'heart' for the Hawaiian people and the mission they are entrusted with fulfilling."[7]

The importance of CJ's humble servant-leader values were underscored when the arrogant and self-dealing behavior of trustees appointed after his retirement fomented a governance crisis at the Schools in the 1990s.[8] The landmark "Kamehameha Schools, Strategic Plan 2000-2015" did much to right the ship and set a bold new course for the Schools. The plan's goal to "practice ethical, prudent and culturally appropriate stewardship of lands

---

[2] *Id.*

[3] John Griffin, *Richardson to Trustee*, HONOLULU ADVERTISER, Nov. 9, 1982, at A10.

[4] *Richardson joins KS/BE*, HA'ILONO O KAMEHAMEHA, Jan. 14, 1983.

[5] *Trustees: The number shall be kept at five*, HE AHA KA MEAHOU MA KAMEHAMEHA, Summer 1989.

[6] *Id.*

[7] *Id.*

[8] *See* GAVAN DAWS & NĀ LEO O KAMEHAMEHA, WAYFINDING THROUGH THE STORM: SPEAKING TRUTH TO POWER AT KAMEHAMEHA SCHOOLS 1993–1999 (2009).

and resources"[9] harkened back to the wisdom and vision CJ had advocated more than a decade earlier.

Notwithstanding his obvious qualifications for service as a trustee, it would be reasonable to ask why CJ would take the position. What motivated a man, who so passionately believed in the legal profession that he would successfully advocate creation of the state's only law school, to step down from the highest court of Hawai'i? To comprehend CJ's decision, it is necessary to share some insights about Hawaiian history, the life and character of an extraordinary Hawaiian chiefess, and the enduring gift she left to improve the capability and well-being of her people.

Kamehameha Schools: A Hawaiian Royal Legacy

Kamehameha Schools commemorates the name of a Hawaiian chief who had profound impact upon the social and political landscape of the Hawaiian Islands. Kamehameha I unified the archipelago under his reign in 1810, completing the campaign of diplomacy and combat begun by his father, realizing the destiny prophesized at his birth, and fulfilling the kuleana (responsibility) associated with the mana (spiritual power) of his line.[10] Four in the Kamehameha line would follow Kamehameha I as rulers of the Hawaiian Kingdom through much of the nineteenth century.[11] The peace, social equity and sustainable practices that characterized life at the beginning of the Kamehameha dynasty, however, changed quickly and dramatically after the death of the line's progenitor in 1819.[12]

Bernice Pauahi Bishop was the great-granddaughter of Kamehameha I.[13] While on his death bed, Kamehameha V (Lot) had asked her to succeed him to the throne.[14] Although Princess Pauahi declined the opportunity to rule, Lot's selection of Pauahi as a successor revealed much about her character.[15] According to scholar George Kanahele, Lot recognized Pauahi's many admirable qualities, including her aloha, courage, independence, determination, humility, prudence, leadership, intelligence,

---

[9] KAMEHAMEHA SCH., KAMEHAMEHA SCHOOLS STRATEGIC PLAN 2000-2015, at 21 (2000), *available at* http://www.ksbe.edu/osp/StratPlan/EntireDocument.pdf.

[10] SAMUEL MANAIAKALANI KAMAKAU, RULING CHIEFS OF HAWAI'I 66-218 (rev. ed. 1992).

[11] *Id.*

[12] *See* JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 9-13 (2002).

[13] *See* GEORGE HU'EU SANFORD KANAHELE, PAUAHI: THE KAMEHAMEHA LEGACY ix, 9 (1986).

[14] *Id.*

[15] *Id.* at 113–14.

integrity, and her understanding of the Western world.[16] "Pauahi fully supported Lot on the importance of maintaining Hawaiian sovereignty and agreed with him . . . in opposing the cession of any lands to the United States . . . . Lot had no difficulty in acknowledging the depth of Pauahi's commitment to her people and to her lineage as a Kamehameha."[17]

Individuals with such outstanding qualities were desperately needed to help Kānaka Maoli (the Hawaiian people) navigate the swirling currents of change in the nineteenth century. Missionaries, merchants, and other foreigners, unaccustomed to Hawai'i's traditional system of communal land stewardship, aggressively asserted their values and lifestyle.[18] The clash between traditional and Western ways bred confrontation and acrimony, heavily influencing the course of Hawaiian history.[19]

An accomplished people who had functioned for centuries in a sophisticated social order were suddenly challenged just to survive as disease and change ravaged the native population, exacting a horrific toll. The thriving population of about 500,000 Kānaka Maoli at the time of Kamehameha I had dwindled to a mere 40,000 by the end of Kamehameha V's reign.[20]

To address these tragic circumstances and fulfill chiefly duties to assure the perpetuation of Hawaiian culture and the welfare of their people, several ali'i (chiefs) used their lands and resources to endow perpetual charitable trusts to meet health, education and human service needs.[21]

Pauahi believed that education held the key to her people's survival, and she dedicated her estate, including 378,506 acres of land, to the founding and maintenance of Kamehameha Schools.[22] The will and codicils of Bernice Pauahi Bishop, who died in 1884, constitute a wise and generous act to meet the educational needs of Hawaiian people in perpetuity.[23]

---

[16] *Id.*

[17] *Id.*

[18] *See* OSORIO, *supra* note 12, at 13-25, 64-65, 74-80, 86.

[19] *Id.*

[20] *Id.* at 9-10.

[21] KANAHELE, *supra* note 13, at 176.

[22] Frank E. Midkiff, *The Kamehameha Schools and the Bishop Estate, in* ASPECTS OF HAWAIIAN LIFE AND ENVIRONMENT, COMMENTARIES ON SIGNIFICANT HAWAIIAN TOPICS BY FIFTEEN RECOGNIZED AUTHORITIES 161, 164 (1971).

[23] The Will and Codicils of Bernice Pauahi Bishop stated:

> 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, one for boys and one for girls, to be known as, and called the Kamehameha Schools.

Will of Bernice Pauahi Bishop, *in* WILLS AND DEEDS OF TRUST 17-18 (3d ed., Printshop of

At the inaugural Founder's Day ceremony in 1889, Charles Reed Bishop, Pauahi's husband and a member of Kamehameha Schools' first Board of Trustees, described his wife's wishes:

> The founder of these Schools was a true Hawaiian. She knew the advantages of education and well directed industry . . . . Her heart was heavy, when she saw the rapid diminution of the Hawaiian people going on decade after decade . . . . The hope [was] that there would come a turning point, when, through enlightenment, the adoption of regular habits and Christian ways of living, the natives would not only hold their numbers, but would increase again . . . . In order that her own people might have the opportunity for fitting themselves for such competition, and be able to hold their own . . . without asking favors which they are not likely to receive, these Schools were provided for, in which Hawaiians have the preference.[24]

CJ's Impact as Trustee

As much as he did and could do to improve our society while serving as chief justice, CJ's appointment to the Kamehameha Schools Board of Trustees presented an opportunity to more directly impact the lives of those who shared his Hawaiian cultural heritage. It was not an opportunity he took lightly.

Serious and compelling needs of Kānaka Maoli have created high expectations for Kamehameha Schools. These needs have also placed considerable pressure upon its trustees to utilize the institution's significant resources to restore vibrancy to a Hawaiian lāhui (nation) reduced from a once-thriving society to lingering dysfunction by introduced diseases, socio-economic collapse, and political upheaval.

It is estimated that there are nearly 450,000 Kānaka Maoli in the United States. Of these, some 251,000 live in the State of Hawai'i.[25] Based on widely used measures of school achievement, intervention is required to enable Kānaka Maoli to achieve parity with non-Hawaiian peers. Family welfare needs are also significant, manifesting in high rates of public assistance, poverty, and over-representation in lower wage occupations.[26]

CJ expressed concern for these issues and a commitment to provide leadership. The effects of such a commendable attitude should not be underestimated. The warm smile, pensive nature and genial demeanor that

---

Hawaii Co. 1957) (1898).

[24] Charles Reed Bishop, *The Purpose of the School*, 1(1) Handicraft (Jan. 1889), *reprinted in* KAMEHAMEHA SCH., *supra* note 9, at 16.

[25] U.S. CENSUS BUREAU, 2006-2008 AMERICAN COMMUNITY SURVEY (2009).

[26] KAMEHAMEHA SCH., KA HUAKA'I: 2005 NATIVE HAWAIIAN EDUCATIONAL ASSESSMENT, PART 2, at 85-87, 91 (2005), *available at* http://ulukau.org/elib/cgi-bin/library?a=redirect&d=D0&rurl=/elib/collect/nhea/index/assoc/D0.dir/doc76.pdf.

CJ brought to our board room contributed to a productive and collegial environment during a time when the Schools found itself embroiled in conflicts with residential lessees who sought the government's assistance in forcing the Schools to sell them the land associated with their lease.

As CJ assumed his new duties, Kamehameha Schools was preparing to fight Hawai'i's mandatory residential leasehold conversion law before the United States Supreme Court. Predecessor trustees and counsel, Clinton Ashford, had presented an exhaustive refutation of the legislation's findings of fact that set forth the public purpose for the State's exercising its eminent domain powers to transfer the underlying land ownership of residential leaseholds from lessors to lessees.[27] In 1984, the challenge was ultimately rejected by a U.S. Supreme Court majority that had little interest in reconsidering factual findings that it felt was best left a prerogative of the State.[28]

CJ was disappointed by the high court's ruling, agreeing with fellow Trustee Myron Thompson's characterization of the decision as "the greatest rip-off of this nation in the 20th century."[29] Trustees were loath to refer to the law by its popular name: the Hawaii Land Reform Act. Instead, they called the measure the "mandatory conversion law" because trustees were emphatic that nothing was reformed by this law.

CJ's paramount concern was his duty of loyalty to Pauahi's instructions regarding management of her estate. He had Pauahi's will and codicils compiled and published to ensure their consideration in trustees' decisions. He would often point to the provision that gave trustees the authority to sell land, yet also explicitly expressed Pauahi's preference to retain these legacy assets for the perpetual use of her trust.[30]

Like Pauahi, CJ did not view the Kamehameha land legacy as a fungible asset that was there merely to generate value through rental or sale. CJ

---

[27] Brief for Appellees, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (No. 83-141).

[28] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (holding that Hawai'i Revised Statutes chapter 516 is constitutional).

[29] *State's Right*, TIME, June 11, 1984, *available at* http://www.time.com/time/magazine/article/0,9171,926537,00.html.

[30] Pauahi's will and codicils stated:

> I give unto the trustees named in my will the most ample power to sell and dispose of any lands or other portion of my estate, and to exchange lands and otherwise dispose of the same; and to purchase land, and to take leases of land whenever they think it expedient, and generally to make such investments as they consider best . . . and I further direct that my said trustees shall not sell any real estate, cattle ranches, or other property, but to continue and manage the same, unless in their opinion a sale may be necessary for the establishment or maintenance of said schools, or for the best interest of my estate . . . .

Will of Bernice Pauahi Bishop, *supra* note 23, at 24.

understood that these lands were the foundation for not only the Schools' wealth, but Hawaiian identity. Just as his court rulings recognized that water should be shared as a public trust asset[31] and that access to the shoreline should be reserved for the collective good,[32] CJ felt that no amount of money could offer just compensation for the severance of a tangible ancestral linkage connecting future generations of Hawaiian beneficiaries with our 'āina makuahine (mother earth), one hānau (sands of birth), and kulāiwi (fields of bones).

The lessons learned from his experience with the mandatory conversion law motivated CJ to advocate the creation of an internal legal group that he believed would more effectively and efficiently address issues arising from an increasingly litigious society. CJ's vision was regrettably accurate as the new legal team has had to defend against the expansion of the mandatory conversion law and rent control to multi-family dwellings,[33] challenges to the Schools' admissions policy,[34] and a myriad of other issues.

In sharp contrast to the controversy surrounding Pauahi's endowment, the mood on campus during CJ's trusteeship was decidedly upbeat and filled with optimism and hope as the Schools built momentum to its centennial anniversary in 1987. The historic occasion was commemorated with a number of events "to reflect on past accomplishments with pride, and anticipate the future with confidence. It was a time to celebrate the living legacy of a beloved Hawaiian princess."[35]

Building on gains made through the cultural and educational renaissance begun in the 1970s, CJ and his fellow trustees adopted an ambitious plan to raise the educational performance of Hawaiian children to a level equal to or better than that of children throughout the nation.[36] To accomplish this, the trustees pushed to improve the quantity and quality of services offered to beneficiaries through the expansion of outreach programs, launch of early education services, and research in literacy education. They also invested in a master plan for the Kapālama campus that led to the construction of the 'Akahi Dining Hall, Ruth Ke'elikōlani Performing Arts Complex, Kapoukahi Industrial Arts Complex, and the Bernice Pauahi

---

[31] Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982).

[32] *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968); Cnty. of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973); *In re* Sanborn, 57 Haw. 585, 562 P.2d 771 (1977).

[33] Richardson v. City & Cnty. of Honolulu, 759 F. Supp. 1477 (D. Haw. 1991); Richardson v. City & Cnty. of Honolulu, 124 F.3d 1150, 1153 (9th Cir. 1997).

[34] Doe v. Kamehameha Schools, 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).

[35] SHARLENE CHUN-LUM & LESLEY AGARD, LEGACY: A PORTRAIT OF THE YOUNG MEN AND WOMEN OF KAMEHAMEHA SCHOOLS 1887–1987, at 140 (1987).

[36] *Id.*

Bishop Memorial Chapel & Heritage Center. CJ supported community-based initiatives that extended the Schools' reach, but he was particularly passionate about expanding enrollment and enhancing the academic rigor of the Kapālama campus secondary school. He wanted to provide Hawaiian youth with educational advantages that would allow them to blossom and lead our community. He often pointed to Pauahi as the type of leader Kānaka Maoli should emulate.

CJ's own example of leadership was not lost on our youth. CJ may have been comfortable in the board room, but he absolutely sparkled in the presence of young people. He gave generously of himself and invested time to forge a special bond with Kamehameha Schools students, often joining boarders for meals and regularly attending sporting events and other activities. Ever humble about his own professional achievements, CJ was far more interested in hearing of our students' accomplishments and plans than in talking about his own life and career.

Privileges and Obligations

The additional opportunities for Hawaiians to enroll in Kamehameha Schools, which resulted in large part from CJ's urgings, constitute an extraordinary gift to future generations. With this gift, as with his landmark legal rulings that ensured water resources for customary uses and protected traditional rights of access, as well as his persistence in creating and building Hawai'i's law school, CJ "paid it forward."

This precious inheritance comes with profound kuleana for those of us who now benefit from his wisdom and efforts. We must understand that: the privilege of traditional access comes with the obligation of resource stewardship; the privilege of water utilization comes with the obligation to conserve this waiwai, a precious source of the type of wealth that cannot be measured by dollars and jobs; the privilege of Kamehameha admission comes with the obligation for our students and alumni to contribute to the well-being of other beneficiaries; and the privilege of graduation from the William S. Richardson School of Law comes with an obligation to take leadership in pursuing justice, representing the interests of the disenfranchised and shaping a more equitable society.

Those of us who have enjoyed these privileges should realize that we owe much to CJ, this man upon whose broad shoulders we now stand. We would do well to heed the wise counsel of our kūpuna (ancestors) who said: "Mai kāpae i ke a'o a ka makua, aia he ola malaila."[37] Do not set aside the teachings of one's parents, for there is life there.[38]

---

[37] MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS

CJ served not only Kamehameha Schools, but our entire community with distinction, and we are deeply appreciative of his leadership and many contributions. The best way we can honor CJ's life is by conducting ourselves in a manner that respects the significance of his gifts and by leaving our own inheritance for future generations. I maika'i ke kalo i ka 'ohā.[39] Just as the goodness of the taro is judged by the young plant it produces,[40] CJ will be judged by our behavior. Let us not disappoint him or diminish his legacy.

224 (1983).

[38] *Id.*

[39] *Id.* at 133.

[40] *Id.*

Father and Grandfather

The Family of William S. Richardson

Fathers and grandfathers can be described according to where they fall on a continuum between those who will allow children to sit on their laps and those who don't. William S. Richardson, the father, grandfather, and great-grandfather, epitomizes the former. As youngsters, we children and grandchildren never hesitated to crawl into his lap—he would give us a little hug and continue reading his newspaper, magazine, or appellate brief. He was the hands-on father, grandfather, and great-grandfather everyone wanted to have. We adored him, and the feeling was mutual.

Looking back on our childhood, we now realize how busy our dad was, but at the time, we did not know that he had important things to do when he went downtown, always smartly dressed in the coat and tie our mother picked out. When Dad was practicing law, he worked six days a week. On Saturdays, our mom took us on a bus headed for Chinatown, where we got a glimpse of his work in the small office from which he practiced law for seventeen years. As soon as we arrived, he closed whatever file he was working on, took us to lunch, then went home to spend the rest of the day with us.

When he was chief justice, the living room light was often illuminated at three o'clock in the morning, the time during which he usually read appellate briefs. At the time, we never really knew what those long numbered pages were, and we certainly were clueless about the significance of the opinions he authored. What we did know is that he genuinely loved his work. It seemed effortless, and we never felt deprived of his time.

Indeed, Dad's dedication to family was boundless. It seems as though he attended all of our athletic matches, meets, and games. He drove us to functions and waited for us to finish practices; he even shuttled a daughter to Sea Life Park's gift shop so she could display her collages made from beach glass and driftwood. He helped crumple paper, soak it in tea, and iron it to make it look like tapa for a college Hawaiian club lū'au. It was not "below him" to sleep on a floor mattress in a dorm room so that he could catch his son Bill's college volleyball series.

We shared many fun moments together. He taught us to play cribbage, trumps, poker, and *hanafuda* (Japanese playing cards). On weekends, we played on the living room floor, loudly slapping down our cards.

We never saw Dad angry except if we were being mean or disrespectful, and together, we can count those instances on one hand. He responded to our confessions of mistakes with compassion and understanding, and because of that, we learned quickly from those experiences.

Besides the clear devotion to his family, church, and friends, how shall we describe him? Most would agree that he was positive, welcoming, charming, encouraging, and always inclusive—sometimes even embracing "radical" ideas. He was a storyteller, a pursuer of justice, and a man with an unfailing and energetic "can do" attitude. He never seemed to be stressed, even when he faced controversy like the mysterious cutting of the royal palms in front of Ali'iōlani Hale (the current home of the Hawai'i Supreme Court), the appointments of Bishop Estate trustees such as Matsuo (Matsy) Takabuki, or the water rights, beach access, and accretion cases that would impact future generations.

Dad was persistent, occasionally to the point of being stubborn. He doggedly pursued his dreams and had the uncanny ability to convince his friends, neighbors, and relatives to go along with him. The very creation and development of the University of Hawai'i law school, now named after him, is a testament to this.

It is difficult to explain why Dad was such a successful leader, but Kimi Sugamura, his secretary of many years, made several observations that provide some insight into his leadership qualities and his humility. She recalls that Dad did not like formality—as chief justice, when he needed to call a quick conference with the justices, he would walk down the hall and knock on each justice's door himself. When staff talked to him about problems and complaints, Dad would patiently listen but would not take action immediately; Dad told Kimi that sometimes things had a way of working out over time—the word he used was ho'omanawanui (patience). Kimi also observed that Dad often gave credit to others, including his law clerks, and that he would always thank them for their efforts.

Qualities like these enabled Dad to connect easily with others. It was not uncommon to walk down the street with him, run in to someone who knew him, and watch them share an engaging conversation. No one could possibly know that many people, but he always seemed to know everyone. Clearly, there was a method to our dad's madness. For example, an old friend of Dad's, who got to know him through our Aunty Barbara, happened to be the junior liaison officer for the Navy during the mid-1950s. He and Dad used to comb through the visitation lists for the Navy Admirals, and whenever a U.S. Senator or Representative was in Hawai'i, Dad knew the importance of welcoming them. This allowed him to make friends with many U.S. politicians, including Al Gore, Sr., Sam Rayburn, Lyndon Johnson, John Kennedy, and Hale Boggs. These contacts were valuable during the Hawai'i Statehood recognition campaign. When we later traveled to Washington, D.C. with Dad, he seemed to be as comfortable in Congress as he was at home. It was quite amazing.

Dad was always welcoming; it seems as though he and our mother never said no to overnight guests, rowdy or not. Our childhood friends were not aware

that Dad was a prominent and respected jurist. One classmate, Hawai'i Intermediate Court of Appeals Chief Judge Craig Nakamura, now a prominent jurist himself, recalls only knowing him as "Billy's Dad"—a father who would throw the baseball around with his son and his friends and let them run around the house and yard. Other friends recall that Dad always invited them into the Richardson household and that he genuinely cared for them. They would often find him lounging on the couch or in his favorite reclining chair with a newspaper or an appellate brief in one hand and an eye on whatever University of Hawai'i game happened to be on at the time. Everyone was received with joviality, warmth, and a friendly "Pehea 'Oe?" (How are you?) Then he would flash the smile that we've all come to love. Whether you were family or friends, Dad wanted to hear what was going on in your life, be it your problems or triumphs. He was always available to listen and offer advice.

The grandchildren also did not know Dad to be the formidable legal, political and social force that he was. To them, he was simply "Puna" (grandfather): the unassuming man who—in shorts, a t-shirt, and slippers—took them to Safeway to buy ice cream. He was the man who swam with them at the beach and played cribbage and poker with them. He was the man who was always relaxed, who loved to devour a bowl of chocolates and take a cat-nap when he could sneak one in. Like his children, his grandchildren only saw the side of him that put his family first and made each of them feel important and special, all of the time.

Puna cherished hanging out in a dirty old dugout or a hot gymnasium, proudly watching a grandson participate in an athletic event. He loved to be with his grandchildren no matter where they were. He traveled far and wide to be with them for every milestone, from graduations in British Columbia and New Hampshire to even a surprise thirtieth birthday party in California, where he quickly became the favorite of his granddaughter's friends. As one grandchild put it, "Puna was a cool dude."

Puna was the guy who would help scrape off tire-flattened toads to find the perfect "Buffalo Chip" for show and tell, *without* telling his grandchild's mom. He was the grandfather who would let his grandchildren stay up late and eat ice cream, because that meant he got some too. But he was also the grandfather who gently urged his grandchildren to "make a difference." He would often say: "If you have a good heart, it is hard to make a bad decision."

Ever the storyteller, the grandchildren remember that Puna often reminisced about the old days. He would tell them about his days delivering the news on his paper route, selling day-old bread, gathering wood for the fire at home to heat water for the bath, or trying to get a balloon home from Liberty House for the family without popping it on the kuku-lined lanes that led to his Kaimukī home. Visits to war memorials would spark stories about his experience in World War II. He would recall what he was doing when a significant event

occurred and talk about the people he knew who had participated in it. In later years, Puna would visit and bring out an old photo album from the trunk of his car; he and the grandchildren would look through it together while he told them about growing up in Hawai'i and going away to school. Of all the stories Puna recounted with such fondness, however, none touched him more than the stories of his wife, Amy. It was obvious that he was the definition of a "devoted and loving husband." He thought she was one of the smartest and loveliest women on earth.

Despite a life not untouched by tragedy, Dad was the most positive force we have ever known–his glass was always half full. He never felt old. Even when he was very sick, he never complained; he only spoke of how happy he was to see his family. The last time he saw one of his granddaughters, he told her that he wished he could live forever, just so that he could watch everyone grow up. He derived incredible energy and happiness when he saw that his family was happy. We will miss that.

Dad always looked optimistically to the future. He rarely looked back unless prompted because he did not want to revise history. He placed his attention and trust with his children, grandchildren, great-grandchildren, and most of all in the young people who strive to better the world through the study of law and science. "You can't go back," he would often say. "So all you can do is make the future better."

A Richardson Lawyer

Mari Matsuda*

Those of us who received our law degrees in person from the hand of William S. Richardson comprise over two thousand lawyers in Hawai'i.[1] I write for the next generation, the ones who will receive a degree with the Richardson name, but without Chief Justice (CJ) Richardson's handshake at graduation. What can we tell you to convey the obligation your degree carries, to "try to live like CJ?"

My class was the fifth to arrive in the quarry years. Where Stan Sheriff Arena now stands, there was an open field of mud and gravel that served as our parking lot, right across from our portable wooden school. It didn't look like a law school, and we didn't look like law students, at least not by 1970s standards.[2] Half of us were women, most of us were some shade of brown, and shoes were not common.[3] Many were older students for whom a professional degree was out of reach until our local law school opened. The majority of my classmates say they would not be lawyers today had CJ not fought to open that school in the quarry.

If family commitments or financial barriers had not forced us to choose the quarry, many would have gone elsewhere. It was a risk to attend a tiny, unknown, unaccredited law school with untested young faculty. What if the provisional American Bar Association accreditation was revoked? The Association of American Law Schools accreditation was years away, and

---

* Professor of Law and J.D. 1980, William S. Richardson School of Law, University of Hawai'i at Mānoa. The author thanks Fawn Jade Koopman, Kaleo Nacapoy, and Kahlan Salina for editorial and research assistance, and Professor Melody MacKenzie for commenting on a draft of this article.

[1] The William S. Richardson School of Law has awarded 2,585 JDs and 67 LLMs. Interview by Kahlan Salina with Laurie Tochiki, Assoc. Dean for Student Servs., William S. Richardson Sch. of Law, Univ. of Haw. at Mānoa, in Honolulu, Haw. (Oct. 13, 2010).

[2] In 1976, full-time and part-time student enrollment in ABA-approved law schools numbered 29,343 women, 83,058 men, 112,401 total. Donna Fossum, *Women in the Legal Profession: A Progress Report*, 67 WOMEN LAW. J., no. 4, 1981 at 1, 3. In 1975 only 6.6% of all lawyers were women. *Id.* By 1979 this figure rose to 11%. *Id.*

[3] The gender ratio of the entering class of 1977 was 47% women and 53% men. Interview by Fawn Jade Koopman with Laurie Tochiki, Assoc. Dean for Student Servs., William S. Richardson Sch. of Law, Univ. of Haw. at Mānoa, in Honolulu, Haw. (Oct. 7, 2010). The entire student body included 232 students, 142 women and 90 men. *Id.* The three largest ethnic groups in that entering class of 1977 were Japanese (40%), Hawaiian (23%) and Caucasian (23%). There were also Chinese (8%), Filipino (7%), and Black (1%). *Id.* Other represented ethnic groups included non-Hawaiian Pacific Islanders and Koreans. *Id.* There was also a separate category in those days for Portuguese students. *Id.*

licensing rules required a degree from an accredited law school.[4] "Don't worry, CJ will take care of us," a classmate told me. "He will change the rules if he has to."

"Who is CJ?" I asked. And then I learned the legend of the quarry—of the chief justice who fought for our school by lobbying the legislature and the board of regents and enlisting support from powerful back channel operators. Our existence drew enmity from the established bar. The Big Five[5] still loomed large in those days: buildings named "Amfac" and "Castle and Cooke" dominated both the literal skyline and the landscape of economic power in Honolulu. The large firms hired from Ivy League schools. The partners were haole, as were the CEOs of the client firms, and they socialized at the Pacific Club, which had only recently admitted its first non-white member.[6] Women were not invited to join for well over a decade.[7]

The Pacific Club crowd argued that Richardson's law school would water down the quality of the Hawai'i bar. How could the shabby school in the quarry produce lawyers who could match the imports? According to critics, CJ's school was obviously destined for second-rate status, ushering in lowered standards, and handouts to political friends of the Burns democrats: Cronyism, not quality. People downtown asked who my parents were. Obviously I knew "somebody" if I was going to school in the quarry.

---

[4] The William S. Richardson School of Law received full ABA accreditation in 1982 and full membership in the AALS in 1989. William S. Richardson Sch. of Law, Univ. of Haw. at Mānoa, *Time Line*, http://www.law.hawaii.edu/time-line (last visited Oct. 17, 2010).

[5] By the 1870s, "life in Hawai'i . . . resembled that of the post-Civil War South, with a small and powerful oligarchy in control of economic and social perquisites, and large masses of dark-skinned laborers . . . working under . . . overseers in the field[s]. LAWRENCE H. FUCHS, HAWAII PONO: AN ETHNIC AND POLITICAL HISTORY 21-22 (1961). "By 1915, sugar constituted about 90 per cent of the value of Hawaiian agricultural production, and more than 20 per cent of the Territory's population was on plantation payrolls." *Id.* at 244. "At the top of the power structure were the men who ran the great sugar agencies" that served as "financial, purchasing, and marketing" agents for the sugar plantations: Castle & Cooke, Alexander & Baldwin, C. Brewer & Co., American Factors (now Amfac), and Theo H. Davies & Co. *Id.* at 22. "The Big Five . . . were not content to confine themselves to the sugar business. . . . and by 1911 the U.S. Commissioner of Labor reported that local transportation by land and water" was "more closely allied than ever" with the sugar industry. *Id.* at 244.

[6] The exclusionary racial policy was "scrapped" in 1968, and Philip Ching and Asa Akinaka joined the Pacific Club. The Pacific Club, *History*, http://www.thepacificclub.org/About-Us/History.aspx (last visited Oct. 17, 2010).

[7] In 1980, Eileen Anderson was elected as the first woman mayor of Honolulu and was named an honorary member of the Pacific Club. *Id.* She returned the membership in 1982 due to the Pacific Club's stand against women members. *Id.* In 1983, the State Legislature threatened to outlaw private club discrimination via a "Pacific Club Bill," and members then voted 70-30 in favor of admitting women. *Id.* Finally, in 1984, after long years of debate, the Pacific Club welcomed Andrea L. Simpson as the first woman member. *Id.*

My parents were journeyman state workers, toiling away as instructors in the community college system. No one made a phone call or an introduction for me. I was a public school kid who knew nothing about how to pull the strings of power. Classmates who knew more about the lay of the land told me what people were saying about us, and, just as scrappy public school underdogs have since the days when McKinley High was designated "non-English Standard," we resolved to prove ourselves through our performance.[8] My study group met every Sunday morning at 8 a.m., no matter how late we had stayed out the night before. Over donuts, we forged a bond and taught each other the rule against perpetuities. The classes above us schooled us from the moment we walked into the portables. "Brief your cases, and finish your outlines by Thanksgiving," Cammie Bain Doi and Susan Park lectured the entering class on Day One. Dani Ho and Riki May Amano took one look at the shoyu bunnies in the class below them and decided, correctly, that we needed contact sports in our survival kits. Pat Lee and Faye Kurren, who preceded me in a summer job at one of those firms that questioned the quality of our law school, gave me tips on what to wear, whom to trust, and how to make a portfolio of my work to present to the hiring committee at the end of the summer. These women saw success as something to share as we built, collectively, the reputation of our law school.

Every step of the way, I was embraced by a law school community that pushed me to succeed, in a tradition of mutual care that no law school anywhere else has ever attained. This ethic of community was forged under the watch of the most powerful lawyer in the state. CJ beamed as he witnessed our bonds grow strong. He was running the entire judicial system of Hawai'i and writing decisions that would change the course of history, yet he took the time to come to our parties, even if a party was just some beer and pipikaula on the steps looking out over the muddy parking lot. He adored the Casualettes,[9] the

---

[8] "In the 1920's, English elitism resulted in a push for segregated public schooling. The non-plantation-employed haole, or white, population in Honolulu grew and began objecting to the contact with the 'pidgin-speaking' non-haole children. Instead of using racial segregation to accomplish this goal, students were grouped in different schools according to their levels of English proficiency. . . . This system of segregation was not abolished until 1948, and the last class of English Standard students graduated in 1960." Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1344 n.55 (1991) (internal citations omitted). McKinley High School, also nicknamed "Tokyo High," was designated a non-English Standard school. LOUISE CHIPLEY SLAVICEK, DANIEL INOUYE 44 (2007). Most of the white population in the area went to Roosevelt High, which was designated an English Standard school in 1924. *Id.*

[9] The Casualettes had a small repertoire of songs from the 1940s and 1950s and appeared in November 1978 following the first Ete Bowl football game. The Casualettes are: Christobel (Chris) Kealoha, piano player and former Pearl City High School music teacher who worked at the Attorney General's office after graduating from the William S. Richardson School of Law

Ete Bowl,[10] and the Casenotes[11]—the sound and sight of his children, the future lawyers of Hawai'i, at play. We learned from him that love is the core of great

---

(WSRSL); Mahealani Wendt, former Executive Director of the Native Hawaiian Legal Corporation; Haunani Burns, WSRSL class of 1980 and deputy attorney general; Juana Tabali-Weir, at the time a wife of a WSRSL student; Riki May Amano, WSRSL class of 1979 and former circuit court judge, who would join the group at every performance to sing just one song, "Calendar Girl;" and Sabrina McKenna, WSRSL class of 1982 and Associate Justice of the Hawai'i Supreme Court, who also joined the Casualettes as a guest singer. Kealoha is the acknowledged leader of the intrepid group.

About twenty years ago, the Casualettes' gig extended beyond the law school borders when they began performing at CJ's annual birthday/Christmas parties. Nearly every December, Kealoha would fly from Kaua'i to re-group the Casualettes and perform traditional "oldies but goodies," Christmas, and Hawaiian songs. In particular, the song "Always" was one of CJ's favorites and was performed by the Casualettes at CJ's ninetieth birthday party in December 2009. Emme Tomimbang, Marlene Booth (WSRSL Dean Aviam Soifer's wife), Ivan Lui-Kwan, Senator Daniel Akaka, Reverend Kahu David Kaupu of Kawaiaha'o Church, and other of CJ's many friends joined CJ and the Casualettes in festive singing.

The Casualettes had deep aloha for CJ, and a special relationship had developed over the years. CJ "adopted" them and and created the vehicle by which the group continued to perform at least annually. The group's last performance was at CJ's ninetieth birthday party. They are unsure of any future performances. As Amano said, "CJ was the magnet and reason for the group. He drew us together." Interview by Kaleo Nacapoy with Riki May Amano, Haw. 3d Cir. Ct. Judge (ret.), in Honolulu, Haw. (Oct. 13, 2010).

[10] The genesis of the Ete Bowl is part of WSRSL lore. In the fall of 1978, 3L Diane Ho was feeling nostalgic about the upcoming graduation. The class of 1979 at WSRSL was very close. She created the Ete Bowl as a way to maintain the strong bonds between her classmates and the class of 1980, many of whom had become friends—especially the women. Diane suggested: "What about football?" Despite classmate Riki Amano's concerns that the graduating class of 1979 consisted of only twenty-two women, the competition between the classes was born as Ho and Amano actively and mischievously cajoled the women to grab a pigskin and strut their stuff. Everyone was involved and some of the women played both offense and defense. The first game, touch football, was in November 1978.

Cheryl Kakazu, then a WSRSL 1L, desperately wanted to play with her friends. In the spring of 1979, the law school women joined together to form a team that played flag football against the women of the John A. Burns School of Medicine. Following that game, the Ete Bowl took the form that continues to this day—the team of law school women alumni (the Bruzers) versus the team of current law student women (the Etes).

The Ete Bowl began as a way to generate and perpetuate bonds of friendship. It has evolved into something more. It is a catalyst for connecting people far, far beyond the three years they spend in law school. Ellen Politano of the class of 1980 played in the most recent Ete Bowl with members of the newest graduating class of 2010. This is a perfect demonstration of thirty years of bonding, camaraderie, and the unusually close relationships that exist in the WSRSL community. Interview by Kaleo Nacapoy with Riki May Amano, Haw. 3d Cir. Ct. Judge (ret.), in Honolulu, Haw. (Feb. 18, 2011); *see also* William S. Richardson Sch. of Law, Univ. of Haw. at Mānoa, *Genesis of Ete Bowl*, http://www.law.hawaii.edu/etebowls (last visited Mar. 6, 2011).

[11] The Casenotes was a Hawaiian music group formed by WSRSL students in 1978. Led by the school's Assistant Dean, Larry Kam (steel guitar), its members included Vince Tio (lead

leadership. The face we remember has a twinkle in the eye, a grin, a little shake of the head in wonderment. "How about those gals, they are something else," he said year after year, as yet another sister slammed her body down in the mud for a diving catch in the quarry. The most powerful lawyer in the state LOVED watching us, and we loved being watched by him. Someone cared about us, believed in us. When we were young and stupid and no one knew who we were, the chief justice of our state wanted to know our names, and he gazed upon us with a look of proud affection.

For all of you who will have CJ's name on your degree without the memory of that face, I want to remember that look, and describe what it stood for. William S. Richardson, the public countenance, was calm, smiling, gracious, and small. He sat, moved, and stood in a way that did not take up space or grab attention. When he arrived in a room, we all knew: "CJ's here!" It was not because he sought the limelight. The light came from within, and conveyed strength and purpose quietly.

To live like CJ is to strive for integrity, aloha, joy, compassion, and generosity.

Integrity: As Judge Burns describes in these pages,[12] the Burns Democrats planned a revolution, a ballot box coup—Huli![13]—that upended the entire power structure. This is risky business, best undertaken with undeniable integrity. Your allies won't take the risks required if they don't trust you completely, and your adversaries will search every crevice for an excuse to bring you down. Like Ralph Nader,[14] CJ lived his life with so much integrity

---

vocals and guitar), Geri Valdriz (vocals and slack key guitar), and Ward Jones (bass). The Casenotes played regularly at the various law school parties, the Ete Bowl, graduations, and other school-related functions. The group also performed at private functions for law professors, fellow law students, and their families. The Casenotes remained together until 1982. After graduation, its members pursued their law careers and played together periodically. They get together for special occasions but rarely see each other these days. Tio lives in Kona, Jones on O'ahu, Valdriz on Maui; Dean Kam has passed on. For those attending WSRSL between 1978 and 1982, the Casenotes provided the musical backdrop to social life on campus. E-mail from Geronimo Valdriz, Jr., Haw. 2d Cir. Fam. Ct. Judge, to Kaleo Nacapoy (Oct. 16, 2010, 07:14 HST) (on file with author).

[12] James S. Burns, *William S. Richardson: A Leader in Hawai'i's Successful Post-WWII Political and Judicial Revolution*, 33 U. HAW. L. REV. 25 (2010).

[13] "To turn, reverse; to curl over, as a breaker; to change, as an opinion or manner of living." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 89 (1986).

[14] Ralph Nader, an activist, "author[,] and lecturer on automotive safety, ha[d], for some years, been an articulate and severe critic of General Motors' products from the standpoint of safety and design." Nader v. Gen. Motors Corp., 255 N.E.2d 765, 767 (N.Y. 1970). When General Motors learned of the imminent publication of Nader's book *Unsafe at Any Speed*, it decided to conduct a campaign of intimidation against him in order to "suppress [Nader's] criticism of and prevent his disclosure of information" about its products. *Id.* Specifically, Nader alleged that General Motors agents:

that an investigator could follow him all day every day and not find so much as a breach of etiquette, much less a breach of ethics.

A Richardson lawyer will not go anywhere near the gray area where "maybe you can get away with it," but will instead act always in ways that can withstand the glaring spotlight of scrutiny.

Aloha: When you huli the power structure, you gain enemies. Blessed with a long life, CJ had many chances to recount who opposed him and how. In all those tellings, we never heard rancor, bitterness, invective, or disparagement. The primary tone was amusement, not unlike his tone commenting at the Ete Bowl. The sugar barons and their lawyers simply saw things differently, and CJ would smile as he told the story of how he got them to come around to his way, whether they liked it or not. In turn, among the elder scions of the established bar, you heard complaints about Richardson decisions, about CJ's reasoning, about his political "machine," but not about the man, who was known to friend and foe alike as someone who extended his handshake in genuine aloha. Every person at the law school—faculty, student, and staff—and every person at the courthouse, from justice to janitor, got the same warm smile and handshake. Because of his constant stance of goodwill, those who opposed the law school were not demonized and backed into a corner. They soon came on board as big supporters. Every firm that sent partners to testify against the formation of this law school is now a donor, with Richardson lawyers "above the line" on their firm letterhead.[15]

A Richardson lawyer will fight hard and win, operating all the while with dignity, respect, gracious civility, and aloha toward all.

Joy: Fighting the good fight, with powerful opponents; starting a law school with the details of funding and accreditation left to hope and prayer; loving his

---

(1) conducted a series of interviews with acquaintances of the plaintiff, "questioning them about, and casting aspersions upon [his] political, social[,] racial[,] and religious views[;] his integrity; his sexual proclivities and inclinations; and his personal habits[;"] (2) kept him under surveillance in public places for an unreasonable length of time; (3) caused him to be accosted by girls for the purpose of entrapping him into illicit relationships; (4) made threatening, harassing[,] and obnoxious telephone calls to him; (5) tapped his telephone and eavesdropped, by means of mechanical and electronic equipment, on his private conversations with others; and (6) conducted a "continuing" and harassing investigation of him.

Id. (internal citations omitted and formatting altered). After Nader suffered through continuous intimidations and invasions of privacy, General Motors' investigations revealed nothing with which to impugn his character. *See id.* The New York Court of Appeals affirmed the lower court decision that the first two allegations met the requirements for invasion of privacy under District of Columbia law. *Id.* at 771.

[15] CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982, at 92-94 (1985); *Donors*, *in* WILLIAM S. RICHARDSON SCH. OF LAW, UNIV. OF HAW. AT MĀNOA, TRI-ANNUAL REPORT, 2005-2008, at 27-34 (2008).

wife and watching his family—both kin and the extended family of Richardson lawyers—grow, make mistakes, and prosper, William S. Richardson did all of this with great joy. I think he lived the long, healthy, strong life he did because he took so much joy in every part of it and didn't want to miss a thing. He would sit in the quarry, and later in the courtyard of our more fancy quarters, and simply watch the students interacting. He looked so calm and so happy. Smiling, because he loved what he saw: the 1Ls coming in, the 3Ls graduating, the alumni spreading out into every corner of the bench and bar. He took pride in our successes, yes, but the real reason for his constant smile as he walked the halls of the law school he made, was that he felt joy in the company of other human beings and he knew how to simply sit, and let that joy descend. There is a picture of CJ at our last big party with him, for his ninetieth birthday. His face is full of that joy. He looked like that often, not just on his birthday, and it made us feel so special to sense that our existence was valued with such celebration.

A Richardson lawyer never forgets to feel the joy.

Compassion: When he became more frail, CJ Richardson still insisted on being at every major law school event. At one forum where he was asked to speak, he was helped to the podium by Professor Melody MacKenzie, and she was prepared to cut the program short if he became fatigued.[16] He spoke slowly. He was asked about the *McBryde* case,[17] perhaps the most important Richardson-era decision, and he told the story slowly, and then stopped altogether. We waited, caring so much for our aging patron, and worrying that we were asking too much of him. Then, after a long pause, he said, "Think of the little guy, the guy downstream." *McBryde* was a huge, convoluted case involving decades of litigation, multiple parties, and complex issues in several areas of law, but its essence, and indeed the essence of everything CJ Richardson ever did as a lawyer and a leader, came down to thinking of the little guy downstream. Whatever we do, there is someone downstream who will bear the consequences. If we could learn to think that way, with an eye to the consequences, we could stop global warming and nuclear proliferation, stop doing things today that will have devastating consequences for future generations. The struggling taro farmer,[18] the kahuna lapa'au[19] who needs to

---

[16] William S. Richardson, Chief Justice (ret.), Haw. Sup. Ct., Remarks at Maoli Thursday at the William S. Richardson School of Law: Kalipi and Beyond: Exploring Chief Justice Richardson's Jurisprudence (Sept. 4, 2008).

[17] McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330, *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam) (holding that water cannot be privately owned and that riparian and appurtenant users have the right to use, but not own, such water).

[18] *See id.*

[19] Nanette L. Kapulani Mossman Judd, Lā'au Lapa'au: A Geography of Hawaiian Herbal Healing (May 1997) (unpublished Ph.D. dissertation, University of Hawai'i) (on file with

gather roots and berries,[20] the little boy holding his step-grandmother's hand at the crosswalk right before a speeding car takes her life[21]—the small and ordinary people who lack money and power were at the center of CJ Richardson's jurisprudence. He judged the righteousness of legal doctrine by what it did for the least among us. He judged with his heart. He judged well.

A Richardson lawyer will help make Hawai'i a better place for those living downstream.

Generosity: By thinking of others always, by walking with humility, by giving his entire professional life to public service, by working tirelessly to build a compassionate legal system in a democratic Hawai'i, by building us a law school, CJ ended his life with a huge net worth of aloha. He was not a wealthy man if gold is the measure, but he knew the true riches available to those who are willing to give it all away. The anthropologists talk about the "big man" in Pacific island cultures. [22] It's hard to maintain big man status.[23]

---

author). Kahuna lapa'au were medical practitioners and healers. MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 114 (1983). Kahuna lā'au lapa'au were herbalists. Judd, *supra*, at 2. These kahuna, also known as Healers, believe that the majority of common health conditions are caused by three categories of environmental factors: lifestyle, personal relationships and communication problems, and other causes. *Id.* at 67. Healers provide treatment through "prayer, introspection, and mental conditioning" and the amount of lā'au administered varies between individuals depending on how severe the condition may be. *Id.* at 70. In a study done by Edward Smith Craighill Handy, Mary Kawena Pūku'i, and Katherine Livermore in 1931, it was reported that Hawaiians used 317 different species in remedies. *Id.* at 79. According to the Healers that the author Judd studied, the five most important and commonly used lā'au today are: "popolo, uhaloa, hauoi, kukui, and olena." *Id.* at 81. Healers may use substitute lā'au that are available when certain native and traditional lā'au cannot be found to promote conservation efforts of native plant species. *Id.* at 79-80. Many healers gather and grow their own lā'au and some healers have family members collect lā'au with them. *Id.* at 80.

[20] *See* Judd, *supra* note 19, at 79-81. The right of access to gather traditional plant material was preserved in *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982) (reaffirming gathering and access rights within one's own ahupua'a).

[21] *See* Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974) (allowing a child to recover emotional distress damages when his step-grandmother was struck and killed by a car while they were crossing a street together). While most jurisdictions would not award emotional distress damages to a child who is not legally related to his caretaker, CJ followed Hawaiian conceptions of family, stating:

> Neither should the absence of a blood relationship between victim and plaintiff-witness foreclose recovery. Hawaiian and Asian families of this state have long maintained strong ties among members of the same extended family group. The Hawaiian word ohana has been used to express this concept. It is not uncommon in Hawaii to find several parent-children family units, with members of three and even four generations, living under one roof as a single family.

Id. at 410, 520 P.2d at 766.

[22] Laura Zimmer-Tamakoshi, *The Last Big Man: Development and Men's Discontents in the Papua New Guinea Highlands*, 68 OCEANIA 107, 107-09 (1997). Big Men are "leaders,

The traditional leaders were under tremendous pressure to throw bigger and better feasts and give more generous gifts to their constituencies. Status, in island cultures, comes from giving, not from plundering and hoarding. Those of us blessed to have known CJ saw a truly big man who reflected the values of an ancient time, when generosity and striving for pono were the measures of greatness. It made him happy to live that way, enjoying the kanikapila at a law school lū'au, watching while lawyers holding Richardson degrees became the leaders of this state, the judges, the partners in the law firms, the scholars, and, most importantly, the next generation of advocates for the little guy downstream.

A Richardson lawyer gives to the community and is gifted by the very act of giving.

In the end, there is judgment, whether cosmic or just personal, when you look in the mirror and ask: what did I do in my time on this planet?

Live your life like Chief Justice William Shaw Richardson. You could not do better than that.

---

entrepreneurs, and translators of Western capitalism and 'modernization' to their village followers." *Id.* at 107. Big Men have tremendous "powers of persuasion and personal forcefulness" and they use this power to "command labor, resources, and the hearts of followers." *Id.*

[23] *Id.* Big Men were under pressure to maintain their success and status through their ability to create a "network of exchange partners and supporters who are indebted to the Big Man" because of their generosity and ability to externalize and distribute production. *Id.* at 107-08. Big Man status in Pacific island cultures was maintained by raising their own reputation as well as the reputation of others in their groups and ensuring that good things happen for their community. *Id.* at 108.

The Richardson Years: A Golden Age of Law in Hawai'i

Simeon R. Acoba, Jr.*

As there had been a social and political revolution beginning in the 1950s in Hawai'i, there was to be a judicial revolution as well, a Golden Age of Law during the Chief Justice William S. Richardson years. With statehood, the Hawai'i Supreme Court became the highest court of a sovereign state and had thrust upon it the responsibility of charting the state's legal course. Following the appointment of CJ Richardson, the court did not merely fulfill this role, but established itself as a trailblazer in a host of areas such as land law, water rights, beach and ocean access, zoning appeals, native Hawaiian rights, consumer protection, tort law, domestic relations, civil rights, worker compensation law, the state bill of rights, and more. The decisions were more than an expression of independence that came with state sovereignty; some announced legal rules had influence beyond our state.

The Richardson courts spanned approximately sixteen years. Some of the most significant cases of the different Richardson courts are set out in footnotes with an asterisk designating cases authored by CJ. The members of the first court served from 1966-1967.[1] The second Richardson court spanned 1967 to 1969.[2] The third Richardson court encompassed 1969 to 1973. I served as a

---

* Associate Justice, Hawai'i Supreme Court. I would like to acknowledge the following people for their contributions to this article: Lorna Ching, Judicial Assistant; Tracey Kubota, Kristi O'Heron, Adam Robinson, and Audrey Stanley, Law Clerks; and Merissa Kraham and Aeri Yum, Student Externs. Portions of this article were published in the Hawaii Bar Journal, Vol. 14, No. 12 (Dec. 2010).

[1] CJ Richardson was appointed to the court as chief justice in 1966. The first Richardson court consisted of Chief Justice William S. Richardson, who was appointed by Governor John A. Burns, and Associate Justices Charles E. Cassidy, Cable A. Wirtz, Rhoda V. Lewis, and Jack H. Mizuha, who had been appointed by Governor William F. Quinn.

[2] In addition to Chief Justice Richardson, the members of the second Richardson court consisted of Associate Justices Jack H. Mizuha, Masaji Marumoto, Kazuhisa Abe, and Bernard H. Levinson. Significant cases include *In re Integration of Bar of Hawaii*, 50 Haw. 107, 432 P.2d 887 (1967) (holding that the supreme court has the inherent power to integrate the bar, even in the absence of any statutory authorization, "at least to the extent of requiring . . . every attorney licensed to practice in this State compulsory membership in a bar association . . . and payment of reasonable membership fee to provide funds for such association"); *State v. Texeira*, 50 Haw. 138, 433 P.2d 593 (1967) (noting that "[a]s long as [the supreme court] afford[s] defendants the minimum protection required by . . . the Federal Constitution, [the supreme court is] unrestricted in interpreting the constitution of this state to afford greater protection," in determining whether an arrest without a warrant was based on probable cause and whether a search incidental to that arrest was reasonable); *Yoshizaki v. Hilo Hospital*, 50 Haw. 150, 433

law clerk to CJ from 1969 to 1970. The third court was comprised of Masaji Marumoto, an associate justice of the last territorial Supreme Court; Kazuhisa Abe, a former president of the State Senate; Bernard Levinson, a previous first circuit court judge; Bert Kobayashi, a former State Attorney General; and CJ, who had been lieutenant governor of the state.[3] This distinguished group of jurists brought to their work a background rich not only in the law, but in life experiences.[4]

P.2d 220 (1967) (holding that the statute of limitations does not begin to run against a medical malpractice claim "until the plaintiff knew or should have known of the defendant's negligence"); *In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968)* (establishing that the boundary line between state and private property "is along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves"); *State v. Hanawahine*, 50 Haw. 461, 443 P.2d 149 (1968)* (explaining that "[a] search implies a prying into hidden places for that which is concealed[,] . . . not a search to observe that which is open to view," and, thus, "[w]hat is in open view, if no dominion is exercised over it, is not a search[,]" in determining whether scanning the interior of the defendants' car with a flashlight constituted an unreasonable search) (internal quotation marks and citations omitted); *Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968)* (concluding that the owners of a "kuleana" (a small parcel of land awarded in fee by the Hawaiian monarch) had established a right of way based on ancient Hawaiian tradition, custom and usage).

[3] All of the members of this court were appointed by Governor John A. Burns.

[4] Significant cases of the third Richardson court include *State v. Matias*, 51 Haw. 62, 451 P.2d 257 (1969)* (holding that "an overnight guest of [a] tenant[] ha[s] a right to privacy in the premises[,]" and explaining that a "person has a 'halo' of privacy wherever he goes and can invoke a protectable right to privacy wherever he may legitimately be and reasonably expect freedom from governmental intrusion[,]" and that "constitutional right to privacy cannot be waived by another unless he has authorized another to do so"); *Acoustic, Insulation & Drywall, Inc. v. Labor & Industrial Relations Appeal Board*, 51 Haw. 312, 459 P.2d 541 (1969)* (establishing that, for worker compensation claims, the burden of proof and burden of persuasion is on the employer); *Petersen v. City & County of Honolulu*, 51 Haw. 484, 462 P.2d 1007 (1969)* (holding that parents who brought suit against the City on behalf of their minor child for injuries sustained at a City-owned-and-operated beach park, could be regarded as joint tortfeasors, and explaining that, inasmuch as "minor children are entitled to the same redress for wrongs done them as are any other persons[,]" a "child can enforce liability against his parents"); *Almeida v. Correa*, 51 Haw. 594, 465 P.2d 564 (1970) (Richardson, C.J. & Levinson, J., co-authors) (holding that exhibition of a child to the finder of fact in paternity cases is not permitted because only expert testimony concerning the resemblance of a child to the parent is admissible); *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970)* (holding that a plaintiff is entitled to recover damages for negligent infliction of emotional distress (NIED) where "a reasonable [person] . . . would be unable to adequately cope with the mental stress engendered by the circumstances of the case"); *Yin v. Midkiff*, 52 Haw. 537, 481 P.2d 109 (1971)* (establishing that "whenever the parties to [an adverse possession] action are cotenants and closely related by ties of blood, the burden of the cotenant claiming adversely is intensified" and "[t]his increased burden usually requires the additional element of 'actual knowledge' of the adverse possession, rather than mere circumstances putting the possessor's cotenants on notice"); *State v. Joao*, 53 Haw. 226, 491 P.2d 1089 (1971) (establishing that a criminal defendant's right to due process requires an unprejudiced grand jury); *State v. Santiago*, 53

The court's members were thus uniquely qualified to engage in the discourse needed to validate the process which was to generate groundbreaking decisions. The court could not have failed to realize the pivotal role it occupied in the state's history. At the risk of oversimplifying what is always a complex matter, the court well represented liberal, conservative, and moderate views. It was a court in which strongly-held beliefs were expressed and positions taken, but whose opinions exhibited little of the enmity that is sometimes found in appellate decisions. Subsequently, the membership of the court changed in 1973,[5] 1975,[6] 1979,[7] and 1981.[8] Despite changes in the court's makeup

---

Haw. 254, 492 P.2d 657 (1971) (establishing the "scope of the protections guaranteed by Hawaii Constitution's privilege against self-incrimination[,]" and holding that absent Miranda warnings, "statements made by the accused may not be used either as direct evidence in the prosecutor's case in chief or to impeach the defendant's credibility during rebuttal or cross-examination"); *Golf Carts, Inc. v. Mid-Pacific Country Club*, 53 Haw. 357, 493 P.2d 1338 (1972) (establishing that a promisor's performance "made in good faith" amidst disputes about the terms of the contract does not warrant recession) (internal quotation marks omitted); *Akamine v. Hawaiian Packing & Crating Co.*, 53 Haw. 406, 495 P.2d 1164 (1972)* (establishing that the employee's preexisting medical condition that contributed to a workplace injury or death did not constitute substantial evidence "to overcome the presumption that the claim is for covered work injury"); *Tittle v. Hurlbutt*, 53 Haw. 526, 497 P.2d 1354 (1972)* (establishing that the "absence of a Hawaii license to practice medicine is immaterial in determining whether a defendant physician exercised proper care in the treatment of his patient where the defendant physician administered patient care under the direction of a licensed physician"); *York v. State*, 53 Haw. 557, 498 P.2d 644 (1972) (holding that Hawai'i's "three-year durational residency requirement" was "unconstitutional"); *State v. Texaco, Inc.*, 53 Haw. 567, 498 P.2d 631 (1972) (establishing that the State of Hawai'i retained the right to terminate public land leases under the lease agreement governed by Hawai'i Revised Statutes (HRS) § 171-16); *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973) (establishing that "the right to water is one of the most important usufruct of lands, and [that] . . . the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants"); *Murphy v. Murphy*, 55 Haw. 34, 514 P.2d 865 (1973) (establishing that service by publication is insufficient absent a "reasonable and due inquiry as to the whereabouts of the defendant") (internal quotation marks omitted); *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973)* (establishing that "title to land lost by erosion" "belongs to the State of Hawaii" and that landowners are not entitled to compensation); *State v. Midkiff*, 55 Haw. 190, 516 P.2d 1250 (1973)* (establishing the formula for "just compensation" in nonrealignment cases under HRS § 101-23, which sets forth how damages for the condemnation of property is to be assessed).

[5] During 1973 to 1974, the court was comprised of Chief Justice Richardson and Associate Justices Bert T. Kobayashi, Bernard H. Levinson, Thomas S. Ogata, and Benjamin Menor. Significant cases include *Walton v. State Farm Mutual Automobile Insurance Co.*, 55 Haw. 326, 518 P.2d 1399 (1974) (holding that HRS § 431-448 invalidates a clause within an automobile insurance policy that would reduce benefits directly payable by the insurer to a sum below the statutory minimum); *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974)* (establishing the standard of proof for recovery from mental distress); *Tighe v. City & County of Honolulu*, 55 Haw. 420, 520 P.2d 1345 (1974) (holding that police records are not insulated by absolute immunity from discovery in a civil trial); *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478,

522 P.2d 1255 (1974) (upholding the due process rights of public housing tenants to an adjudicatory hearing before increases in rent); *State v. Mickle*, 56 Haw. 23, 525 P.2d 1108 (1974) (establishing a multi-factor indigency test to determine a defendant's qualification for court-appointed counsel); *Board of Education v. Hawaii Public Employment Relations Board*, 56 Haw. 85, 528 P.2d 809 (1974) (establishing the good faith requirement for bargaining or negotiations between the government and its employees); *State v. Good Guys for Fasi*, 56 Haw. 88, 528 P.2d 811 (1974) (holding that a campaign committee itself is not subject to criminal penalties for the failure of one of its members to comply with campaign reporting requirements under HRS § 19-6(19)).

[6] Chief Justice Richardson and Associate Justices Bert T. Kobayashi, Thomas S. Ogata, Benjamin Menor, and H. Baird Kidwell made up the fifth Richardson court, from 1975 to 1979. Significant cases include *City & County of Honolulu v. Bennett*, 57 Haw. 195, 552 P.2d 1380 (1976)* (establishing a good faith standard for tenants in common to claim adverse possession against cotenants); *In re Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977)* (holding that "regardless of whether or not there has been permanent erosion," a beachfront's "title boundary is the upper reaches of the wash of [the] waves"); *Sawada v. Endo*, 57 Haw. 608, 561 P.2d 1291 (1977) (recognizing that a "tenancy by the entirety" is held by a husband and wife "in single ownership" and determining that "an estate by the entirety is not subject to the claims of the creditors of one of the spouses during their joint lives"); *State ex rel. Kobayashi v. Zimring*, 58 Haw. 106, 556 P.2d 725 (1977)* (establishing that "lava extensions . . . [are] held in public trust by the government for the benefit, use and enjoyment of all"); *State v. Huelsman*, 60 Haw. 71, 588 P.2d 394 (1978) (holding that in all cases where the court imposes an extended term sentence, "the sentencing court shall state on the record its reasons for determining that commitment of the defendant for an extended term is necessary for protection of the public and shall enter into the record all findings of fact which are necessary to its decision"), *overruled on other grounds by State v. Tafoya*, 91 Haw. 261, 982 P.2d 890 (1999); *State v. Kaaheena*, 59 Haw. 23, 575 P.2d 462 (1978)* (holding that the police's actions of standing on crates to look through a one-inch hole in blinds that had been drawn across windows, to see into an apartment where illegal gambling occurred, constituted an unreasonable warrantless search under article I, section 5 of the Hawai'i Constitution).

[7] During 1979 to 1981, the members of the Hawai'i Supreme Court were Chief Justice Richardson and Associate Justices Thomas S. Ogata, Benjamin Menor, Herman T. Lum, and Edward Nakamura. Significant cases include *Life of the Land, Inc. v. Land Use Commission*, 61 Haw. 3, 594 P.2d 1079 (1979)* (holding that a nonprofit environmental organization, which opposed the reclassification of property and comprised of members who lived adjacent to that reclassified property, was a "person aggrieved" under the Hawai'i Administrative Procedure Act); *Klinger v. Kepano*, 64 Haw. 4, 635 P.2d 938 (1981)* (concluding that proceedings condemning plaintiffs' property for failure to pay for back taxes "constituted a denial of due process" inasmuch as the notice by publication "was not 'reasonably calculated' to apprise [them] of the pending sale"); *Nakamoto v. Fasi*, 64 Haw. 17, 635 P.2d 946 (1981) (holding that a city policy of conducting physical inspections at a public auditorium of any item capable of concealing bottles or cans was unconstitutional); *State v. Bloss*, 64 Haw. 148, 637 P.2d 1117 (1981) (holding that a city ordinance regulating commercial speech by prohibiting the distribution of handbills was unconstitutionally vague).

[8] During 1981 to 1982, the court consisted of Chief Justice Richardson and Associate Justices Herman T. Lum, Edward Nakamura, Frank D. Padgett, and Yoshimi Hayashi. Significant cases include *Levi v. University of Hawaii*, 63 Haw. 366, 628 P.2d 1026 (1981)* (holding that the University of Hawai'i's policy of requiring employees to retire at age sixty-five

throughout CJ's tenure, the court continued to establish landmarks in Hawai'i's case law.

That the Richardson courts issued so many groundbreaking decisions (or as CJ liked to say, to "pioneer")[9] was in part because CJ fostered a setting in which the court flourished. Fifteen other justices served during the Richardson years, and their work thrived in the environment CJ established. CJ was tolerant, respectful, truly humble, and even-handed. His personality was grounded in the culture of Hawai'i. On the court, he personified Hawaiian values of "aloha"—respect, "laulima"—cooperation, "lokahi"—unity and balance, "malama"—caring, and "kuleana"—responsibility.[10] In my view, these values constitute a universal formula for promoting collegiality on multi-member courts. Thus, nurtured by these virtues and a sense of order, open discourse on the court abounded; each justice's independence could be asserted within the court and in opinions.

It is not surprising, then, that one hallmark of the Richardson courts was separate opinions—dissenting, concurring, or dissenting and concurring opinions. From 1969 to 1971, a period roughly encompassing my clerkship, separate opinions were issued in more than twenty-five percent of the cases. Thus, cases were thoroughly debated, assuring the parties and the public that legal disputes had been extensively examined from more than one point of view. As did the other law clerks, I worked on opinions. At our annual

---

violated article X, section 6 of the Hawai'i Constitution); *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982)* (concluding, *inter alia*, that the Hawai'i Constitution imposes a fiduciary duty on Hawaiian Homes Commission and individual commissioners to act for the exclusive benefit of native Hawaiians, and that the Commissioners breached that duty by weighing the interests of native Hawaiian beneficiaries against interests of the State and taxpayers); *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982) (holding "that an employer may be held liable in tort where his discharge of an [at-will] employee violates a clear mandate of public policy"); *State v. Clark*, 65 Haw. 488, 654 P.2d 355 (1982)* (holding that a warrantless cavity search incident to an arrest absent exigent circumstances violated article I, section 7 of the Hawai'i Constitution); *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982)* (holding that riparian rights and appurtenant water rights cannot be severed or extinguished from the land); *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982)* (upholding the public's superior interest over the private interest in the rights to Hawai'i's waters); *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982)* (holding that lawful occupants of an ahupua'a may enter undeveloped lands within the ahupua'a to gather specifically enumerated items for the purposes of practicing native Hawaiian customs and traditions).

[9] In his dissent to *Rodrigues*, Justice Levinson referred to CJ's statement to "pioneer," relating that he was not against "pioneer[ing,]" in referring to CJ's majority opinion establishing for the first time an independent duty to refrain from NIED. 52 Haw. 156, 178, 472 P.2d 509, 522 (1970) (Levinson, J., dissenting).

[10] The meanings attributed to these terms are not intended to be comprehensive, but representative of the terms involved.

gatherings on his birthdays, true to his humble nature, CJ always said we law clerks were the ones who had "blazed the trail." Of the cases I was fortunate to work on, one, *Rodrigues v. State*,[11] seemed emblematic of CJ's "pioneering." Another, *Almeida v. Correa*,[12] reflected CJ's sensitivity to our island culture.

In *Rodrigues*, the Rodrigueses had just completed construction of their home when heavy rains dammed by a clogged state culvert flooded their home.[13] The waters caused "extensive damage to the house and furnishings."[14] The Rodrigueses "had waited fifteen years to build their own home."[15] Mr. Rodrigues "was heartbroken and couldn't stand to look at it," and Mrs. Rodrigues was "'shocked' and cried."[16] In addition to other repairs, "the Rodrigueses spent approximately six weeks scraping damaged rubber carpets off the floor of the house with razor blades."[17] Among the damages awarded the Rodrigueses for the state's negligence was $2500 for "'mental anguish and suffering, inconvenience, disruption of home and family life, past and future, etc.'"[18]

After recounting that "[t]he traditional rule . . . is that there is no recovery for the negligent infliction of mental distress alone[,]"[19] the opinion noted that "the interest in freedom from the negligent infliction of mental distress has in fact been protected whenever the courts were persuaded that the dangers of fraudulent claims and undue liability of the defendant were outweighed by assurances of 'genuine and serious' mental distress."[20] The court observed that in the past, "courts ha[d] found such assurances in an accompanying physical injury or impact, host cause of action, or special factual pattern."[21] *Rodrigues*, however, determined that the time had come for such an interest to be afforded independent legal protection. According to the court, "[t]he force which compels recognition of an element of damages, once parasitic, as an independent basis of liability is social change."[22]

This social change was "a multiplication of psychic stimuli as 'society becomes more complex and people are crowded together'" and reflected "increasing widespread knowledge of the debilitating effect mental distress may

---

[11] 52 Haw. 156, 472 P.2d 509 (1970).

[12] 51 Haw. 594, 465 P.2d 564 (1970).

[13] *Rodrigues*, 52 Haw. at 159, 472 P.2d at 513.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 159-60, 472 P.2d at 513.

[18] *Id.* at 175, 472 P.2d at 521.

[19] *Id.* at 169, 472 P.2d at 518.

[20] *Id.* at 170, 472 P.2d at 519.

[21] *Id.*

[22] *Id.* at 173-74, 472 P.2d at 520 (citation omitted).

have on an individual's capacity to carry on the functions of life."[23] The court held "that the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection[, and], therefore, . . . there is a duty to refrain from the negligent infliction of serious mental distress."[24] Furthermore, "[c]ourts and juries which have applied the standard of conduct of 'the reasonable man of ordinary prudence'"[25] could be trusted to administer "a standard of serious mental distress based upon the reaction of 'the reasonable man.'"[26] In *Rodrigues*, the Hawai'i Supreme Court was the first court in the nation to recognize negligent infliction of emotional distress (NIED) as an independent tort.[27] One article said of the opinion: "While almost all American jurisdictions are still wallowing in the remnants of this distinction, the Hawaiian Supreme Court, in a burst of revolutionary zeal, has delivered up *Rodrigues v. State*: therein establishing a new basis for a claim for negligently inflicted emotional harm[.]"[28] The article concluded: "*Rodrigues* is truly a

---

[23] *Id.* at 173, 472 P.2d at 520.

[24] *Id.* at 174, 472 P.2d at 520.

[25] *Id.* at 173, 472 P.2d at 520.

[26] *Id.*

[27] *See* Denise E. Antolini, *Punitive Damages in Rhetoric and Reality: An Integrated Empirical Analysis of Punitive Damages Judgments in Hawaii, 1985-2001*, 20 J.L. & POL. 143, 172 (2004) (noting that "Hawaii sparked a national judicial trend by abolishing the physical injury rule in [NIED] cases, allowing the claim as an independent cause of action"); John Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1076-77 (2005) (stating that *Rodrigues* "paved the way for unprecedented recovery for [NIED] absent a physical manifestation of emotional distress").

[28] James W. Brott, *Negligent Infliction of Emotional Harm*, 7 HAW. B.J. 148, 148 (1971) (footnote omitted). The Hawai'i Supreme Court later retreated somewhat from the holding in *Rodrigues* by distinguishing the case on different bases. *See, e.g.*, Ross v. Stouffer Hotel Co., 76 Haw. 454, 465, 879 P.2d 1037, 1048 (1994) (asserting "that recovery for [NIED] by one not physically injured is generally permitted only when there is 'some physical injury to property or a person'" (citation omitted)); *see also* HAW. REV. STAT. § 663-8.9 (1993) (limiting NIED liability where "the distress or disturbance arises solely out of damage to property or material objects" to situations in which "the serious emotional distress or disturbance results in physical injury to or mental illness of the person who experiences the emotional distress or disturbance").

In recent cases, however, the Hawai'i Supreme Court has recognized more exceptions to a person or property injury requirement to accommodate NIED claims. *See, e.g.*, Guth v. Freeland, 96 Haw. 147, 148, 28 P.3d 982, 983 (2001) (holding that "HRS § 663-8.9[, which precludes recovery of emotional distress and damages in certain instances,] does not apply to an NIED claim arising from the negligent mishandling of a corpse"); John & Jane Roes, 1-100 v. FHP, Inc., 91 Haw. 470, 476-77, 985 P.2d 661, 667-68 (1999) (holding that "a plaintiff states a claim of NIED for which relief may be granted where he or she alleges, *inter alia*, actual exposure to HIV-positive blood, whether or not there is a predicate physical harm"); *see also* Doe Parents No. 1 v. State, Dep't of Educ., 100 Haw. 34, 70, 58 P.3d 545, 581 (2002) (stating that, although the plaintiffs alleged "purely psychic injuries" resulting from a teacher's molestation of children, the facts of that case "warrant[ed] the recognition of yet another

radical innovation; so radical, in fact, that it may be considered 'bad' law by some. Such is not the case, however. It stands as a much needed reform in an area of the law bogged down by judicial inertia and outmoded doctrinal distinctions."[29] Indeed, "[c]ourts throughout the United States have recognized the flaws in the physical injury rule and . . . Hawaii began the judicial trend by abolishing the physical injury requirement."[30] Thus, "[w]hen Hawaii established the precedent for an independent cause of action, other states began to eliminate the physical injury rule in emotional distress cases."[31] As one local commentator would state in answer to critics of the opinion,

> the court is to be congratulated for its bold advancement of the injured party's right to recovery. For really, how serious is the trauma complained of? Is not the trier of fact fully capable of sorting the meritorious from the feigned? Will not the injured party be required to prove the occurrence of the injury as well as its nature and severity?[32]

As elucidated, *Rodrigues* was revolutionary; its impact in the area of tort law extended far beyond the geographic limits of this state.

In *Almeida*, a prime question was "whether the exhibition of a child to a jury for the purpose of proving paternity is proper."[33] CJ assigned the case to Justice Levinson to write. What troubled CJ, however, was the proposition that the jury could ascertain paternity by simply viewing the infant, the underlying premise being that certain facial characteristics could be commonly attributed

---

exception to the general requirement that [a] plaintiff seeking redress solely for emotional distress must establish a predicate physical injury to a person"). *Guth, FHP,* and *Doe Parents No. 1* fit squarely within the framework of the *Rodrigues* serious mental distress rubric. *See Guth*, 96 Haw. at 159, 28 P.3d at 994 (Acoba, J., concurring and dissenting) ("Recognition of negligently inflicted psychic injury as an independent tort, like the life experiences that compel it, cannot be confined in a doctrinal straitjacket.") (internal citation omitted.).

[29] Brott, *supra* note 28, at 152 (footnote omitted).

[30] Kenneth W. Miller, *Toxic Torts and Emotional Distress: The Case for an Independent Cause of Action for Fear of Future Harm*, 40 ARIZ. L. REV. 681, 695 (1998).

[31] *Id.* at 696. *See, e.g.*, Molien v. Kaiser Found. Hosps., 616 P.2d 813, 820 (Cal. 1980) (agreeing with *Rodrigues* "that the unqualified requirement of physical injury is no longer justifiable"); *cf.* Antolini, *supra* note 27, at 173 ("Without doubt, Hawai'i has established itself as the national standardbearer [sic] of liberal NIED rulings.").

[32] James Koshiba, *Negligent Infliction of Mental Distress: Rodrigues v. State and Leong v. Takasaki*, 11 HAW. B.J. 29, 31 (1974). *See also* Andrew K. Lizotte, *"The Enormous Radio": Expanding Intentional Infliction of Emotional Distress Causes of Action Under the Theory of the Commodity Fetish*, 59 SYRACUSE L. REV. 501, 524 (2009) (stating that "the groundlessness of these concerns" about frivolous claims has been proven inasmuch as "more than ten years after *Rodrigues*, . . . 'there has been no plethora of similar cases,'" and "'the fears of unlimited liability have not proved true.'" (quoting Campbell v. Animal Quarantine Station, 63 Haw. 557, 565, 632 P.2d 1066, 1071 (1981))); Jayne De Young, *Toward a More Equitable Approach to Causation in Veterinary Malpractice Actions*, 16 HASTINGS WOMEN'S L.J. 201, 207 (2005).

[33] Almeida v. Correa, 51 Haw. 594, 597, 465 P.2d 564, 567 (1970).

to different ethnic groups. The vote was 4-1 in favor of affirming the jury view. CJ sent me to do some research at the University of Hawai'i, the product of which is contained in footnotes four through nine of the opinion. CJ issued a dissent based on that research, and the court's vote changed to 4-1 *against* allowing a view of the child without expert guidance. CJ and Justice Levinson[34] were designated as co-authors of the opinion. I believe it is the only dual-authored opinion in the Hawaii Reports.

On one level, *Almeida* imposed an evidentiary rule limiting display of the child to a jury in paternity cases. On another level, it exemplified CJ's sensitivity to the unique ethnic composition of the state and to intermarriage among different ethnic groups that made Hawai'i the true "melting pot" of America. CJ, of course, was a product of such an ethnic intermarriage. The opinion states:

> Generally races, as selected populations differing in the frequency of occurrence of particular inherited characteristics, possess measurable physical traits which overlap considerably between groups of people.
>
> . . . .
>
> The fact that Hawaii represents a unique population, where interracial unions are common, only underscores the need for a focused examination of "racial characteristics" by the fact finder under expert guidance. *See* A. Montagu, *Human Heredity* 57 (2d ed. 1963); Morton, Chung, Mi, *Genetics of Interracial Crosses in Hawaii* (Monographs in Human Genetics 1967). Most anthropologists agree that the Mongoloid, European and Negroid features are all "blended" in the Polynesian. *See* E. Hooton, *Up From the Ape* 616 (2d ed. 1946).[35]

Wigmore on Evidence said of the case: "A learned and fully documented opinion of recent date is that of Richardson, C.J., and Levinson, J., in *Almeida v. Correa*, 51 Hawaii 594, 465 P.2d 564 (1970)."[36] No other court in the country would bring that broad of a perspective to what would otherwise seem to be a well-settled rule of evidence. Presently, jury trials are not provided for in paternity proceedings under HRS § 584-14.[37] Nevertheless, *Almeida* stands for the proposition that considerations of a multi-ethnic society may require adaptation of legal rules, even rules that seem of the most elementary order.

As a practicing attorney following my clerkship, I had the opportunity to argue several appeals before the court. The importance of oral advocacy in

---

[34] Circuit Court Judge Michael Town (ret.) was Justice Levinson's law clerk who worked on the case.

[35] *Almeida*, 51 Haw. at 602 n.9, 465 P.2d at 570 n.9.

[36] 4 WIGMORE, EVIDENCE § 1154 (Chadbourn rev. ed. 1972).

[37] *See* Doe v. Roe, 5 Haw. App. 558, 563, 705 P.2d 535, 541 (1985) (stating that "HRS § 584-14 (Supp. 1984) does not afford [] the right to a jury trial, which [was available] under the prior statute, HRS § 579-2 (1968)").

making the judicial process visible was not lost on the court or on CJ. I believe nearly every case during the Richardson years had the benefit of a face-to-face exchange between the attorneys and the justices.

As a circuit court judge, I also sat as a substitute justice on several occasions, two of them with CJ.[38] Had the public been sitting in the supreme court conference room with the justices when CJ presided during the court's deliberations, it could not have been more impressed with the manner in which decisions were made. CJ would call upon each justice in order of seniority. A substitute justice, such as myself, would be last, but was accorded the same considerate treatment as the other justices. CJ would ensure that each justice had his say without interruption. Oftentimes attention turned to the larger consequences a decision bore on the future and to its impact on society. The discussion was orderly, respectful, and businesslike, focused on the legal issues at hand. The people of our state could not have been prouder of the professionalism of the court or more confident in the integrity of the judicial process. Looking back at the Richardson years, I did not know then what I know now: that there could not have been a better model to emulate for service in the judiciary. CJ set the standard by which to judge our appellate courts and the judicial process. The Richardson years exemplified as perfect a marriage of law and culture as there could be.

Finally, CJ's influence has expanded through his law clerks,[39] who have collectively served in all three branches of government, on the state and federal

---

[38] *See* First Ins. Co. v. Int'l Harvester Co., 66 Haw. 185, 659 P.2d 64 (1983) (affirming the circuit court's decision that the City and County of Honolulu was partially liable for damages in an auto accident because the accident stemmed, in part, from the "City's negligence in licensing the driver of the truck"); Chung v. Animal Clinic, Inc., 63 Haw. 642, 636 P.2d 721 (1981) (holding, *inter alia*, that "the unitary work-connection approach," which considers whether an injury is causally related to any incident or condition of employment, "is the correct one" for determining whether a workers' compensation claimant's injuries arose out of the course of employment).

[39] CJ's law clerks (as can be ascertained) and some of the positions they have held are as follows:

Nathan Aipa, former General Counsel and COO of Kamehameha Schools Bishop Estate; Irene Anzai, past President, Hawai'i Womens' Legal Foundation; Robyn Au, Assistant District Counsel, U.S. Army Corps of Engineers; Philip M. Brooks, former deputy state public defender for the State of California; Kirk Caldwell, former Managing Director of the City and County of Honolulu; Edward Case, member, U.S. House of Representatives, 2002-07; Catherine O.Y. Chang, former hearings officer, Administrative Drivers License Revocation Office; Steven Ching, partner of Char Sakamoto, Ishii, Lum & Ching; Kathleen K.O. Conahan (ret.), Conahan & Conahan, a law corporation; Marvin Fong, President and COO of Market City, Ltd.; Helen Gillmor, U.S. District Court Judge; John Gillmor, Deputy Attorney General; Matt Goodbody (deceased), staff attorney, Hawai'i Supreme Court; Glenn Grayson, attorney, Office for Civil Rights, U.S. Department of Education; Eden Hifo (ret.), Judge, Circuit Court of the First Circuit; Joseph Kinoshita,

level, and in private positions of responsibility. The scope of their contributions seems singularly remarkable in sharing a connection with one person. Perhaps CJ perceived a mutuality of values that united us all. Our ties to CJ are what we, his law clerks, share in common, and through him, a tie that will always bind us to one another and to an uncommon and significant period of judicial history in Hawai'i.

CJ, and his leadership on the court, reflected an abiding belief in the good that the rule of law can foster in Hawai'i. This belief was grounded in respect for the diversity of Hawai'i's peoples, a commitment to equal and just treatment for all, and faith in the rights guaranteed by the Hawai'i Constitution. CJ's courts established principles that remain true for us and for the future.

---

former State of Hawai'i deputy attorney general; Robert Klein, former Associate Justice, Hawai'i Supreme Court, 1992-2000; David Kuriyama, business investments, Japan; Laurence Lau, Deputy Director for Environmental Health of the State Department of Health; Ivan M. Lui-Kwan, Executive Vice President and COO of The Queen's Health Systems, parent of The Queen's Medical Center, Queen Emma Land Co., and Queen's Development Corporation; Linda Luke, Judge, Family Court, First Circuit; Melody MacKenzie, associate professor of law, William S. Richardson School of Law; Melvin M.M. Masuda, professor of business law and criminal justice, Hawai'i Pacific University; William K. Meheula, partner, Meheula and Devens LLP; Ron Menor, former member, State Senate; Brian Nakamura (deceased), former Chair, Hawai'i Labor Relations Board; Renton Nip, former Chair, State Land Use Commission; Susan Park; Eric Romanchak, Per Diem Judge, District Court of the Second Circuit; Bev (Wee) Sameshima, Assistant U.S. Attorney; Alex Seita, professor of law, Albany Law School (Albany, New York); Suzanne Terada, Director, Hawai'i State Bar Association; Alan Van Etten, past president, Hawai'i State Bar Association; Stuart E. Wolfe, former President and CEO of Graymont, Ltd.; Wayson Wong, former State Judge Advocate for the Hawai'i National Guard; Gary Yokoyama, general counsel for Hawaiian Dredging Construction Co.; Terry Yoshinaga, former member, State House of Representatives; William Yuen, former Chair, State Land Use Commission.

William S. Richardson: A Visionary with a Common Touch

Jon M. Van Dyke* and Maile Osika**

When resolving the controversies that came before his court, Chief Justice William S. Richardson applied his rich knowledge of Hawai'i's history and his experience in its multicultural ethnic mix to balance public values and private rights. During his tenure on our highest court from 1966 to 1982, he drew upon a range of legal traditions with a particular focus on the approaches Native Hawaiians have traditionally used to resolve land disputes. Prior to the arrival of Westerners in 1778,

> the dominant system of land tenure was an intricate and interdependent arrangement based on agricultural needs and hierarchical structure. Individuals lived in reciprocity with the 'Āina (land), which they believed would sustain them if properly respected and cared for. 'Āina was not a commodity and could not be owned or traded. Instead, it belonged to the Akua (gods and goddesses), and the Ali'i (the chiefs and chiefesses who were the human embodiment of the Akua) were responsible for assisting ka po'e Hawai'i (the people of Hawai'i) in the proper management of the 'Āina.[1]

Although much of the 'āina was moved into private hands during the Māhele of 1846-48,[2] public values and public rights of access remained, and Richardson approached the cases that came before his court from that historical perspective. While he served as chief justice, the Hawai'i Supreme Court ruled that the State owns—in trust for all the people of Hawai'i—the water in

---

* Professor of Law and Carlsmith Ball Faculty Scholar, William S. Richardson School of Law, University of Hawai'i at Mānoa; Yale B.A. 1964 *cum laude*; Harvard J.D. 1967 *cum laude*.

** J.D. Candidate 2012, William S. Richardson School of Law, University of Hawai'i at Mānoa.

[1] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 11 (2008) (footnotes omitted).

[2] *Id.* at 30-53. The Māhele (division) was the process whereby King Kamehameha III converted the system of communal land ownership to one of private ownership. During this process, about 1.6 million acres were distributed to the Ali'i, about 1.5 million acres were allocated to the government, and the King retained about 1 million acres (which became known as the Crown Lands). Although the maka'āinanana (commoners) were supposed to emerge from this process with one-third, or at least one-fourth of the lands, they actually received less than one percent. *See also* LILIKALĀ KAME'ELEIHIWA, NATIVE LANDS AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992); JON J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 (1958).

streams,[3] all public roads that existed prior to 1892,[4] the beaches up to the vegetation line,[5] and land newly created by lava flows.[6]

These decisions—handed down when Hawai'i was emerging as a self-governing society from six decades of plantation rule (preceded by the illegal overthrow of the Kingdom of Hawai'i[7])—reflect essential Hawaiian community values and protect those underlying values for future generations of Hawai'i's people. Richardson found shared values in the Native Hawaiian heritage and multicultural population mix in the islands and applied those values to protect a culture that risked losing its identity through the rigid application of Western legal principles. He guided his court by drawing upon his personal experiences, the deeply-rooted values of his ancestors, and a practical approach to problem-solving. These foundational cases have proved enduring and continue to provide fundamental Hawaiian legal principles applicable to the islands' land and natural resources.

This essay focuses first on the 1968 case of *In re Kelley*,[8] which is not as well known as some of the later Richardson Court decisions but which provides an instructive example of how Chief Justice Richardson approached controversies with both common sense and a vision of what Hawai'i was and what it could be. *Kelley* presented the court with a dispute between restrictive exclusive ownership and public access to limited coastal property. The case involved a strip of valuable oceanfront property in the Ka'alāwai area, near Diamond Head on O'ahu. This fifty-foot wide strip of land separated the Kelleys' property from the ocean. It was a remnant of the original road from Waikīkī to Kāhala, a passageway that had fallen into disuse, replaced by the modern Diamond Head Road.[9] This land segment was not contained in the Kelleys' property deed, yet the couple sought official title from the Land Court in 1959.[10] The Kelleys knew that their property would gain greater privacy and value if it extended all the way to the coastline. They characterized the strip of land as an easement over their property dating back to 1885 that had been

---

[3] McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973), *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam).

[4] *In re* Kelley, 50 Haw. 567, 445 P.2d 538 (1968).

[5] *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968).

[6] State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977).

[7] *See* Joint Resolution To Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (referring in its Operative Section 1 to "the illegal overthrow of the Kingdom of Hawaii on January 17, 1893").

[8] 50 Haw. 567, 445 P.2d 538.

[9] *Id.* at 572, 445 P.2d at 542.

[10] *Id.* at 568, 445 P.2d at 539.

abandoned and which therefore should be officially registered in their name.[11] The Land Court ruled in their favor, concluding that the Kelleys had "good title" to the fee underlying the road stemming from the previous conveyance of their property to James Smith in 1885.[12] The State of Hawai'i disagreed and appealed to the Hawai'i Supreme Court, arguing that the strip was a public road owned by the State.[13]

The opinion authored by Chief Justice Richardson on behalf of the Hawai'i Supreme Court opens with a careful and full description of the land in dispute. He began with the Māhele and then gradually discussed each event that affected the parcel's title. This prudent analysis reminds us that all such decisions involving the precious 'āina of Hawai'i should be made with full deliberation, because land sustains life and our small islands are becoming crowded. Public lands have become especially precious, and they should not be lost because of ignorance or lack of diligence.

Chief Justice Richardson explained that this disputed parcel was one small lot within the 'ili'āina of Kapahulu, which was once owned in its entirety by King William Charles Lunalilo.[14] After the death of Lunalilo in 1874, the trustees of the Lunalilo Estate were authorized by the Hawai'i Supreme Court to "sell and dispose" his property.[15] The trustees subdivided the property into manageable parcels. They hired surveyors and had maps drawn of the area to indicate the delineations.[16] Richardson depicted in detail the particularities of each plot as they were carved from the large landholdings of King Lunalilo.[17] He analyzed the ancient deeds, maps, and history of the area, and wove these details together to provide the context for this case, illustrating the level of care that each parcel of Hawaiian land justified.

Much of the 'āina in the Diamond Head area was sold by Lunalilo's trustees to the Kingdom of Hawai'i, but the Ka'alāwai subdivision was not.[18] The southwest portion of this subdivision contained nine properties near the coastline, including the parcel that became the Kelleys' property. Seven of the properties were depicted in the relevant map as bordering a strip of land that separated the properties from the ocean, but this strip was not labeled or specified.[19] In fact, this strip was the main road that led from Waikīkī to

---

[11] *Id.*

[12] *Id.* at 568, 445 P.2d at 540.

[13] *Id.*

[14] "The King, while a private citizen, had acquired the Iliaina of Kapahulu as his private lands during the Mahele of 1848." *Id.*

[15] *Id.* (citing *In re* Estate of Lunalilo, 4 Haw. 381, 382 (1881)). The court decisions that led to the break-up of the Lunalilo Estate are described in VAN DYKE, *supra* note 1, at 324-31.

[16] *Kelley,* 50 Haw. at 568, 445 P.2d at 540.

[17] *Id.* at 568-71, 445 P.2d at 539-42.

[18] *Id.* at 569, 445 P.2d at 540.

[19] *Id.*

Kāhala.[20] By 1885, the nine parcels had been conveyed to private individual purchasers, such as James Smith.[21] In the deeds from the Lunalilo Estate, the parcels were described as running up to the "road near the sea."[22] But in subsequent property conveyances, neither the strip nor the road were mentioned.[23] Chief Justice Richardson determined that the strip had not been conveyed to Smith in 1885 (and subsequently not to the Kelleys) because it was an access road for public use, the only road that led from Waikīkī to Kāhala at the time.[24] Construction of the modern road from Waikīkī to Kāhala did not begin until the early 1900s.[25] As Richardson explained, it would be illogical to have conveyed such a road into private ownership when it was the primary means of transportation between two points.[26]

When the Lunalilo Estate trustees sold the property to Smith in 1885, they did not merely reserve public rights to traverse over the property, but "deliberately excluded [the road] from the conveyance" altogether.[27] Richardson placed great emphasis on the goal of the trustees and what their actions meant to convey. He wrote that "[t]he intent of the trustees was clearly to abandon the existing road from Waikiki to Kahala to the public."[28] The trustees' purpose was clear because they included a clause in the deeds of conveyance that explained the conveyed property as "excepting and reserving however a public right of way fifty feet wide along the sea beach and across the South Eastern portion of the said premises where the present road runs[.]"[29] Richardson linked the deed's exclusion of the road with the important role the road served to support his conclusion that it was purposefully set aside for public use.[30] The registered maps, the maps prepared by land surveyors, and the 1885 deed itself all "indicate[ed] that the strip of undesignated land along [the Kelleys' property] was used as a right of way from the early 1880's, if not

---

[20] *Id.* at 572-73, 445 P.2d at 542-43.

[21] *Id.* at 570, 445 P.2d at 541.

[22] *Id.*

[23] *Id.* at 572, 445 P.2d at 542.

[24] *Id.* at 573, 445 P.2d at 543.

[25] *Id.* at 572, 445 P.2d at 542.

[26] "It strains the imagination not to conclude that the public right of way extended along the Government property and along the Kaalawai subdivision and served as a primary means of travel between Waikiki and Kahala from the early 1800's, if not earlier." *Id.* at 572-73, 445 P.2d at 542.

[27] *Id.* at 578, 445 P.2d at 546.

[28] *Id.* at 573, 445 P.2d at 543.

[29] *Id.* at 570, 445 P.2d at 541.

[30] "The evidence in the form of deeds and maps indicates an intent not to convey up to and including the highway. Thus, the original grantee, Smith, did not obtain fee title to the disputed parcel over which the road ran, and his successors in title cannot register the parcel." *Id.* at 578, 445 P.2d at 545.

earlier[,]" and provided conclusive evidence that the segment was not conveyed but was reserved as a public right of way.[31]

The Chief Justice then addressed the Kelleys' argument that even if they did not own the strip of property through deed, they had absorbed the adjacent strip of land after the road fell into disuse. Richardson first observed that under Western common law property doctrines, when a road or stream is described in a deed as a boundary, the conveyance does not include title to the road or stream.[32] A road had run along this strip, and thus the government had acquired fee title as a "trustee of the public's interests in the roadway[.]"[33] The question concerned who obtains title when the road is abandoned and is no longer used as a public way. Richardson answered by emphasizing that because the road was a public road and not a private highway, the land should remain in public hands. "[W]here maps and deeds clearly indicate that, as of 1885, a strip of land had been set aside for a public highway and that the highway was a primary route of travel for the public, such highway was at that time a public, not a private, highway."[34] This conclusion was reinforced by the enactment of the Hawai'i Highways Act of 1892,[35] which stated that every single road that had been "dedicated, surrendered[,] or abandoned" to the government was declared a public highway.[36] The Highways Act of 1892 thus vested fee simple ownership of all public highways that existed prior to the passage of the Act to the Hawaiian Government.[37] The Act did not require formal acceptance by the government, but the road must have been in public

---

[31] *Id.* at 572, 445 P.2d at 542 (emphasis omitted).

[32] *Id.* at 574, 445 P.2d at 543.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 579, 445 P.2d at 546.

[36]

> A Highways Act was passed for the first time in 1892. It declared as 'public highways' all roads existing at the time of the passage of the Act, as well as those to be built thereafter, regardless of whether such roads had been built by the Government or by private parties which had dedicated, surrendered or abandoned the roads to the Government. L. 1892, c. 47, s 2 (now R.L.H.1955, s 142-1).

Id.

[37]

> A careful reading of the Act shows, however, that the Act prescribed a definite method of acceptance only for highways built by private parties and abandoned to the public after the passage of the Act. The statute does not require a formal act of acceptance for highways already existing at the time of the passage of the Act, and if originally private in nature, already abandoned to the public for a period of five years at the time of passage. Rather, such highways were declared "public highways" upon the enactment of the statute itself.

Id. (internal citations omitted).

usage for a period of five years prior to the Act.[38] The 1892 Highways Act confirmed that the government held the underlying fee and that the government continued to hold the fee title of the disputed segment even though the public later discontinued use of it as a road.[39] The Lunalilo Estate trustees intentionally abandoned the Ka'alāwai strip of land to public use, which continued through 1892 when the Highways Act was passed.[40] This made the road a public highway owned by the government, and the Kelleys could not gain ownership of the land even though they had tried to exercise control over it.

Ultimately, Richardson explained, the strip of land that lay between the Kelleys' property and the ocean continued to be held in public trust by the State of Hawai'i.[41] Government ownership did not depend on whether the public use of the parcel as a road had continued or not.[42] Richardson stated that "the Government can be relied upon to act as trustee of the public's interests in the roadway, whereas private purchasers cannot."[43] The only way the government could abandon the public's interest in the road is by formal governmental action.[44] The private interests of the Kelleys proved to be secondary to those of the community and were inconsistent with traditional Hawaiian values and legal principles.

Passage of the 1892 Highways Act came right before the overthrow of the Hawaiian Kingdom, and Chief Justice Richardson may have thought it was particularly important to draw upon the purpose of this law and the spirit that perpetuated the community values of public ownership in a world dominated by private property.

In the same year that *Kelley* was decided—1968—the Richardson Court decided *In re Ashford*,[45] which again drew upon the importance of shared public ownership, as well as the spirit of Native Hawaiian values. The Ashfords owned shoreline property on Moloka'i, including portions of two royal patents, historical land grants.[46] These royal patents were issued in 1866 by King Kamehameha V, eighteen years after the Māhele.[47] The Ashfords

---

[38] The Kelleys had argued "that the road that ran over the disputed parcel never became a 'public highway' because it was never accepted by the Minister of Interior as required by Section 3 of the Act." *Id.*

[39] *Id.* at 580, 445 P.2d at 547.

[40] *Id.* at 572, 445 P.2d at 542.

[41] *Id.* at 580, 445 P.2d at 547.

[42] "There is no adverse possession against the sovereign, in this case the Government, unless expressly provided for by statute." *Id.*

[43] *Id.* at 574, 445 P.2d at 543.

[44] *Id.* at 580, 445 P.2d at 547.

[45] 50 Haw. 314, 440 P.2d 76 (1968).

[46] *Id.* at 314, 440 P.2d at 76.

[47] *Id.* at 315, 440 P.2d at 77.

wanted the Land Court to verify that the makai (toward-the-ocean) border of their property was at the "mean high water mark."[48] The royal patents described the boundary as "running 'ma ke kai' (along the sea)[,]" and a dispute ensued to interpret the point at which the public coastline ended and the Ashford property began.[49] The Ashfords used scientific data compiled by the U.S. Coast and Geodetic Survey to show that the "mean high water mark" theory was the contemporary mode of interpreting such boundaries.[50] The State of Hawai'i opposed this reasoning and offered kama'āina (long-term resident) witnesses who testified that the boundary was historically measured at the "high water mark," where the beach visually appeared to end and where the vegetation and debris accumulated.[51] The trial court rejected the kama'āina testimony and ruled in favor of the Ashfords, that the "mean high water mark" determined the coastal property line.[52]

Chief Justice Richardson's opinion, however, reversed the lower court and affirmed the legitimate value of kama'āina testimony as a source of Hawai'i common law. These local perspectives were found to be multifaceted and rich with opinion, experience, and culture. Richardson found the kama'āina testimony to be more valuable than modern methods of measurement that had not even been invented at the time King Kamehameha V conveyed the lands at issue.[53] Richardson placed the perspective of community elders above a rigid modern rule of property delineation because the former integrated the unique culture and values of Hawai'i, while the latter was based on a theory totally unrelated to the original conveyance.[54] This ruling did not mean that community opinion would always govern property boundary decisions where a cultural context is indicated, but Richardson explained that the kama'āina opinions constituted valuable "reputation evidence," which was supplemented in this case with evidence that the Hawai'i survey office used the same analysis.[55] "It is not solely a question for a modern-day surveyor to determine boundaries in a manner completely oblivious to the knowledge and intention of

---

[48] *Id.* at 314, 440 P.2d at 77.

[49] *Id.* at 314-15, 440 P.2d at 77.

[50] "The appellees contend that the phrase describes the boundaries at mean high water which is represented by the contour traced by the intersection of the shore and the horizontal plane of mean high water based on publications of the U.S. Coast and Geodetic Survey." *Id.*

[51] "The State contends in this case that 'ma ke kai' is the high water mark that is along the edge of vegetation or the line of debris left by the wash of waves during ordinary high tide." *Id.* at 315, 440 P.2d at 77.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 315-16, 440 P.2d at 77.

[55] *Id.* at 316, 440 P.2d at 77.

the king and old-time kamaainas who knew the history and names of various lands and the monuments thereof."[56]

Richardson explained that the testimony of elders has been important since the time of the Māhele,[57] and that these community leaders are qualified to explain the purpose and practicalities behind the determination of borders along a shoreline. It was common, Richardson reminded the parties, for Hawaiians to use physical landmarks to indicate a boundary and for government surveyors to adopt such a delineation to depict a property line.[58] The approach advocated by the Ashfords—to determine the mathematical mean between the high tide and the low tide and draw an arbitrary line where no physical indication exists—was simply not the approach utilized by the Native Hawaiian community, who relied upon a visual indication to determine boundaries.

Richardson thus reminded us that the traditions and customs of Hawai'i are binding over contradictory or deviating English common law concepts.[59] English common law was adopted in Hawai'i to supplement legal doctrines when Hawaiian concepts did not apply or where no Hawai'i precedent was available,[60] but the English common law did not uproot traditional local interpretations where those interpretations could be harmonized with modern concepts. Richardson explained that "[c]ases cited from other jurisdictions cannot be used in determining the intention of the King in 1866."[61] When a Hawaiian concept needs interpretation, Richardson urged us to look within the community for answers before introducing a foreign concept that was never contemplated at the time of the conveyance. For example, when looking to the intent of a conveyor, the court must not forget that "[i]t was the custom of the ancient Hawaiians to name each division of land and the boundaries of each division were known to the people living thereon or in the neighborhood."[62] Richardson reminded us that custom is an integral part of Hawai'i law, and that custom must be reconciled with modern legal theories to preserve the identity and the integrity of Hawai'i's unique community and its jurisprudence.

Chief Justice Richardson later described the *Ashford* decision as "a judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right."[63] He found a

---

[56] *Id.*

[57] "With the Great Mahele in 1848, these kamaainas, who knew and lived in the area, went on the land with the government surveyors and pointed out the boundaries to the various divisions of land." *Id.* at 316, 440 P.2d at 78.

[58] "In ancient Hawaii, the line of growth of a certain kind of tree, herb or grass sometimes made up a boundary." *Id.* at 316-17, 440 P.2d at 78.

[59] *Id.* at 316 n.3, 440 P.2d at 78 n.3.

[60] *Id.*

[61] *Id.* at 317, 440 P.2d at 78.

[62] *Id.* at 316, 440 P.2d at 77.

[63] Cnty. of Hawaii v. Sotomura, 55 Haw. 176, 181-82, 517 P.2d 57, 61 (1973).

way of interpreting historical materials that were shared among members of the community, and he perpetuated them through the law. Indeed, Richardson "has identified *In re Ashford* (1968) as the decision of which he is most proud and as the one that he believes has had the most significant impact."[64]

Five years later, the facts of *County of Hawaii v. Sotomura*[65] gave Richardson the opportunity to clarify some important points in coastal boundary disputes. Joseph Sotomura owned land on both the mauka (toward-the-mountain) and makai (toward-the-ocean) side of the Puna Coastal Road on the Big Island.[66] The County of Hawai'i wanted to acquire the makai property through eminent domain to use it as a park abutting Kalapana Black Sand Beach.[67] In 1962, Sotomura registered the property with the Land Court, and the makai boundary of his property was determined to be at the "limu line."[68] Sotomura claimed that, by law, the registration bound the land and that this determination was not open to re-evaluation.[69]

The Hawai'i Supreme Court rejected this claim. First, Chief Justice Richardson clarified that the *Ashford* definition of a makai boundary as "along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris" lies above the "limu line," where the seaweed accumulates on the shore.[70] Richardson re-asserted this Hawai'i common law principle in the interest of preserving maximum public access and expanding public trust areas. "Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[71] He explained that the line of vegetation growth is a "more permanent monument" than the debris line to indicate the high water mark because the debris line fluctuates with seasonal tidal changes.[72]

---

[64] Melody Kapilialoha MacKenzie & Aviam Soifer, *Introduction* to KA LAMA KŪ O KA NO'EAU: THE STANDING TORCH OF WISDOM: SELECTED OPINIONS OF WILLIAM S. RICHARDSON, CHIEF JUSTICE, HAWAI'I SUPREME COURT, 1966-1982, at viii (2009).

[65] 55 Haw. 176, 517 P.2d 57.

[66] *Id.* at 177, 517 P.2d at 59.

[67] "This case arises as an appeal from eminent domain proceedings initiated by . . . County of Hawaii . . . in the acquisition of a park site at the Kalapana Black Sand Beach, a unique tourist attraction and surfing spot on the Island of Hawaii." *Id.* at 177, 517 P.2d at 59.

[68] *Id.* at 179, 517 P.2d at 60.

[69] "They argue that because the land court proceedings are res judicata and conclusive against all persons as to the boundary determination, the certificate of registration shall be conclusive evidence of the location of the seaward boundary." *Id.* at 178, 517 P.2d at 60.

[70] *Id.* at 179, 517 P.2d at 60.

[71] *Id.* at 182, 517 P.2d at 61-62.

[72] "Thus while the debris line may change from day to day or from season to season, the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves." *Id.* at 182, 517 P.2d at 62.

Second, Richardson determined that registration of a makai boundary with the Land Court did not prevent the boundary from changing if erosion occurs.[73] Although the state law governing registered property seeks to preserve stability and consistency in land boundaries, it excludes the concept of erosion entirely, and Richardson filled the legal void with an assertion of Hawaiian common law:[74] "[T]he precise location of the high water mark on the ground is subject to change and may always be altered by erosion."[75]

Richardson looked to the common law to determine whether the land lost by Sotomura through erosion passed to the State because no kama'āina testimony or Hawaiian customary law addressed this topic.[76] Applying the common law concepts of riparian ownership and the public trust doctrine, he concluded that the State owned the land below the makai boundary and that it was open to public use.[77]

Richardson firmly rejected Sotomura's argument that the portion of the land taken by the State should have been valued in conjunction with the mauka property across the street to determine its "highest and best use."[78] Based on the zoning of the mauka property, Sotomura suggested the possibility that a hotel might be built there, and that, in conjunction, the makai property, which was zoned as conservation space, might be used for the swimming pool.[79] Richardson acknowledged the possibility of conjunctive use, but rejected the hotel/swimming-pool possibility as too hypothetical and not "reasonably probable" at the time.[80] He reminded the parties that valuation of the property for park purposes was proper and indicated that the State should be able to reasonably acquire these types of properties for parks and recreation.[81] Richardson noted that the "highest and best use" of this open space between the Puna Coastal Road and the Kalapana Black Sand Beach was as a park, regardless of the monetary valuation of such holding.[82] He implied that "best use" should also consider the public and the possible public use of a parcel,

---

[73] "We hold that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion." *Id.* at 180, 517 P.2d at 61.

[74] "We cannot assume that the silence of the statute or the rules is an expression of intent to foreclose the state or county from challenging the title to newly-eroded tidelands." *Id.*

[75] *Id.*

[76] *Id.* at 183, 517 P.2d at 62.

[77] As an eminent domain action, Sotomura sought compensation for the seaward portion of the land lost to erosion. Richardson found that Sotomura did not own the land below the newly established high water mark, and therefore, deserved no compensation. *Id.* at 184, 517 P.2d at 63.

[78] *Id.* at 184-85, 517 P.2d at 63.

[79] *Id.* at 185, 517 P.2d at 63.

[80] *Id.* at 186, 517 P.2d at 64.

[81] *Id.* at 186-87, 517 P.2d at 64.

[82] *Id.* at 184-85, 517 P.2d at 63-64.

which may not always result in the most financially lucrative option for all involved.[83]

Also in 1973, the Hawai'i Supreme Court decided *McBryde Sugar Co. v. Robinson*,[84] a landmark decision concerning water rights. Although not authored by Richardson himself,[85] the *McBryde* opinion highlights his prominent sense of shared community and his dedication to the public trust doctrine. The court rejected the private litigants' claims that they had ownership rights and control over the flow of the Hanapēpē River on Kaua'i.[86] Diversion of large amounts of water from this stream by a private landholder was not proper because "the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants."[87] The common law of "reasonable use" of water, derived from the common law riparian rights doctrine, echoed a value similar to the Native Hawaiians and their use of natural resources.[88] Also, with respect to common law "appurtenant rights," a landowner may not use more water than is reasonably needed for the specific parcel that lies along the waterway.[89] Private landowners may not divert water to storage units for hydration to other plots that do not lie along the river.[90]

The Hawai'i Supreme Court found that the English common law of riparian rights aligned more closely to the interests of Hawai'i's people than did the precedent developed during the territorial period.[91] The court attributed this particular adoption of the common law to the missionaries who brought the English common law from Massachusetts and "had tremendous influence among the leaders of the Hawaiian Kingdom."[92] The common law melded well with Hawaiian principles about the proper use of water resources to create a "right to use water flowing [within the river adjoining a private parcel] without prejudicing the riparian rights of others and the right to the natural flow of the stream without substantial diminution and in the shape and size given it by

---

[83] *Id.* at 185, 517 P.2d at 63-64.

[84] 54 Haw. 174, 504 P.2d 1330 (1973), *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam).

[85] The opinion was written by Justice Kazuhisa Abe.

[86] *See McBryde Sugar Co.*, 54 Haw. 174, 504 P.2d 1330.

[87] *Id.* at 186, 504 P.2d at 1338.

[88] *Id.* at 182, 504 P.2d at 1336.

[89] *Id.* at 190, 504 P.2d at 1340-41.

[90] "[T]he right to the use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant . . . ." *Id.* at 191, 504 P.2d at 1341.

[91] "[A] proprietor of land adjoining natural watercourses has riparian water rights." *Id.* at 197-98, 504 P.2d at 1344.

[92] *Id.* at 193, 504 P.2d at 1342.

nature."[93] This right did not translate into a specific quantity of a "normal daily surplus"; it merely meant that adjacent owners may use the water as long as they do not create "substantial diminution" in the flow of the stream.[94] The riparian owners had the right to use the water, but they actually had no property right to the water.[95] Water was established as a shared resource to be governed for the common good.[96]

The court provided further guidance regarding the status of freshwater resources in Hawai'i in its 1982 opinion in *Robinson v. Ariyoshi*,[97] authored by Richardson for a unanimous court, to answer questions certified by the U.S. Court of Appeals for the Ninth Circuit. In this opinion, the Chief Justice explained:

> It is generally recognized that a simple private ownership model of property is conceptually incompatible with the actualities of natural watercourses. Rather, the variable and transient nature of the resource, as well as the necessity of preserving its purity and flow for others who are entitled to its use and enjoyment have led to water rights being uniformly regarded as usufructory and correlative in nature.[98]

He continued that "the public interest in the waters of the kingdom was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses."[99] This opinion observed that the 1973 *McBryde* decision "made clear that underlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty."[100]

---

[93] *Id.* at 198, 504 P.2d at 1344.

[94] *Id.* at 199, 504 P.2d at 1345.

[95] "[O]wners of land, having either or both riparian [rights] or appurtenant water rights, have the right to the use of the water, but no property in the water itself." *Id.* at 200, 504 P.2d at 1345.

[96] The *McBryde* decision is discussed in detail in Jon Van Dyke, Williamson B.C. Chang, Nathan Aipa, Kathy Higham, Douglas Marsden, Linda Sur, Manabu Tagamori, and Ralph Yukumoto, *Water Rights in Hawaii*, *in* LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141-333 (1979).

[97] 65 Haw. 641, 658 P.2d 287 (1982).

[98] *Id.* at 667, 658 P.2d at 305-06.

[99] *Id.* at 674, 658 P.2d at 310. This concept was repeated more recently in *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 222, 140 P.3d 985, 1002 (2006) ("'[T]he king's reservation . . . necessarily limited the creation of certain private interests in waters.'" (quoting *Robinson*, 65 Haw. at 674 n.31, 658 P.2d at 310 n.31)).

[100] *Robinson*, 65 Haw. at 677, 658 P.2d at 312. *See also* Reppun v. Bd. of Water Supply, 65 Haw. 531, 539, 656 P.2d 57, 63 (1982). The public trust principles underlying the decisions in *McBryde*, *Robinson*, and *Reppun* have been developed and expanded by the Hawai'i Legislature in the State Water Code, Hawai'i Revised Statutes chapter 174C, and by the Hawai'i Supreme

In 1977, in *State ex rel. Kobayashi v. Zimring*, the Hawai'i Supreme Court was presented with the question of who owned "lava extensions" to the coastline on the Big Island.[101] *Zimring* involved owners of shoreline property who sought to acquire 7.9 acres of property created by a 1955 lava flow.[102] The new acreage was the result of the lava overflowing into the ocean and extending the shoreline. Chief Justice Richardson found that "lava extensions vest when created in the people of Hawaii, [and are] held in public trust by the government for the benefit, use and enjoyment of all the people."[103] Richardson also explained that the government had a duty to devote this new land to actual public uses, such as recreation.[104]

In search of a Hawaiian cultural practice related to lava extensions, Richardson began with an account of the Māhele process and tracked the intricate details of the transition to private land ownership in Hawai'i,[105] but also emphasized the establishment of public domain government lands.[106] "This encapsulation of the origin and development of the private title in Hawaii makes clear the validity of the basic proposition in Hawaiian property law that land in its original state is public land and if not awarded or granted, such land remains in the public domain."[107] Richardson explained that absent any title of private ownership to a parcel of land, a person can also establish ownership

---

Court in cases such as *In re Water Use Permit Applications* (*Waiāhole I*), 94 Haw. 97, 9 P.3d 409 (2000); *In re Water Use Permit Applications* (*Waiāhole II*), 105 Haw. 1, 93 P.3d 643 (2004); *In re Wai'ola O Moloka'i, Inc.*, 103 Haw. 401, 83 P.3d 664 (2004); and *In re Kukui (Moloka'i), Inc.*, 116 Haw. 481, 174 P.3d 320 (2007).

[101] 58 Haw. 106, 566 P.2d 725 (1977).

[102] *Id.* at 107, 566 P.2d at 727.

[103] *Id.* at 121, 566 P.2d at 735.

[104] "Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation." *Id.* (internal citations omitted).

[105] "Responding to pressure exerted by foreign residents who sought fee title to land, and goaded by the recognition that the traditional system could not long endure, King Kamehameha III undertook a reformation of the traditional system of land tenure by instituting a regime of private title in the 1840's." *Id.* at 111, 566 P.2d at 729.

[106]

> The public domain, which previous to the Mahele had been all-inclusive, was diminished by withdrawals of the Crown Lands and the lands successfully claimed by chiefs, konohiki and tenants. It included, inter alia, the lands surrendered to the Government by the King, the lands ceded by the chiefs in lieu of commutation, the lands purchased by the government, and all lands forfeited by the neglect of claimants to present their claims to the Land Commission within the period fixed by law. In 1893, following the overthrow of the monarchy, the Republic declared that Crown Lands were Government property and part of the public domain.

Id. at 113, 566 P.2d at 730-31 (internal citations omitted).

[107] *Id.* at 114, 566 P.2d at 731.

through "common law or as established by pre-1892 Hawaiian usage."[108] In respect to lava extensions, however, evidence did not establish what customary Hawaiian principles governed ownership of these new lands.[109] Richardson drew indirect parallels between the general ancient Hawaiian use of land and the likely reaction Hawaiians had toward lava extensions that abutted land.[110] He identified the "economic necessity" Hawaiians had for reaching the ocean within their ahupua'a, one that continued even if the shoreline was extended by a lava flow,[111] and noted that the modern system of private property lacked such an "economic necessity."[112]

Because the common law provided no specific principle governing ownership of lands created by lava extensions,[113] Chief Justice Richardson examined the common law doctrines of accretion and avulsion, which provided indirect legal guidance.[114] In most other states, a riparian owner, an owner of property abutting water, could lose access to the water through accumulation of soil or sand (accretion) or a dramatic deposit that enlarged the shoreline as a result of a storm or a flood (avulsion).[115] Richardson likened this land addition on a water boundary to the growth of an island by lava flow.[116]

Ultimately, Chief Justice Richardson resolved this dispute by drawing upon principles of fairness and equity.[117] He was troubled by the "windfall" a private property owner would receive if a lava flow, say, quadrupled the person's seafront acreage.[118] He seemed uncomfortable with the luck a lava flow could

---

[108] "[T]he State's position that all land not awarded or granted remains public land [is] basically correct. We would only add that transfer to private ownership can also be shown through the operation of common law or as established by pre-1892 Hawaiian usage." *Id.* at 115, 566 P.2d at 731.

[109] *Id.* at 116, 566 P.2d at 732.

[110] *Id.* at 116-17, 566 P.2d at 732-33.

[111] "Under the traditional and more communal economic system in pre[-]Mahele Hawaii, the ahupua'a were designed to be self-sufficient economic units. Thus, had a practice existed which allowed the landowners the use of lava extensions, such practice would have made good economic sense since denial of access to the ocean and fishing grounds would have rendered the ahupua['a as] something less than self-sufficient." *Id.* at 116-17, 566 P.2d at 732.

[112] "[T]he interests a landholder may have enjoyed under the traditional system, within which there was no private title and all land was held in trust for the people by the King, are of little relevance in determining private rights to title under a private property regime." *Id.* at 117, 566 P.2d at 733.

[113] *Id.* at 119, 566 P.2d at 734.

[114] *Id.*

[115] *Id.* at 119-20, 566 P.2d at 734.

[116] *Id.* at 119, 566 P.2d at 734.

[117] *Id.* at 120, 566 P.2d at 734.

[118] "If a one-third acre parcel fronting the ocean is flowed over by lava which adds one or two seaward acres to the parcel, is it equitable that its owner acquire property which is three or six times the size of the preexisting parcel?" *Id.*

provide to an oceanfront owner, contrasted with the harm an inland farmer could suffer from a flow that passed over his land.[119] Many situations deposit luck on certain people and simultaneously ruin others, but Richardson did not want this particular inequity to be reinforced by the court.[120] In a bow to equity and a salute to public policy, Richardson placed the newborn Hawaiian land in the hands of the public, "in whose behalf the government acts as trustee."[121] He identified the reality that there was a "concentration of private ownership in relatively few citizens" in Hawai'i, and made it clear that he had no desire to serve their interests to the detriment of the general public.[122] Richardson also explained that everyone in the community, even the Zimrings, gains access to the new coastal land and increased access to the ocean.[123]

As a case like *Zimring* indicates, tension can often be found between the interests of private property owners and the "interest of the public at large, the original and ultimate owner of all Hawaiian land."[124] Through a culmination of established caselaw, Hawaiian cultural practices, common law, and settled property doctrine, Richardson navigated through controversial issues with a consistent emphasis on the public's interest. The Chief Justice created this legal framework during a time of political and cultural turmoil among the people of Hawai'i, and he had a feel for the way our community could grow and thrive.

In these cases, Chief Justice Richardson sought to resolve disputes by drawing upon principles that best reflect Hawaiian thoughts and values. He wrote opinions with a passionate commitment to Hawai'i's history, context, and culture, and with an understanding of the practical effects of his decisions. By applying the unique traditions of Hawai'i and by reaffirming public values in the decisions described above, William S. Richardson demonstrated that he was a visionary with a common touch.

---

[119] *Id.* at 120, 566 P.2d at 735.

[120] *Id.* at 120-21, 566 P.2d at 734-35.

[121] *Id.* at 121, 566 P.2d at 735.

[122] *Id.*

[123] "While the Zimrings cannot be granted the private beachfront title which they seek, they, as members of the public, would share in the public access to the lava extension and to the ocean . . . ." *Id.*

[124] *Id.* at 120, 566 P.2d at 734.

The Life of the Law is Perpetuated in Righteousness: The Jurisprudence of William S. Richardson

Williamson B.C. Chang*

I. INTRODUCTION

In the end, William S. Richardson was hailed as a "legal giant."[1] The jurisprudence of the Chief Justice, including the body of property cases[2] he authored for the Hawai'i Supreme Court, was equally acclaimed.[3]

---

* Professor of Law, William S. Richardson School of Law, University of Hawai'i at Mānoa. This article is dedicated to Brian Nakamura and Larry Storch. The author would also like to thank Laura Chen Allen for editing assistance.

[1] *See* Mary Vorsino & Ken Kobayashi, *A Legal Giant*, HONOLULU STAR-ADVERTISER, June 22, 2010, *available at* http://www.staradvertiser.com/news/hawaiinews/20100622_a_legal_giant.html.

[2] This body of cases includes *In re Robinson*, 49 Haw. 429, 421 P.2d 570 (1966) (interpreting Land Commission Awards and Royal Patents); *In re Property Situate at Moiliili*, 49 Haw. 537, 425 P.2d 83 (1967) (asserting an interpretation of the School Lands Act of 1850 by which lands used as schools were exempt from passing into private ownership under the Great Māhele); *Schimmelfenning v. Grove Farm Co.*, 50 Haw. 166, 434 P.2d 314 (1967) (affirming a traditional and customary duty to keep auwai (irrigation ditches) clean; plaintiff landowner could not receive any damages from defendant because plaintiff's failure to receive water resulted from his own failure to maintain the auwai); *Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968) (recognizing traditional Hawaiian customary access rights and establishing traditional Hawaiian usage as the context within which Western property rights must be interpreted); *In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968) (holding that location of boundary described as "ma ke kai" was along upper reaches of the wash of the waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves; first of three landmark decisions that changed the shoreline demarcation between public and private boundaries on beaches); *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (Abe, J.), *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam) (holding that water cannot be privately owned and that riparian and appurtenant users have the right to use, but not own, such water; although written by Justice Abe, *McBryde* is identified as part of Richardson's jurisprudence because he personally defended the opinion from constitutional attack in federal court and because he reaffirmed its holding in his own opinion in *Robinson v. Ariyoshi*); *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973) (holding that seaward boundary of landowner's lot should have been located along the vegetation line, not the debris line; second of the three shoreline cases); *In re Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977) (applying *Ashford* to property registered with the Land Court and holding that any purported registration of land below the upper reaches of the wash of the waves was ineffective; third of the three shoreline cases); *State ex rel. Kobayashi v. Zimring*, 58 Haw. 106, 556 P.2d 725 (1977) (holding that land newly formed by a lava flow belonged to the State, not to the abutting

During his seventeen years as chief justice he became known for decisions in property law that expanded the beaches[4] and preserved state waters[5] and newly-added volcanic lands[6] for the people of Hawai'i. Today, those and other decisions have become the foundation of natural resources law in the State of Hawai'i.[7]

---

landowner); *United Congregational & Evangelical Churches v. Heirs of Kamamalu*, 59 Haw. 334, 582 P.2d 208 (1978) (reaffirming the interpretation of the 1850 School Lands Act in the *Moiliili* case and holding that, despite the State's claim to title in the subject property, the United Churches possessed an easement to the property as long as they continued to use the property for religious and educational purposes); *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982) (establishing standing of beneficiaries to sue under the Hawaiian Homes Commission Act of 1920 and recognizing that the State, through the Department of Hawaiian Home Lands, has a fiduciary relationship to beneficiaries); *County of Kauai v. Pacific Standard Life Insurance Co.*, 65 Haw. 318, 653 P.2d 766 (1982) (holding that developers may not rely on approvals or permits issued after certification of a referendum to repeal a zoning ordinance affecting the development site); *Akau v. Olohana Corp.*, 65 Haw. 383, 653 P.2d 1130 (1982) (establishing trail and access rights across private property and affirming the validity of Hawai'i Revised Statutes sections 1-1 and 7-1); *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 571 (1982) (reallocating rights to taro farmers and invalidating purchases and appurtenant water rights from the lands); *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982) (imposing a public trust over state waters and establishing a legal basis for the legislatively-created state water code); and *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982) (reaffirming gathering and access rights within a tenant's own ahupua'a).

[3] *See* DAN BOYLAN & T. MICHAEL HOLMES, JOHN A. BURNS: THE MAN AND HIS TIMES 304 (2000) (quoting Bambi Weil, a reporter who eventually became a state judge, as saying that the Hawai'i Supreme Court under Richardson "was an activist court in the best tradition of the United States Supreme Court under Chief Justice Earl Warren"); Michael Tsai, *Former Chief Justice William S. Richardson Dies*, HONOLULU STAR-ADVERTISER, June 21, 2010, *available at* http://www.staradvertiser.com/news/Former_Chief_Justice_William_S_Richardson_dies.html ("But it was as head of the state's highest court that Richardson's impact was greatest. With Richardson at the helm from 1966 to 1982, the Richardson court handed down a series of judgments that assured public access to beaches, upheld traditional Hawaiian laws on access to kuleana lands, and affirmed public ownership of water and other natural resources. The decisions were consistent with Richardson's controversial stand that western exclusivity concepts were not always consistent or applicable in Hawaii."); *see also* A. A. Smyser, *Richardson Court Bent Rules in Public's Favor*, HONOLULU STAR-BULLETIN, Oct. 17, 1989, at A14 (comparing favorably the jurisprudence of Chief Justice Richardson with that of Chief Justice Warren).

[4] *In re* Sanborn, 57 Haw. 585, 562 P.2d 771 (1977); Cnty. of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973); *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968).

[5] Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982); Reppun v. Bd. of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982).

[6] State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 556 P.2d 725 (1977).

[7] *See* Diamond v. Bd. of Land & Natural Res., 112 Haw. 161, 145 P.3d 704 (2006); HAW. REV. STAT. § 205A-1 (2001) (defining shoreline as consistent with the holdings of *Ashford, Sotomura,* and *Sanborn*); *In re* Water Use Permit Applications (*Waiāhole I*), 94

It was not always this way, and his jurisprudence[8] was not always universally acclaimed. Thirty years ago, when first rendered, those decisions were bitterly and vehemently contested in certain quarters.[9] To opponents, these decisions were radical departures from existing state law.[10] Critics called them pure policy-oriented decisions,[11] implying that Chief Justice Richardson avoided applying settled law[12] simply to reach results that were to his personal liking.

Today, it is different. The jurisprudence of Chief Justice Richardson is more than merely accepted as settled simply because it is final; it is hailed as defining a new, historically oriented approach to the law of property. For example, the three decisions that Chief Justice Richardson authored as to shoreline boundaries[13] have become settled law. His opinion in *Robinson v. Ariyoshi* has established the legal context by which all water rights are

---

Haw. 97, 9 P.3d 409 (2000) (affirming the imposition of a public trust over the waters of the State as asserted in *Robinson v. Ariyoshi*); *see also* Simeon L. Vance & Richard J. Wallsgrove, *More than a Line in the Sand: Defining the Shoreline in Hawai'i After* Diamond v. State, 29 U. HAW. L. REV. 521 (2007); Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n, 79 Haw. 425, 903 P.2d 1246 (1995), *cert. denied sub nom.* Nansay Haw. Inc. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996) (adopting *Palama v. Sheehan* and *Kalipi v. Hawaiian Trust Co.*).

[8] It is important to clarify what is meant by the jurisprudence of Chief Justice Richardson. Every majority opinion officially represents the views of a number of judges or justices. We cannot know, therefore, the specific role of the chief justice in these property decisions. It is with this caveat in mind that one speaks about the "jurisprudence" of Chief Justice Richardson or the "Richardson Court." Nonetheless, such a reference is fair when one examines and counts the common elements of those decisions—a deep understanding of the true history of Hawai'i, a basic sense of fairness, and an awareness of the uncommon political forces that brought Chief Justice Richardson to the Hawai'i Supreme Court in 1966. One assumes that while the results are those in which a majority must concur, much of the logic, the reasoning, and passion of these decisions arises from the sense and sensibilities of Chief Justice Richardson.

[9] *See* Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977), *aff'd*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986), *remanded to* 796 F.2d 339 (9th Cir. 1986), *remanded to* 676 F. Supp. 1002 (D. Haw. 1987), *rev'd*, 887 F.2d 215 (9th Cir. 1989); Robinson v. Ariyoshi, 703 F. Supp. 1412 (D. Haw. 1989) (motion for costs and fees), *rev'd and vacated*, 933 F.2d 781 (9th Cir. 1991); *see also* J. Russell Cades, *Judicial Legislation in the Supreme Court of Hawai'i: A Brief Introduction to the "Knowne Uncertaintie" of the Law*, 7 HAW. B.J. 58 (1970).

[10] *See* McBryde Sugar Co. v. Robinson, 55 Haw. 260, 262, 517 P.2d 26, 27 (1973) (Levinson, J., dissenting).

[11] *See* cases cited *supra* note 9.

[12] *McBryde*, 55 Haw. at 303, 517 P.2d at 50 (Levinson, J., dissenting); *see also* Smyser, *supra* note 3; *Robinson*, 441 F. Supp. at 583 ("*McBryde I* therefore came as a shocking, violent deviation from the solidly established case law—totally unexpected and impossible to have been anticipated. It was a radical departure from prior decisions.").

[13] *See* cases cited *supra* note 4.

adjudicated.[14] His opinion in *State ex rel. Kobayashi v. Zimring* settled the principle that newly accreted volcanic lands are property of the state.[15] Richardson's opinions in *Palama v. Sheehan*[16] and *Kalipi v. Hawaiian Trust Co.*[17] are equally important for affirming the legal basis for asserting gathering and access rights on private property and were the backbone of the landmark decision in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*.[18]

The bold decisions of Chief Justice Richardson demonstrated how a jurist could support the rights of the people without resorting to legislation from the bench. Richardson may have been considered "activist" because he used the power of the court to create profound, progressive change, but he did so by reaching back into history and precedent and thus showing a respect for the deep-rooted values of the Western legal system. Today, nominees to the office of Chief Justice of the Supreme Court of Hawai'i are held to the standard set by Chief Justice Richardson. This article addresses how and why the jurisprudence of the Chief Justice, once so controversial, has become so celebrated today.

The Chief Justice succeeded in part because of his personality and place in history: he was the right man, at the right time, with the right tools. He also succeeded because of the nature of his jurisprudence, which had four qualities: it was constitutional, restorative, unifying, and island-based. His jurisprudence survived constitutional attack. It was restorative of Hawaiian sovereignty and values, yet it was also unifying, uniting Hawaiians and the immigrant communities that had settled in Hawai'i. Finally, it was a jurisprudence particularly appropriate for an island society. Justice Oliver Wendell Holmes once said that the life of the law was not logic, but experience.[19] The jurisprudence of the Chief Justice succeeded because it was tailored to the uniqueness of Hawai'i's island history and experience.

Generally speaking, the Chief Justice's jurisprudence succeeded because it was the legal embodiment of the political motto of Hawai'i—that the life of the land is perpetuated in righteousness. To Chief Justice Richardson, the life of the law was itself perpetuated in righteousness. This

---

[14] *See In re* Water Use Permit Applications (*Waiāhole I*), 94 Haw. 97, 9 P.3d 409 (2000) (affirming the imposition of a public trust over the waters of the State as asserted in *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982)).

[15] 58 Haw. 106, 556 P.2d 1079 (1979).

[16] 50 Haw. 298, 440 P.2d 95 (1968).

[17] 66 Haw. 1, 656 P.2d 745 (1982).

[18] 79 Haw. 425, 903 P.2d 1246 (1995), *cert denied sub nom.* Nansay Haw. Inc. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996) (adopting *Palama v. Sheehan* and *Kalipi v. Hawaiian Trust Co.*).

[19] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

righteousness meant, at its most basic, that the power to make law was a trust. Those who were lawmakers were kahu, or stewards, whose primary responsibility was to care for those for whom the laws were made. The values and needs of the governed must be reflected in the laws themselves. Importantly, the phrase "the life of the law" meant that the law itself was alive—not dead, static, or pre-existing. The law must grow and evolve as necessary. This is the credo of an activist jurist.

Part II of this article looks at Chief Justice Richardson as a person and examines his success. Part III elaborates on his jurisprudence as having the right "fit"—as restorative, unifying, and island-based. Part IV examines the controversy over the constitutionality of his jurisprudence and whether his jurisprudence violated the Constitution by taking property without just compensation. His jurisprudence was not, as alleged by his critics, a radical departure from pre-existing law. Instead, his jurisprudence was corrective, rectifying errors made by earlier courts. Those courts had erred in accepting the unrighteous, un-pono common law of the Territory of Hawai'i, an undemocratic period of Hawai'i's history.

II. CHIEF JUSTICE RICHARDSON: THE RIGHT PERSON AT THE RIGHT TIME WITH THE RIGHT INSTRUMENT

Chief Justice Richardson was the right man because he belonged to two key political and ethnic communities within post-statehood Hawai'i. He was a Hawaiian and he was a Democrat. These were separate communities at that time, and he had the ability to bridge the two.

He also had the right tool. His instrument was the state supreme court. As Chief Justice of the Hawai'i Supreme Court, he was the leader of an institution that had the power to establish the property law of the State of Hawai'i with finality.

His timing was also superb. He was appointed chief justice at the beginning of statehood and was the first chief justice selected by Democrat John A. Burns. The Democrats controlled Hawai'i and would control Hawai'i for many years. The appointment of William S. Richardson as chief justice would be followed by the appointment of many like-minded Democrats.[20] In time, the new majority would be in a position to render a new and transformative jurisprudence.

---

[20] *See* CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982, at 49-82 (1985).

A. The Instrument

Chief Justice Richardson had the precise tool needed to carve his jurisprudential legacy: the Hawai'i Supreme Court. In the Supreme Court he had the power to make state property law with finality. It is settled law in the United States that the various states are sovereign[21] as to the law of property.[22] Thus, each state supreme court is the final arbiter with regard to the property law of that state.[23]

He also knew the importance of the Hawai'i Supreme Court in shaping history. He was knowledgeable about Hawaiian culture, politics, and history by birth, family, and ancestry.[24] He was also a lawyer from a family of lawyers. His grandfather had been a judge and counsel to Queen Lili'uokalani.[25] William Richardson knew the importance of the Supreme Court in the political history of Hawai'i. He knew its significance as to property law, particularly law that led to the demise and dispossession of the Hawaiian people.[26]

Equally important, he was a Democrat. He was close to the Nisei, the second-generation Japanese-Americans. He knew them from shared experiences in World War II. He knew them from the practice of law. He knew them from working within the Democratic Party. He shared their

---

[21] *See* Williamson B.C. Chang, *Unraveling* Robinson v. Ariyoshi*: Can Courts "Take" Property?*, 2 U. HAW. L. REV. 57, 59 (1979) [hereinafter Chang, *Unraveling*].

[22] *See* Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930); *see also* Chang, *Unraveling*, *supra* note 21; Cent. Land Co. v. Laidley, 159 U.S. 103, 112 (1895) ("When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of this property without due process of law, within the Fourteenth Amendment of the Constitution of the United States.").

[23] *See* Robinson v. Ariyoshi, 65 Haw. 641, 677, 658 P.2d 287, 303 (1982). "That our state supreme court is the final arbiter within our state system of constitutional issues arising in or from a particular case is supported by the fact that the United States Supreme Court is authorized to consider and will consider only final judgments in its review and that the takings issue was presented as part of final judgment before the Supreme Court in the *McBryde* appeal. The Supreme Court has stated the test of finality for the purposes of review is whether the state appeals court 'has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court.'" *Id.* (quoting United States v. Pink, 317 U.S. 264, 268 (1942)); *see also* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

[24] He had grown up in a political family with deep ties to the Hawaiian monarchy.

[25] *See* DODD, *supra* note 20, at 17.

[26] As discussed in *Robinson*, 65 Haw. at 667-77, 658 P.2d at 305-12, the following cases established ownership rights in surplus water, thus benefitting the sugar industry: *Peck v. Bailey*, 8 Haw. 658 (1867); *Lonoaea v. Wailuku Sugar Co.*, 9 Haw. 651 (1895); *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 14 Haw. 50 (1902), *on subsequent appeal*, 15 Haw. 675 (1904); *Carter v. Territory*, 24 Haw. 47 (1917); and *Territory v. Gay*, 31 Haw. 376 (1930).

understanding of the plantation experience. Richardson knew the role that the Hawai'i Supreme Court and the law played in the discrimination, racism and oppression that occurred during the plantation era. He would, as chief justice, use the Hawai'i Supreme Court to forge a corrective jurisprudence—one that would correct past harms to both Hawaiians and immigrants.

Thus, at statehood, he had precisely the right tool in his hands, the power to make property law—right or wrong—that was final.[27] As he would remark later, after leaving the court:

> Maybe the guy [himself as chief justice] was right. Maybe he was wrong, you know (chuckles), but I do have that luxury in that, if I made some mistakes, throughout the generations historians will be able to point them out to me. What's done is done. What's right is right. Maybe when you run the highest court in the state, when you say this is the law, it is the law. (chuckles) It's a little tough for someone to say you're wrong because that is the law.[28]

B. The Moment

William S. Richardson would never have been selected as a chief justice during the territorial period. The justices of the Territorial Supreme Court were selected by the President of the United States. The residents of Hawai'i could not vote for the President. Thus, Hawai'i residents had no impact on the President's appointment of a chief justice for the Territory. The justices and judges of the territorial courts were not representative of the common people of Hawai'i.[29] The justices chosen by the President were "insiders," attorneys from the large, predominantly white law firms that represented the sugar interests and the Big Five companies—the oligarchy of mercantile agents of the sugar plantations that effectively controlled the economic and social structure of the Territory.[30]

---

[27] Interview by Warren Nishimoto & Daniel W. Tuttle, Jr. with William S. Richardson, Chief Justice (ret.), Haw. Sup. Ct., in Honolulu, Haw. (Jan. 24, 1990) [hereinafter Richardson Interview].

[28] *Id.*

[29] *See* Elizabeth Pa Martin et al., *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U. HAW. L. REV. 71, 97-98 (1996).

[30] LAWRENCE H. FUCHS, HAWAI'I PONO: AN ETHNIC AND POLITICAL HISTORY 152 (1961).

> In some respects, Hawaii's oligarchy was different. No community of comparable size on the mainland was controlled so completely by so few individuals for so long. Rarely were political, economic, and social controls simultaneously enforced as in Hawaii. Rarely were controls so personal, and rarely were they as immune from such

William S. Richardson was an outsider, a member of the "downtown" rather than the "uptown" bar. He recalled what it was like to practice before territorial judges, appointed from afar and often not from Hawai'i:

> And you get down to the judges, and that was one thing that really motivated us to go for statehood because we didn't have any judges, you know. And it was hard for a young lawyer, who had been through the war, to come back and take a second class position in a trial, knowing that the judge wasn't catering to you, he was catering to some secretary in the interior department, because the Secretary of Interior would do the appointing of the judges. And you never thought you had a fair shake as a lawyer. And I couldn't see going my whole life as a second-class lawyer and getting judgments I didn't think was fair.[31]

With statehood, justices were selected by the governor,[32] who was popularly elected. This meant that the justices, as appointed by the governor, reflected the constituency that selected the governor. Thus, the kind of person who became a justice of the Hawai'i Supreme Court was vastly different after statehood.

After statehood, justices and judges reflected the electorate: Hawaiians, Japanese, Chinese, Filipinos, and others. It was clear that one of the consequences of statehood would be a judiciary comprised of persons more representative of the people of Hawai'i.[33] It was equally clear that an attendant consequence of this shift would be a new judiciary rendering different decisions.

Thus, there should have been little surprise that the Richardson Court, now constituted by persons selected by the new, popularly-elected governor, would challenge the jurisprudence set down by the Territorial Supreme Court.[34] It would be unrealistic to expect that the new court, made of persons from different classes and different backgrounds than past courts, would simply rubber-stamp the jurisprudence of the past.[35]

> counterforces as Eugene Deb's socialism, Woodrow Wilson's New Freedom, and Franklin D. Roosevelt's New Deal as in Hawaii. For forty years, Hawaii's oligarchy skillfully and meticulously spun its web of control over the Islands' politics, labor land and economic institutions, without fundamental challenge.

Id.

[31] Richardson Interview, *supra* note 27.

[32] *See* HAW. CONST. art. VI, § 3. In 1978, the Hawai'i Constitution was amended to require that the governor's nominees be selected from a list provided to him from the Judicial Selection Commission.

[33] DODD, *supra* note 20, at 71-72, 80 n.37 (describing the make-up of the Hawai'i Supreme Court as of 1974).

[34] *Cf. id.* at 80 n.37.

[35] *See id.* at 48 ("This is a 'real people' court. These justices know the people of the real world, they know how real people feel. They know especially how local people feel."

The act of statehood thus constituted a mandate for change in the jurisprudence of Hawai'i. Support for statehood, both among the electorate in Hawai'i and among Congress in Washington D.C., was also support for change. Statehood was a referendum on a broad number of changes to political life, including a referendum on the nature of the common law of Hawai'i.

The decisions of the Richardson Court were not sudden and radical departures from settled law. Changes in the governance of Hawai'i, as well as changes in the manner in which the law was interpreted, were expected as a natural consequence of change by both those in Washington as well as in Hawai'i.[36]

C. The Man: Hawaiian and Democrat

1. The ability to cross over

William S. Richardson grew up in a family that was Hawaiian and Democrat.[37] These were two communities that normally did not overlap. Hawaiians and Democrats had different histories and different political agendas. Chief Justice Richardson was unique because he bridged these

---

(quoting Honolulu attorney Wallace S. Fujiyama)).

[36] Williamson B.C. Chang, *Missing the Boat: The Ninth Circuit, Hawaiian Water Rights and the Constitutionality of Retroactive Overruling*, 16 GOLDEN GATE U. L. REV. 123, 165 (1986) [hereinafter Chang, *Missing the Boat*].

> Statehood brought major political changes to Hawaii. From the perspective of local residents the political reasons for statehood were clear. The citizens of Hawaii held a second class political status, having no electoral influence on their governor or the judiciary. They could not even vote for President of the United States. Thus, along with the desire for a popularly elected governor, one of the political motivations behind the move for statehood was development of a judiciary more directly representative of the population. This is a right held by the citizens of every state.
>
> Thus, statehood promised to bring change to the racial makeup and philosophical outlook of the state bench. Given the fact that a majority of Hawaii's citizens were not white, a popularly elected governor would have appointed a judiciary of undoubtedly different color and temperament than had existed in Territorial days.

Id.

[37] He was a Democrat in part because of the influence of his Hawaiian grandmother. *See* DODD, *supra* note 20, at 17.

> His paternal grandmother was an active Democrat on Maui at a time when it was neither popular nor especially wise to be one. Mary Ann Kaulaikalauele Shaw Richardson—the same Kaula Shaw who used to be confined to the upper alcove in Iolani Palace for childish misdeeds—instilled in her son Wilfred a devotion to the Democratic and Hawaiian causes, which she viewed as intertwined.

Id.

two communities. Equally important, his jurisprudence would draw from the experiences of both communities.

On one hand, his jurisprudence borrowed from Hawaiians by resurrecting the principles and values of Hawai'i's kings and queens who reigned during the monarchy. His jurisprudence drew on Native Hawaiian values, which emphasized kinship and stewardship of the environment. Hawaiians knew how to care for resources. They knew how to live on islands.

On the other hand, his jurisprudence also reflected the aspirations and values of immigrant plantation communities and in particular borrowed from the experience of those who made up the Democratic Party—predominantly the Nisei, second-generation Americans of Japanese ancestry. Their experience was one of inequality, discrimination, political ostracism, and racism. Chief Justice Richardson could, by friendship and affiliation with the Nisei Japanese, share these experiences. Thus, his jurisprudence always reflected concern for the "little guy."

His experiences as both Hawaiian and Democrat blended, and two principles emerged from the Chief Justice's membership in these two communities. The first was a distrust and suspicion of territorial jurisprudence.[38] The second was his celebration of the jurisprudence of the Kingdom of Hawai'i.[39] The Chief Justice combined these two principles to formulate a jurisprudence that was restorative, unifying, and island-based.[40]

As chief justice, Richardson would effectively blend his membership in both communities. On one hand, he was able to convince the Japanese-American and other immigrant communities of the value of resurrecting and living by traditional Hawaiian principles. The Chief Justice knew, by background and ancestry, the customs, practices, and principles of the old Hawaiian legal ways. He could draw on knowledge gleaned from generations of Hawaiians and thus do what no Nisei could: speak authentically about Hawaiian historical practices and traditions that should be incorporated into the law.

On the other hand, as a Democrat, Richardson was a bridge to the Hawaiian community. It was difficult for many Hawaiians to accept the Democratic Party because an important part of the Democratic platform was the acceptance of statehood. Statehood was one further step away from the restoration of sovereignty and independence.

Unlike many Hawaiians, William S. Richardson believed in the United States.[41] Whatever wrongs had occurred (and he agreed that there were

---

[38] *See* Robinson v. Ariyoshi, 65 Haw. 641, 667-68 n.25, 658 P.2d 287, 306 n.25 (1982).

[39] *See* HAW. REV. STAT. § 1-1 (2009).

[40] The territorial era was, in a sense, the "dark age" of Hawaiian law. The Kingdom was the "golden age" of Hawaiian custom, usage, and precedent.

[41] William S. Richardson served, after all, as Lieutenant Governor of the State of

wrongs), the United States now had jurisdiction over Hawai'i. That was, to Richardson, political fact. His acceptance of United States jurisdiction over Hawai'i was more than just practical politics, however. He sincerely believed in the promise of the American Constitution. It was this belief in America that Richardson brought to Hawaiians as a Democrat. In a sense, he was like the Japanese-Americans. Like the Nisei, whose parents had immigrated to Hawai'i and the United States, Richardson had decided to cast his lot with the United States. He had voluntarily embraced America. He was an American by consent while some Hawaiians still viewed themselves as Americans by conquest.

The value of Richardson to the Democratic Party was his belief in America. If there was to be sovereignty for Hawaiians, it would be within the rubric of the United States Constitution. When asked about Hawaiian independence and the return of the monarchy, he would reply:

> We cannot go back that far. Too many generations have gone by. Can you think of my not being an American anymore, you know, and that's unthinkable. Cannot do it. I think [Native Hawaiians] have to live within the system. The American system is a good system that can cope with these things.[42]

Thus, on one hand, he was the Hawaiian who could, with experience, integrity, and knowledge, convince the Japanese-Americans and other groups of the value of Hawaiian ways. On the other hand, he was the Democrat who sought to convince Hawaiians that some kind of sovereignty could be resurrected and recreated within an American framework.

2. *Different communities: Hawaiian and Japanese*

In order to understand William S. Richardson, one must understand the differences between Democrats and Hawaiians. At statehood, few Hawaiians were members of the Democratic Party. Hawaiians were largely Republican.[43] The haole (Caucasian) elite that had dispossessed Hawaiians

---

Hawai'i between 1963 and 1966. *See, e.g.*, Vorsino & Kobayashi, *supra* note 1. He had therefore sworn allegiance to the United States.

[42] Richardson Interview, *supra* note 27.

[43] FUCHS, *supra* note 30, at 182.

> The skillful juggling of the haole-Hawaiian alliance and the influence of the plantation vote enabled the oligarchy to maintain its control for nearly four decades, despite the imposition of universal citizen suffrage by Congress in the Organic Act. Helping sustain the Oligarchy during difficult periods was the weakness of the Democratic party of Hawaii—a weakness stemming from two sources.

Id.

had, through various alliances,[44] enticed them into the Republican Party.[45] Hawaiians were taught to be suspicious of the numerically superior Japanese.[46] Moreover, different experiences divided the Hawaiians from immigrant communities like the Japanese-Americans.[47]

On one hand, the Japanese-Americans and other immigrant groups thought not of sovereignty and self-determination but of survival and acculturation in a new land.[48] Japanese-Americans and Filipino-Americans who made up the Democratic families were the sons and daughters of first-generation immigrants who had left homelands in Japan and the Philippines for the United States. Now that they had chosen to stay, the Nisei, like other immigrants, wanted, above all, the privileges and rights of

---

[44] *Id.* at 161. On the haole-Hawaiian Republican coalition, Fuchs writes:

> Throughout the Territory as a whole, the Home Rulers undoubtedly won a majority of the Hawaiian votes. But a minority of Hawaiians combined with the near-monolithic strength of haoles and Portuguese, was enough to change the balance of power and to keep it in favor of the GOP for the next several years.

Id. at 160-61.

[45] *Id.* at 162. Fuchs describes how the haole-Hawaiian Republican coalition was held together:

> Outright bribery was probably less important than promises of jobs in winning native support for Republican candidates. According to old-timers who were part of the inner circle of Hawaiian and haole leaders in the Republican party, key jobs on some ranches and most plantations could not be held without dedicated service in the Republican cause. Government jobs also bound thousands of Hawaiians to the G.O.P. A political scientist discovered that in 1927 Hawaiians held 46 per cent of the appointive executive positions, 55 per cent of the clerical and other government jobs in the Territory, and more than half of the judgeships and elective offices. Certain categories of government service, such as local law enforcement, were virtually turned over to the Hawaiians by the oligarchy. An investigation of law enforcement in Hawaii in 1932 found the field highly influenced by "*kanaka* politics."
>
> Three years later, another study showed that Hawaiians, then less than 15 per cent of the population, held almost a third of the public-service jobs in the Islands.

Id.

[46] *Id.* at 159. Regarding this suspicion of the Japanese, Fuchs notes:

> Kuhio had only to look around to realize that the Hawaiians should join the haoles to protect themselves against the rising Oriental tide. There would come a day, Kuhio was probably warned, when the Japanese who already outnumbered Hawaiians and haoles combined would inundate the politics of the islands and Kuhio had best be prepared.

Id.

[47] *See* TOM COFFMAN, THE ISLAND EDGE OF AMERICA: A POLITICAL HISTORY OF HAWAI'I 178 (2003) ("For deeply rooted reasons, Japanese Americans supported statehood more actively than any other group. Initially, the unique identity of native Hawaiians seemed to be further obscured by statehood.").

[48] *See* BOYLAN & HOLMES, *supra* note 3, at 305.

American citizenship—they wanted to be American. They wanted to be treated as equals.

On the other hand, many Native Hawaiians longed for monarchy and independence. Many Native Hawaiians were not willing Americans, not Americans by consent. Hawaiians had not come to the United States from a foreign land; instead, the United States had come to Hawai'i. The United States had annexed the Hawaiian Islands over the objection of the vast majority of Hawaiians. Few Hawaiians accepted American citizenship without some sense of ambivalence or resentment. Put bluntly, the difference between Hawaiians and immigrant communities in Hawai'i was as to the manner in which they had become Americans. It was the difference between being an American by conquest and an American by consent.[49]

Americans of Japanese ancestry and other immigrants to Hawai'i were, of course, free to reinvent themselves, confident that the ways of their homeland, its culture, language, food and ethos were being preserved back in their home country. They could be American without fear of the loss of language or culture. Hawaiians, on the other hand, did not have a homeland outside of the islands, which were now a part of America. For Hawaiians, theirs was the daily task of ensuring the survival of language, custom, and culture. As America became a bigger part of their lives, being Hawaiian became a smaller part. Hawaiians assimilated at the risk of losing their Hawaiianness, which is what made sovereignty such an important political aspiration.

3. William S. Richardson: A Hawaiian

First and foremost, William Shaw Richardson was Hawaiian. As a Hawaiian from a family with deep ties to both the monarchy and Hawaiians who were members of the legal profession, the Chief Justice grew up knowing and observing the operation of the legal system. He observed the manner by which Western lawyers and judges misinterpreted Hawaiian customs and practice—mistaking kahu, or stewardship, for ownership.[50]

As a Hawaiian, Richardson knew the power of the law in molding and shaping society. What Hawaiians know about the law is not evident to others:

> The system by which the Hawaiian understood the world and ordered their daily lives was interpreted by outsiders to their detriment. In time, this

---

[49] *See* Williamson B.C. Chang, *The Wasteland in the Western Exploitation of Race and the Environment*, 63 U. COLO. L. REV. 849, 860-69 (1996) [hereinafter Chang, *Wasteland*].

[50] *Cf.* Reppun v. Bd. of Water Supply, 65 Haw. 531, 547-48, 656 P.2d 57, 68 (1982).

> outside interpretation gained authority as a series of extraordinary political, social[,] and economic events in Hawai'i placed outsiders in a position to make conclusive assumptions about the Hawaiian. Simply thinking and acting as a Hawaiian accelerated the downfall. An inability to reject the West, as the West becomes a larger and larger part of one's life, renders the individual vulnerable. Not understanding how one's own actions are interpreted, one faces a choice between a loyalty to one's own culture at an unknown cost or meaningless imitation of Western forms at the cost of alienation from one's own self. Unexpected consequences befall ordinary Hawaiian actions and experiences: lands are lost, paper and "title" supplant traditional duties and responsibilities. . . . An effective and real Hawaiian order centered on a Hawaiian cosmology chaotic to Westerners is now displaced by a Western order chaotic to Hawaiians. Westerners come to feel at home in Hawai'i, while Hawaiians come to feel lost.
>
> Central to the Western order is its centuries-old Eurocentric legal system. Hawaiians act as Hawaiians at their peril, since Hawaiian actions will have unintended meanings when evaluated in terms of the Western model. The "reasonable man," in short, does not act like a Hawaiian. As the Western model becomes the consequential model one eventually cannot afford to act as a Hawaiian, since the Western (and only operational) legal system in Hawai'i penalizes "unreasonable men."
>
> One may still sense that one is a Hawaiian and have Hawaiian thoughts and emotions, but since one's intuitive actions will be evaluated incomprehensibly, action itself is discouraged. One is then chastised for laziness. That is, a rational strategy for avoiding danger and pilikia is perceived as indolence. When Westerners serving as Her Majesty's Cabinet members (*i.e.*, Hawaiian subjects engaging in treason) plotted to overthrow the monarchy, Hawaiians were instructed by Queen Liliuokalani not to resist; she urged them to have faith in the U.S. government. A responsible government would never ratify this violation of international law by its *pied noirs*. The subsequent submission of Hawaiian militants to the will of their ruler would ultimately appear to have been submission to the annexation of Hawai'i by the United States, *i.e.*, to the disappearance of Hawai'i as a country off the face of the earth.[51]

Richardson had seen how Western judges had misconstrued the Hawaiian ahupua'a system and the power of the konohiki. Westerners had observed the konohiki, or the lesser chief of the ahupua'a, direct the tenants when to close and open gates, when to allow water to run, and when to stop it with barriers. Judicial decisions from the territorial period tied the power of the

---

[51] Williamson B.C. Chang, *Law and the Reconstruction of Communal Property Values* 1-3 (2010) (unpublished manuscript) (on file with author).

konohiki of water to his or her ownership of the lands on which the waters arose.[52]

Such interpretations were self-serving, often inuring to the benefit of the Westerners. In traditional Hawaiian society, the konohiki did not own the waters but rather was an administrative agent representing the ali'i (who was simply a kahu—a steward or trustee—of the waters).[53]

Western concepts by which water could be owned and transferred far from its original source had disastrous consequences for Hawaiians. Windward waters were diverted to the hot leeward side of the island, never to be returned. Taro, which depended on the constant flow of water, suffered from the lack of water. Long irrigation systems diverted water to the leeward plains for sugar plantations and taro cultivation. That water could never be returned. The taro plants on the windward side rotted and died. The Hawaiian communities that were built around the cultivation of taro were forced to relocate.

There was no ownership of water in traditional Hawai'i. Western interpretations of Hawaiian practices, however, became Western misinterpretations, and often those misinterpretations were deliberate. These early lessons in legal history would influence Chief Justice Richardson's later jurisprudence.

In the most important of his decisions, the Chief Justice ruled that the surface waters of Hawai'i were not private property owned by those who purchased certain parcels of land.[54] He held that the surface waters of Hawai'i were under a public trust and that the State as trustee held the waters for the people of Hawai'i.[55]

4. William S. Richardson: A Democrat

The Democratic Party was comprised mostly of Americans of Japanese ancestry, who were the political power behind the Party. William S. Richardson was essentially an honorary Nisei who understood well the plantation experience, the significance of the internment of thousands of Japanese Americans, and the challenges of World War II. He understood what was unfair and oppressive about territorial Hawai'i.

Chief Justice Richardson shared the experience of discriminatory treatment during the territorial period. He was not one of the elite, landed Hawaiians who socialized with the Caucasian missionary families. As did

---

[52] *See Reppun*, 65 Haw. at 547-48, 656 P.2d at 68-69.

[53] MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 113 (rev. ed. 1986).

[54] Robinson v. Ariyoshi, 65 Haw. 541, 658 P.2d 287 (1982).

[55] *Id.*

Nisei and other immigrant groups, he lived and experienced the social and class biases of the territorial period.[56] If the restoration of Hawaiian law was the first key tenet of the jurisprudence of Chief Justice Richardson, the second key tenet of his jurisprudence was disgust with the unfairness of territorial Hawai'i.

This distaste with the colonialism of the Territory of Hawai'i would lead Chief Justice Richardson to a key principle of his jurisprudence: territorial precedent was not really "Hawaiian" precedent for the purposes of the law. Hawai'i, during the territorial period, had been captured by the federal government. Federal judges that ruled in Hawai'i during the territorial period did not apply Hawai'i law. Thus, he would write in his most important decision, *Robinson v. Ariyoshi*, that the common law established during the territorial period was not equal to the common law of Hawai'i before and after this period.[57]

---

[56] Hawai'i State Senator Clayton Hee related an anecdote about the chief justice which demonstrates the importance of background experiences and upbringing:

> Chief Justice Richardson often told the story of when, as a curious youngster, he found himself peering over the hedges from the shore at a grand party going on inside the Royal Hawaiian Hotel at Waikīkī. He reminded us that a worker of the hotel instructed him, that he, Richardson, needed to watch the ongoing party from "in the water," as the beach was "private property." He said he never forgot the humiliation as a young Hawaiian being told that the beach was private property which he said gave rise to the ruling by the Hawai'i Supreme Court regarding the rights of access of all people that the beach, up to (at the time) the high water mark belonged to the public.

[57] *See Robinson*, 65 Haw. at 667-68 n.25, 658 P.2d at 306 n.25. This position was later criticized by Judge Pence in *Robinson v. Ariyoshi*, 676 F. Supp. 1002 (D. Haw. 1987):

> In the quotation from *Robinson II*, supra, is to be found note 25. That note typifies the frantic search on the part of the Richardson Court to justify its sudden reversal of settled law. Because the rights of the konohiki as to surplus water were first decided during the Monarchy and the Republic, and after 1897 by judges and justices of the Territorial Supreme Court appointed by the President of the United States, therefore, said the Answers, all those opinions "were not the product of local judiciary," therefore, "we doubt whether those essentially federal courts could be said to have definitively established the common law of what is now a state . . . And it is from our authority as a *state* that our present common law springs." Pure chauvinistic sophistry! The Richardson Court would hold for naught the Constitution of the State of Hawaii[.]"

Id. at 1019 n.35 (emphasis in original).

III. THE JURISPRUDENCE OF CHIEF JUSTICE RICHARDSON: LAWMAKING AS A TRUST

A. Lawmaking as a Political Trust

While Chief Justice Richardson may have been the right person with the right tool at the right moment, these factors alone did not make him celebrated. These factors only meant that he and Hawai'i were blessed with good fortune. The Chief Justice still had to forge his jurisprudence. What would be the principles that underlay his jurisprudence? The Chief Justice himself provides the best description:

> Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained.
>
> During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawaii's territorial period, the decisions of our highest court reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawaii's indigenous people and its immigrant population.
>
> We set about returning control of interpreting the law to those with deep roots in and profound love for Hawaii. The result can be found in the decisions of our Supreme Court beginning after Statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases—and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people and that water resources could not be privately owned.[58]

The principle that underlay his jurisprudence was political and Hawaiian. It is best expressed in the state motto: "the life of the land[59] is perpetuated in righteousness."[60] The exercise of governance must be "pono," or righteous.[61] Similarly, that philosophy guided lawmaking, for it

---

[58] Melody Kapilialoha MacKenzie & Aviam Soifer, *Introduction* to KA LAMA KŪ O KA NO'EAU: THE STANDING TORCH OF WISDOM: SELECTED OPINIONS OF WILLIAM S. RICHARDSON, CHIEF JUSTICE, HAWAI'I SUPREME COURT, 1966-1982, at vi-vii (2009).

[59] The 'āina is related to the people. *See* Chang, *Wasteland*, *supra* note 49; MARTHA WARREN BECKWITH, THE KUMULIPO: A HAWAIIAN CREATION CHANT (1951); LILIKALĀ KAME'ELEIHIWA, NATIVE LANDS AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 24-25 (1992).

[60] *See* HAW. CONST. art. XV, § 5; *see also* RALPH KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854: FOUNDATION AND TRANSFORMATION 220 (1938) (describing the origins of the motto as arising from the restoration and return of the sovereignty of the Kingdom of Hawai'i by the British upon the wrongful taking by Lord George Paulet).

[61] PUKUI & ELBERT, *supra* note 53, at 340-41.

was equally true that the life of the law[62] is perpetuated in righteousness. For lawmaking to be just, it must be derived from a harmonious relationship between the government and the governed.[63] The power to make law is a power held in trust for the people. If government is not representative of the people, then law is not righteous. Chief Justice Richardson would use this concept of righteousness and representative government to rewrite the property law of Hawai'i.[64]

In doing so, Chief Justice Richardson recognized that references to caselaw in Hawai'i were misleading because the body of law represented separate political regimes.[65] There are five political periods in Hawaiian history: (1) The Kingdom of Hawai'i, 1840-1893,[66] (2) the Provisional Government, which came to power by overthrow, 1893-1894,[67] (3) the Republic of Hawai'i, which was an extension of the Provisional Government and was a Republic in name only, 1894-1898,[68] (4) the Territory of

---

[62] The Chief Justice believed that law must evolve. The law was alive. Law must change. The master rule is not stability, but change. Oliver Wendell Holmes also shared this opinion. He stated, "The life of the law has not been logic; it has been experience. . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." HOLMES, *supra* note 19, at 1; *see also* Chang, *Missing the Boat*, *supra* note 36, at 163 ("In the long run, the master rule of law is not stability, it is change.").

[63] *See* KAME'ELEIHIWA, *supra* note 59, at 30-31.

> In practical terms, the maka'āinana fed and clothed the Ali'i Nui, who provided the organization required to produce enough food to sustain an ever-increasing population. Should a maka'āinana fail to cultivate or mālama his portion of the 'Āina that was grounds for dismissal. By the same token, should a konohiki fail in proper direction of the maka'āinana, he too would be dismissed—for his own failure to mālama. The Ali'i Nui were no better off in this respect, for if any famine affected the 'Aina they would be ousted for failing to mālama their religious duties. Hence to Mālama 'Āina was by extension to care for the maka'āinana and the Ali'i, for in the Hawaiian metaphor these three components are mystically one and the same.

Id.

[64] The cases that rewrote property law are: *In re Robinson*, 49 Haw. 429, 421 P.2d 570 (1966); *In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968); *In re Kelley*, 50 Haw. 567, 445 P.2d 538 (1968); *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973); *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973); *In re Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977); *United Congregational Churches v. Heirs of Kamamalu*, 59 Haw. 334, 582 P.2d 208 (1978); *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982); *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982); and *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982).

[65] *Robinson*, 65 Haw. at 667-68 n.25, 658 P.2d at 306 n.25.

[66] *See* KUYKENDALL, *supra* note 60.

[67] *See* WILLIAM ADAM RUSS, JR., THE HAWAIIAN REVOLUTION (1893-94), at 69-112 (1992).

[68] WILLIAM ADAM RUSS, JR., THE HAWAIIAN REPUBLIC AND ITS STRUGGLE TO WIN ANNEXATION (1894-98), at 33 (1992) ("Native Hawaiians were, perhaps, not extremely

Hawai'i, which followed the annexation of Hawai'i by the United States, 1898-1959,[69] and (5) statehood in 1959.[70]

Certain periods were righteous—that is, representative. Others were not.[71] Accordingly, the common law arising from the "dark" periods of Hawai'i, the periods in which government was not representative of the people, was not authentic, not valid, not "pono."

The Chief Justice, in footnote 25 of the Hawai'i Supreme Court's opinion in *Robinson v. Ariyoshi*, pointed to the territorial period as non-representative:

> We recognize that [Hawai'i Revised Statutes] § 1-1, which was enacted during the monarchy in 1892 and amended only once, in 1903, might be construed to adopt territorial caselaw as among the "Hawaiian judicial precedent" representing the common law of the State. We do not at this time, however, address the question of whether those cases can truly be considered "Hawaiian" rather than federal precedent for we wish only to point out that the development of the law governing surplus water took place during a period when the resources of our land were subject to an authority which did not directly represent Hawaii's people and that the most recent pronouncements on the subject arise more immediately from the authority of those who will be forever affected by it.[72]

The era of the Kingdom was a golden one. The rulers of that era were stewards of the land. The politics of the Kingdom, although a monarchy, were essentially Hawaiian with Western labels. There was a hierarchy of titles and positions from top to bottom. At the top was the island's mō'ī, the highest chief. At the bottom was a tenant who worked a taro lo'i. In between these two ranks were high chiefs, lesser chiefs or konohiki, and maka'āinana or tenants. Each was charged with the care and use of certain parcels of land. The chiefs received the largest parcels. Lesser chiefs received land divisions carved from the lands held by the high chiefs.

---

sophisticated in governmental matters, but it took no great amount of political insight to perceive that this constitutional system was a beautifully devised oligarchy devoted to the purpose of keeping the American minority in control of the Republic.").

[69] FUCHS, *supra* note 30; ROGER BELL, LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS (1984).

[70] BELL, *supra* note 69.

[71] For a description of the harshness of plantation life and discrimination against non-whites during the territorial period, see generally FUCHS, *supra* note 30; RONALD TAKAKI, PAU HĀNA: PLANTATION LIFE AND LABOR IN HAWAI'I (1983); RONALD TAKAKI, RAISING CANE: THE WORLD OF PLANTATION HAWAI'I (1989); Williamson B.C. Chang, *Reversals of Fortune: The Hawai'i Supreme Court, the Memorandum Opinion and the Realignment of Political Power in Post-Statehood Hawai'i*, 14 U. HAW. L. REV. 17, 22-23 n.13 (1992) [hereinafter Chang, *Reversals of Fortune*].

[72] 65 Haw. 641, 667-68 n.25, 658 P.2d 287, 306 n.25 (1982).

Tenants had lo'i within the units of the konohiki. No one "owned" land or water—rather, there was a right of use with a concomitant duty or responsibility.[73]

Each individual in customary Hawai'i was a kahu or steward of the land. Thus, use of land and waters did not arise from ownership but arose from duty or responsibility, the concept of kuleana (responsibility) and mālama (caring). Each individual had a kuleana—the highest chiefs, the mō'ī, had the broadest kuleana—responsibility for the nation as a whole. One could not separate favors—or rights of use—from responsibility.[74] Lawmaking did not stem from the autocratic power of the highest chiefs, it arose from the concept of caring for the land, mālama 'āina, and caring for the people, mālama Lāhui.[75]

After the Kingdom, during the post-overthrow period, Western laws were used to reconstruct Hawaiian custom and practice. Thus began the misinterpretations, such as the assertion that the king was the owner of all property. As to water rights, this was false. The king held the waters in trust. Westerners also misconstrued the nature of the konohiki's relationship with water. Territorial precedents declared that since the king owned the waters, the king's grants to lesser chiefs, the konohiki, conveyed ownership of the bulk of the surface waters.

> The rules that supposedly decreed private ownership of water were primarily set out by the Territorial Supreme Court of Hawai'i. These rules were not faithful to the way Native Hawaiians managed water prior to the coming of the westerners . . . . Rather, the Native Hawaiians exercised water rights in a communal manner. The Konohiki was an agent of the King. He did not "own" the water, as later, post-annexation, Territorial precedents may have suggested . . . . Rather, the Konohiki oversaw the allocation, management and regulation of water among the taro farmers.[76]

To Chief Justice Richardson, the precedent and jurisprudence of the territorial period was not "Hawaiian"—not "pono." The elite and powerful of the Territory, such as the sugar industry, captured the Hawai'i Supreme Court and changed the property law of Hawai'i, particularly the law of water rights. The Chief Justice saw his duty as returning the law to those with "deep roots" in and a "profound love" of Hawai'i. Territorial precedent

---

[73] *See* KAME'ELEIHIWA, *supra* note 59, at 51.

[74] *See generally* Horner v. Kumuliili, 10 Haw. 174 (1895) (describing a system of water rights by which tenants were kahu (stewards) of the waters and lands).

[75] *See* KAME'ELEIHIWA, *supra* note 59, at 150 ("One cannot mālama the 'Āina if one does not mālama the maka'āinana who work the 'Āina.").

[76] Chang, *Missing the Boat*, *supra* note 36, at 164 (noting that the societal background to the rules regarding water rights in Hawai'i had completely changed by the time of the *McBryde* decision).

could be set aside. As Chief Justice Richardson wrote in *Reppun v. Board of Water Supply*:

> [O]ur decision [in the earlier 1973 opinion of *McBryde v. Robinson*] was premised on the firm conviction that prior [territorial] courts had largely ignored the mandates of the rulers of the Kingdom and the traditions of the native Hawaiians in their zeal to convert these islands into a manageable western society . . . . We cannot continue to ignore what we firmly believe were fundamental mistakes regarding one of the most precious of our resources. *McBryde* was a necessary and proper step in the rectification of basic misconceptions concerning water "rights" in Hawaii.[77]

Hawai'i Revised Statutes section 1-1 was the statutory tool by which the Hawai'i Supreme Court could resurrect the past.[78] It was designed, as of 1892, to incorporate the common law of England and the United States as the law of the Kingdom of Hawai'i. It had important exceptions: common law was displaced if there was conflicting Hawaiian precedent, custom, or usage. The original section 1-1, the Judiciary Act of 1892, was reenacted by the Territory and by the State. Today, it reads as follows:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as 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 the State.[79]

For the Chief Justice, section 1-1, or the principle of "looking back" to the laws and values of the Kingdom, was present in all of his critical property decisions: *Palama v. Sheehan*,[80] *In re Ashford*,[81] *County of Hawaii v.*

---

[77] 65 Haw. 531, 545-48, 656 P.2d 57, 67-69 (1982).

[78] For Chief Justice Richardson, Hawai'i Revised Statutes section 1-1 was the most important of Hawai'i's laws. On many occasions he would emphasize to his law clerks the central importance of section 1-1. For example, Justice Robert Klein recalled, as a law clerk for Chief Justice Richardson, being taught and reminded by the Chief Justice of section 1-1. It was the vehicle that connected jurisprudence of the State of Hawai'i with the laws, values and customs of the Kingdom of Hawai'i. Justice Klein would use section 1-1 in the landmark PASH decision by which he, for the court, incorporated section 7-1, as applicable to modern property rights. *See* Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n, 79 Haw. 425, 437, 903 P.2d 1246, 1258 (1995) (citing HAW. REV. STAT. § 1-1 (Supp. 1992)).

[79] HAW. REV. STAT. § 1-1 (2009).

[80] 50 Haw. 298, 440 P.2d 95 (1968).

[81] 50 Haw. 314, 440 P.2d 76 (1968).

Sotomura,[82] *In re Sanborn*,[83] *Reppun v. Board of Water Supply*,[84] *Kalipi v. Hawaiian Trust Co.*,[85] and especially *Robinson v. Ariyoshi*.[86]

Chief Justice Richardson also used section 1-1 to correct the law—disregarding decisions that arose from the "dark ages." Thus, in footnote 25 of *Robinson v. Ariyoshi*, he distinguishes the territorial period as a regime in which the people of Hawai'i were essentially non-self-governing.[87]

The use of both section 1-1 and footnote 25 became extremely controversial. Some critics sarcastically commented that footnote 25 meant that the volumes of the Hawai'i Reports containing cases dating from 1898 to 1959 should be thrown away. Judge Pence, for example, sharply denounced the logic of footnote 25 as "frantic" and "[p]ure chauvinistic sophistry[.]"[88]

The jurisprudence by which the Chief Justice looked past territorial precedent to resurrect the values and principles of the Kingdom would be sternly challenged. Ultimately, though, that jurisprudence would succeed. First, it would restore to Hawaiians a sense of sovereignty. Second, it would unify both Hawaiians and the immigrant communities that had come to work the plantations. Third, it would be a jurisprudence appropriate for an island-based society. Fourth, and perhaps most importantly, that jurisprudence would withstand constitutional attack.

B. The Jurisprudence of Restoration

The jurisprudence of Chief Justice Richardson was restorative in two different senses. First, it took values and principles of the kings and queens of Hawai'i and restored them to present law.[89] Second, it restored to Hawaiians one attribute of sovereignty—the ability to live under one's own laws.

The power to make laws and live under those laws is an essential element of sovereignty. Imagine if Hawai'i had survived as an independent nation. In such a case, the property decisions of the Hawai'i Supreme Court would

---

[82] 55 Haw. 176, 517 P.2d 57 (1973).

[83] 57 Haw. 585, 562 P.2d 771 (1977).

[84] 65 Haw. 531, 656 P.2d 571 (1982).

[85] 66 Haw. 1, 656 P.2d 745 (1982).

[86] 65 Haw. 641, 658 P.2d 287 (1982).

[87] *See id.* at 667-68 n.25, 658 P.2d at 306 n.25.

[88] Robinson v. Ariyoshi, 676 F. Supp. 1002, 1019 n.35 (D. Haw. 1987); *see also supra* note 57.

[89] *See Robinson*, 65 Haw. at 667, 658 P.2d at 306 (restoring the concept of publici juris (the public trust) for surface waters).

likely resemble the property jurisprudence of Chief Justice Richardson. In other words, his property jurisprudence was the jurisprudence of Hawai'i had it remained sovereign and independent.

C. The Jurisprudence of Unification

The jurisprudence of the Chief Justice ultimately succeeded because it was non-discriminatory. It was unifying. It treated all communities equally. The restoration of Hawaiian values, customs, and usage was not for Hawaiians only. Hawaiian principles established rights for all who reside in contemporary Hawai'i.

Chief Justice Richardson widened the beaches because that is what the kings and queens during the monarchy would have done.[90] Chief Justice Richardson imposed a public trust applicable to all waters in the state because that is what the kings and queens of Hawai'i would have done.[91] He made that public trust applicable to all because that is what the kings and queens under the monarchy would have done.[92] If Hawai'i had remained independent and sovereign, there would be no distinction between the rights of Native Hawaiians and others. Much as if Hawai'i had remained independent, the jurisprudence of Chief Justice Richardson is a "Hawaiian," not a "Native Hawaiian," jurisprudence. The principle of non-discrimination was applied to the whole of the common law, including torts,[93] property,[94] and contracts.

Nonetheless, the Chief Justice did support statutory[95] and constitutional provisions that gave Native Hawaiians special rights.[96] Constitutional and statutory provisions according Native Hawaiians specific rights were appropriately "pono," particularly when such rights were reflective of the political will of the people of Hawai'i or the United States. Thus, in decisions such as *Ahuna v. Department of Hawaiian Home Lands*, he

---

[90] *See* cases cited *supra* note 4.

[91] *See Robinson*, 65 Haw. 641, 658 P.2d 287; Reppun v. Bd. of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982).

[92] *See id.*

[93] *See* Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 210-14, 532 P.2d 673, 677-79 (1975) (Richardson, C.J., dissenting).

[94] *See* cases cited *supra* note 4.

[95] *See, e.g.*, HAW. REV. STAT. § 174C-101 (1993) ("Native Hawaiian Water Rights").

[96] *See* Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982) (establishing a fiduciary duty on the State as to a federal program, created by statute, to provide homestead lands to native Hawaiians).

vigorously protected the rights of Native Hawaiians as enjoyed under federal law.[97]

D. Toward an Island-Based Jurisprudence

The jurisprudence of Chief Justice Richardson also incorporated principles particularly appropriate for life in an island environment. Hawaiians had lived in the Hawaiian islands for thousands of years. Hawaiian concepts of the 'āina reflected communal values particularly suited to island life. During the territorial period, the imposition of Western market-based property rules undermined communal practices.

Hawaiians understood how life on islands was different from life on continents. Market-driven economies do not work well on islands. Accumulation, the hoarding of goods by which the wealthy can deprive others of access to resources, does not promote societal well-being on islands. Rather, the ahupua'a system, by which stewardship and sustainability of resources is emphasized, was the political norm for traditional Hawai'i.

The importance of communal property rights and public ownership of resources is expressed in a number of Chief Justice Richardson's property decisions. In the shoreline cases, he expanded the public area of beaches because in crowded island communities, access to ocean resources is critical for sustenance, recreation, and public access.[98] Thus, his decisions expanding public use of beaches make absolute sense for an island community[99] because that was where early Hawaiians parked their canoes in olden days so canoes would not wash out to sea. As Chief Justice Richardson acknowledged: "You couldn't leave your canoe on the beach

---

[97] *Id.*

[98] *See* cases cited *supra* note 4. In the shoreline cases, Chief Justice Richardson expanded the beaches so that the demarcation between public and private dominion was the higher of the vegetation line or the debris line. Usually, the vegetation line is much higher on the beach. It is where permanent vegetation begins to grow.

[99] *See* DODD, *supra* note 20, at 72.

> As the controversy continued, especially after the land and water decisions, Bill Richardson would say, with a smile, in private conversations: "If I had my way, the public would have even greater access to water and shoreline property. Hawaiian kings, I'm sure, intended to give their subjects more public seashore lands than we now allot. No one but a fool would leave his canoe at the vegetation line and let the waves wash it out to sea! The kings *really* must have intended to extend public property to that area on the beach where canoes could be left without danger of being washed away.

Id.

and have it [drift] out to sea at night. You must bring it far enough up. And as far up as you needed to bring it, must have been public domain."[100]

Moreover, the water rights opinions reflected the heightened importance of fresh water resources in island societies. The privatization of surface water rights, which occurred during the territorial period, meant that the public was effectively excluded from decisions regarding the allocation of water. The decisions of the Hawai'i Supreme Court during the territorial period allocated all power to private owners, namely the large sugar companies. A market system, as had been established during the territorial period, affirmed the rights of sugar companies and those with money. Water is too critical a resource to be left to market forces where one can only hope that the laws of supply and demand will result in policy that serves the whole community.

Hawai'i and its self-renewing water supply system can be analogized to a spaceship traveling on a journey that will take many generations. There are a limited supply of goods on board and a finite quantity of renewable resources such as food and water. Which system of allocation would work best: a system where resources are collectively pooled and distributed according to need? Or a system based on private ownership? Private ownership permits those who started with the resources or money to hoard resources to the deprivation of others.[101]

Islands are different from continents. The property law appropriate for a continent is not compatible with small islands. The paradigm for property rights on an island, with scarce lands, must be different from the paradigm of property for England where estates are the norm. The legal paradigm for Western property law is "Blackacre." The Blackacre of contemporary Hawai'i is far different from that of common-law England:

> The property law one would expect to find on a spaceship would be different from that of seventeenth-century England. In Hawaii, one cannot expect the property law of old England to make sense today. Nineteenth-century English law focused on the paradigm of "Black-acre," a 25-acre (10-ha) estate with running streams, gardens, and a 20-room mansion. With Blackacre as a model, property law developed in a certain way. On the other hand, the paradigm of Blackacre for Hawaii is likely to be a two-bedroom condominium in a 20-story building with 1000 residents on 3.5 acres (1.4 ha).[102]

Islands must be self-sustaining. Hawai'i, as an island state, cannot rely on neighboring states; if Hawai'i residents do not have enough water, food,

---

[100] Richardson Interview, *supra* note 27.

[101] *See* Chang, *Missing the Boat*, *supra* note 36, at 167.

[102] Williamson B.C. Chang, *Water Rights in the Age of Anxiety*, J. AM. WATER WORKS ASS'N, Mar. 1978, at 40-43.

recreational space, and jobs, they cannot find substitutes in neighboring, contiguous states. Hawai'i's electric grid cannot rely on a regional multi-state system that would protect it from a blackout. Hawai'i, in short, is like a spaceship, and resource rules on a spaceship must be far different than those on a bountiful planet.

Hawaiians knew how to live on islands. They knew enough to eschew market-driven economies for economic systems based on gifting.[103] Hawaiians knew the importance of stewardship and applied principles such as mālama 'āina[104] (caring for the land) and kuleana (responsibility) to resource management. The incorporation of communal Hawaiian resource principles has succeeded today because it is the appropriate way of living on an island.

IV. CONFISCATION OR CORRECTION: THE CONSTITUTIONALITY OF CHIEF JUSTICE RICHARDSON'S JURISPRUDENCE

The jurisprudence of Chief Justice Richardson has its place in history today because it survived constitutional attack. So long as a cloud hung over those decisions, there could be no acceptance, no celebration, no legacy.[105] When the court first rendered these key decisions, there was a storm of controversy. Critics did not see them as restorative, unifying, and island-based, but condemned them as confiscatory.[106] The losing parties in these cases, including *McBryde v. Robinson*,[107] *County of Hawaii v. Sotomura*,[108] and *State ex rel. Kobayashi v. Zimring*,[109] would all sue in federal court seeking enforcement of vested rights that were based on territorial common law. This part provides a history of the constitutional litigation in the most important of those cases, *McBryde v. Robinson*.

---

[103] JOCELYN LINNEKIN, CHILDREN OF THE LAND: EXCHANGE AND STATUS IN A HAWAIIAN COMMUNITY (1985).

[104] *See generally* KAME'ELEIHIWA, *supra* note 59.

[105] Typical of such opinion was the opinion of A.A. Smyser, long the editor of the *Honolulu Star-Bulletin*. Smyser objected to the jurisprudence of Chief Justice Richardson. To him, it was destabilizing. Only when the constitutional controversy was over did Smyser grudgingly accept the decision in *Robinson v. Ariyoshi*.

[106] *See* Robinson v. Ariyoshi, 676 F. Supp. 1002, 1019 (D. Haw. 1987).

[107] *McBryde v. Robinson* was challenged in federal court as *Robinson v. Ariyoshi*. *See* cases cited *supra* note 9.

[108] *See* Sotomura v. Cnty. of Hawaii, 460 F. Supp. 473 (D. Haw. 1978).

[109] *See* Zimring v. Hawaii, Civ. No. 79-0054 (D. Haw. 1979).

1. McBryde v. Robinson: The original action[110]

McBryde v. Robinson[111] was a quiet title action by which two sugar companies sought to settle ownership of the surface water rights of the Hanapēpē River on Kaua'i.[112] Both sugar companies claimed ownership of the bulk of the surface waters of the rivers. Under prior law, the Territorial Supreme Court had ruled that the ownership of waters was vested in the ownership of lands on which such surface waters originated.[113] Surface waters were private property and could be used as the owner of such waters pleased. The trial court in *McBryde* divided the waters between the competing claimants, and all was quiet until the Hawai'i Supreme Court ruled on appeal.

On appeal, Justice Abe, writing for the court, overturned the law establishing private ownership of surface waters and held that the waters were owned by the State of Hawai'i. The sugar companies were shocked as the decision divested both parties of all ownership rights. None of the parties, even the State, had urged such a result. All parties sought rehearing before the Hawai'i Supreme Court.

The sugar companies alleged that Justice Abe's decision resulted in a taking of their property without just compensation because prior to the decision they had water rights, and after the decision they had none. Surely, they argued, this was as much of a taking as if the State had actually condemned their rights, which would require the State to pay just

---

[110] *McBryde v. Robinson*, a 1973 decision adjudicating water rights on the island of Kaua'i, was actually written by Justice Kazuhisa Abe. Nonetheless, the *McBryde* decision is today so closely associated with Chief Justice Richardson that it is treated here as part of his body of work. Although he did not author the decision, Chief Justice Richardson clearly concurred in the result and the reasoning of Justice Abe. When the decision was collaterally attacked in federal district court, the Chief Justice, under his authority as Chief Administrator of the Hawai'i Judiciary, actively became involved in defending the decision. Most important, when the Ninth Circuit directed certified questions to the Hawai'i Supreme Court to answer, the response was written by Chief Justice Richardson. Those answers, reported in *Robinson v. Ariyoshi*, constitute the most important decision of the Chief Justice's body of work. Thus, *McBryde v. Robinson*, which the chief justice did not author, and *Robinson v. Ariyoshi*, which he did, are both treated as part of the core of his jurisprudence.

[111] 54 Haw. 174, 504 P.2d 1330 (Abe, J.), *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam).

[112] *See* Chang, *Unraveling*, *supra* note 21, at 61 (footnotes omitted) ("*McBryde* is the Hawaii Supreme Court decision culminating some twenty years of litigation regarding the extent to which various parties have rights to the water in the Hanapepe River. The parties involved were the State of Hawaii and the various landowners whose property adjoined the river and streams.").

[113] *See* cases cited *supra* note 26.

compensation. The sugar companies also alleged a violation of procedural due process and claimed that their property had been taken without a proper hearing.

The Hawai'i Supreme Court granted a rehearing but limited the issues: the takings and procedural due process claims could not be argued.[114] The only issue that would be reheard would be as to whether Hawai'i Revised Statutes section 7-1,[115] a law from the Kingdom of Hawai'i, had been applied correctly.[116] The Hawai'i Supreme Court reaffirmed the decision of Justice Abe.[117]

Significantly, however, Justice Levinson joined Justice Marumoto in dissent. Levinson wrote a lengthy dissent, arguing passionately that the sugar companies had vested water rights.[118] Levinson was the first to articulate the theory that the Hawai'i Supreme Court, by its very decision, had taken the property of the sugar companies without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.[119] The losing parties sought review in the United States

---

[114] *McBryde*, 55 Haw. at 261, 517 P.2d at 27.

[115] HAW. REV. STAT. § 7-1 (2009).

[116] *McBryde*, 55 Haw. at 261, 517 P.2d at 27.

[117] *Id.*, 55 Haw. 260, 527 P.2d 26 (per curiam), *aff'g* 54 Haw. 174, 504 P.2d 1330 (Abe, J.) (1973). Judge Pence was later to call this rehearing "farcical." Robinson v. Ariyoshi, 441 F. Supp 559, 580 (D. Haw. 1977).

> Thereafter on the almost farcical "rehearing", although the due process issues were urged by the plaintiffs, the court refused to permit argument thereon or consider the same. Rather, the court extended a clearly pro forma invitation to the plaintiffs "to prove to us why we were wrong" on issues and conclusions assumed sua sponte by the court. On this basis alone the judgment of the court would have to be declared void, for if permitted to remain in full force and effect, plaintiffs have been deprived of property rights without ever having had a fair and meaningful opportunity to defend against their being handed over to the state on a silver platter without even a request by the State for the gift.

Id.

[118] *McBryde*, 55 Haw. at 262-304, 517 P.2d at 27-51 (Levinson, J., dissenting).

[119] Justice Levinson quoted Justice Stewart's concurring opinion in *Hughes v. Washington*:

> For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. *Id.* at 302, 517 P.2d at 50 (quoting Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring)).

Supreme Court, making the same arguments.[120] The United States Supreme Court refused to hear the appeal.[121]

In an innovative move, the two sugar companies joined forces and together, as plaintiffs, sued the State of Hawai'i in federal district court, alleging that the State, through the Hawai'i Supreme Court, had taken their property without just compensation.[122] In 1977, Judge Martin Pence ruled in favor of the sugar companies, enjoining the enforcement of the Hawai'i Supreme Court decision.[123] Judge Pence was extremely harsh in his criticism of the Hawai'i Supreme Court:[124] Pence said the ruling was "strictly a 'public-policy' decision with no prior underlying 'legal' justification"[125] and called it "one of the grossest examples of unfettered judicial construction used to achieve the result desired—regardless of its effect upon the parties, or the state of the prior law on the subject."[126] Judge Pence's ruling enjoined state officials from acting to enforce the *McBryde* decision and essentially "reversed" the Hawai'i Supreme Court.

Chief Justice Richardson understood the implications. Although the named defendants were the Governor of the State of Hawai'i and the members of the Board of Land and Natural Resources, the real defendant was the Hawai'i Supreme Court. Here, contemplated Chief Justice Richardson, a federal district court, the lowest court in the federal system, had reversed a state supreme court, the highest court of the state system.[127] If a federal district court could set aside a judgment of the Hawai'i Supreme Court whenever the Hawai'i Supreme Court overturned prior law, then federal trial courts would be, in fact, the highest court of the state system. Richardson firmly believed that the Hawai'i Supreme Court had acted constitutionally. A state supreme court has the power and right to correct

---

[120] *See* McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974) (dismissing appeal and denying certiorari); Robinson v. Hawaii, 417 U.S. 974 (1974) (denying certiorari).

[121] *Id.*

[122] Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977). *See also* cases cited *supra* note 9.

[123] *Robinson*, 441 F. Supp. 559.

[124] *Id.* at 583 ("*McBryde I* therefore came as a shocking, violent deviation from the solidly established case law, totally unexpected and impossible to have been anticipated. It was a radical departure from prior decisions.").

[125] *Id.* at 566; *see also id.* at 585 ("It may be that the court did not conceive its action as a taking—it said the plaintiffs never *had had* any such water rights, ergo, no taking! Just that simple! The Constitution does not measure the taking of property by what a court may say or even what it may intend; the measure is by the result.").

[126] *Id.* at 568; *see also* Chang, *Reversals of Fortune*, *supra* note 71, at 28-29 n.31.

[127] Richardson Interview, *supra* note 27 ("And I felt that the highest court of a state should be higher than the lowest court in the federal system.").

the law of its state. The Hawai'i Supreme Court was sovereign over state law.

The whole of the property jurisprudence of the Chief Justice hung in the balance. Each of his landmark cases—*Sheehan*, *Ashford*, *Sotomura*, *Sanborn*, *Zimring*, *Reppun*, and *Kalipi*—all overruled intervening law in some fashion. Each could similarly be collaterally attacked as a taking of property. If the federal district courts could enjoin the enforcement of these decisions, then the Chief Justice's judicial transformation of the property law of Hawai'i would be stopped in its tracks. Moreover, the independence and sovereignty of the Hawai'i Judiciary would be subservient to the federal district courts.

The named state defendants, including the Governor, appealed Judge Pence's ruling to the Ninth Circuit Court of Appeals. Chief Justice Richardson, however, believed that the Hawai'i Supreme Court and the Hawai'i Judiciary had an interest separate from the individuals named as state defendants. As such, Chief Justice Richardson himself sought to be heard in the appeal before the Ninth Circuit. Thus, as Chief Administrator of the Hawai'i Judiciary, Chief Justice Richardson retained the author of this article as a Special Deputy Attorney General to represent the Hawai'i State Judiciary in federal court.[128]

Chief Justice Richardson's fears were correct: the federal district court's injunction in *Robinson v. Ariyoshi* led others to attack state supreme court judgments that allegedly took property when overturning prior law. The Sotomuras, for example, who had lost beachfront land when the Hawai'i Supreme Court reduced their beach frontage, sued in federal district court.[129] The Zimrings also sued after they lost land they claimed by volcanic accretion.[130] This was a precarious moment for the Hawai'i Supreme Court. Its independence, sovereignty, and ability to elevate Hawaiian principles above Western property concepts, were all on trial.

This author and others represented the State in all three actions. The State defendants and Chief Justice Richardson argued that the federal district courts lacked jurisdiction to enjoin the property decisions of the Hawai'i Supreme Court. If federal district courts could enjoin state supreme courts,

---

[128] The Chief Justice thought it critical that he retain his own counsel because the attack on *McBryde* was sure to lead to other attacks on his jurisprudence. He was correct. *See supra* notes 106-109 and accompanying text.

[129] *See supra* note 108.

[130] *See supra* note 109. The attacks on *McBryde*, *Sotomura*, and *Zimring* all raised the same issue: did the Hawai'i Supreme Court, in implementing the jurisprudence of the Kingdom over that of the Territory, "take" the property of the plaintiffs in violation of the United States Constitution? The author was also retained as counsel in the *Sotomura* and *Zimring* federal cases.

then state supreme courts were no longer sovereign as to matters of property law. This author argued that if losing parties were allowed to re-file an original action and sue on the basis of a judicial taking, there would be no finality in the legal system.

This author also asserted that there was no such cause of action as a judicial taking; courts do not take property when they declare winners and losers. A state supreme court, when rendering a decision, does not take from one party and give to another; it adjudicates the rights of parties. If a court is deemed to have taken property every time it rules on a case, then every ruling is a judicial taking because there is a losing party in every case.

Nonetheless, the sugar companies, the parties that had allegedly lost vested rights, had a simple yet powerful argument: before *McBryde,* they had water rights, and after *McBryde*, they had no water rights—ipso facto, the Hawai'i Supreme Court had taken the water rights of the sugar companies. The economic ramifications of such a decision were huge because all sugar companies in the state relied on private ownership of surface waters for irrigation. The two sugar companies, now joined by other sugar companies from around the state, launched extraordinary efforts into the fight that reflected the large stakes involved. For example, the sugar companies retained the former dean of Harvard Law School, Solicitor General Erwin Griswold, as co-counsel.[131] They brought disciplinary charges alleging that this author had violated the canons of ethics for publishing law review articles on related issues.[132] Attorneys for the sugar industry even sought to stifle this author's publications and succeeded in blocking the publication of one article in the *Hawaii Bar Journal.*[133]

The case was destined for the United States Supreme Court. As counsel for Chief Justice Richardson and the Hawai'i State Judiciary, this author feared the result there. The sugar companies had, in practical terms, a very strong case. Their arguments were visceral while the judiciary's defenses were academic and theoretical.

It was clear that this author could not afford to risk winning or losing before the Ninth Circuit and the United States Supreme Court on the theoretical grounds that courts simply could not "take" property.[134] There was a strong chance that the United States Supreme Court would follow the

---

[131] *See, e.g.*, Reply Memorandum for the Appellants and Petitioners, McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974) (No. 73-1440).

[132] *See* Chang, *Reversals of Fortune, supra* note 71, at 48-49 n.69.

[133] *See id.*

[134] The United States Supreme Court had looked at the issue from various viewpoints and had never ruled on whether courts can take property. *See* Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Dunbar v. City of New York, 251 U.S. 516 (1920); Patterson v. Colorado, 205 U.S. 454 (1907); Cent. Land Co. v. Laidley, 159 U.S. 103 (1895).

concurring opinion of Justice Stewart in *Hughes v. Washington*: "For a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."[135]

But this was a case of first impression and the Supreme Court would probably want to avoid the takings question. In all its history, the United States Supreme Court had never ruled that a state supreme court, in overturning or overruling prior law, had "taken" property in violation of the Constitution.

For, if a state supreme court that overturned prior law could be charged with taking property, the same could be said of the United States Supreme Court when it overturned prior precedent. Yet, how could the United States Supreme Court, in rendering a decision, be guilty of taking property? The Supreme Court would likely do everything possible to avoid the substantive issue—avoid having to rule on the question of whether courts could take property when overruling prior law. Thus, the Ninth Circuit and the United States Supreme Court needed some other way out—some other issue by which to rule in favor of the Hawai'i Supreme Court. In short, this author sought a basis by which to win without exposing the Hawai'i Supreme Court and the jurisprudence of Richardson to an all-or-nothing result.

The answer lay in the Chief Justice's own jurisprudence and his own view that Western concepts of ownership had misinterpreted the trust principle by which Hawai'i's kings and queens held the waters of Hawai'i. The whole claim that the Hawai'i Supreme Court had taken the property of the sugar companies rested on a single assumption: that water could be owned in a corporeal sense. Yet, this was not the Hawaiian view of water. Under the Hawaiian view, no one could "own" water. Thus, no one could "take" water. When Justice Abe in *McBryde v. Robinson* awarded the State "ownership" of the surface waters of the stream, all parties had interpreted the term "ownership" in its Western sense, in the sense used by the Territorial Supreme Court.[136] However, Justice Abe did not mean ownership in a corporeal sense. Justice Abe carefully intimated that water under English common law could not be owned; rather, it was held as publici juris—a public trust.[137]

---

[135] Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

[136] *See* Chang, *Unraveling*, *supra* note 21, at 86-87.

[137] *See* McBryde Sugar Co. v. Robinson, 54 Haw. 174, 187, 504 P.2d 1330, 1339 (1973) ("It appears that this Act was very similar to the English common law rules which had evolved by that time that no one may acquire property to running water in a natural water course; that flowing water was publici juris; and that it was common property to be used by all who had a right of access to it, as usufruct of the water course.").

Moreover, Chief Justice Richardson believed, as did the Hawaiians during the time of the Kingdom, that "ownership" was how Westerners mischaracterized the king's relationship with the lands and waters of Hawai'i.[138] The king was not the owner of the waters of Hawai'i—he was its trustee. Ownership was not righteous. Trusteeship was righteous. Trusteeship recognized both the beneficiaries' interest in the waters and the fiduciary duty of the trustee to the beneficiaries.[139]

Thus, this author raised in oral argument before the Ninth Circuit the possibility that there was a misunderstanding in the use of the term "ownership." The sugar companies used "ownership" to mean ownership and possession of the water in a real, corporeal sense. Suppose, this author asked, the Hawai'i Supreme Court did not use "ownership" in that sense but rather used the term "ownership" as it was used in all jurisdictions outside of Hawai'i—as publici juris. Suppose the Hawai'i Supreme Court meant to merely give the State a public trust over the surface waters. If the latter were true, then there was no taking of property. The assertion of the public trust was akin to an assertion of a police power over the waters. The State always had a police power over its resources; thus, a decision establishing state police power over the surface waters of Hawai'i did not give the State something it did not already have, and no taking had occurred.

This author argued that if there was ambiguity about state law, then the Ninth Circuit should certify questions to the Hawai'i Supreme Court for clarification.[140] The sugar companies were of course reluctant to return to the very court they were suing; nevertheless, the Ninth Circuit ordered certification. Once back in the Hawai'i Supreme Court, the sugar

---

[138] *See* Reppun v. Bd. of Water Supply, 65 Haw. 531, 545, 548, 656 P.2d 57, 67, 69 (1982) (citations omitted) ("In *McBryde* . . . our decision there was premised on the firm conviction that prior courts had largely ignored the mandates of the rulers of the Kingdom and the traditions of the native Hawaiians in their zeal to convert these islands into a manageable western society . . . . We cannot continue to ignore what we firmly believe were fundamental mistakes regarding one of the most precious of our resources. *McBryde* was a necessary and proper step in the rectification of basic misconceptions concerning water 'rights' in Hawaii.").

[139] Chief Justice Richardson was to make clear that the use of the term "ownership" was not meant to refer to ownership in a corporeal sense. This was clearly stated in *Robinson v. Ariyoshi*, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982) ("This is not ownership in the corporeal sense where the State may do with the property as it pleases; rather, we comprehend the nature of such authority to assure the continued existence and beneficial application of the resource for the common good.").

[140] *See* HAW. R. APP. P. 13(a) ("When a federal district or appellate court certifies to the Hawai'i Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawai'i that is determinative of the cause and that there is no clear, controlling precedent in the Hawai'i judicial decisions, the Hawai'i Supreme Court may answer the certified question by written opinion.").

companies moved to recuse Chief Justice Richardson.[141] The Hawai'i Supreme Court denied that motion.[142]

The question of "ownership" was certified, as one of six questions, to the Hawai'i Supreme Court.[143] After lengthy briefing and hearings on the questions, Chief Justice Richardson's answer was clear: corporeal ownership of water was never a Hawaiian concept.[144] Thus, "state ownership" as was awarded to the State by the *McBryde* decision merely meant that the State had a public trust, not ownership in a corporeal sense. Chief Justice Richardson's opinion on the certified questions would be the finest of his legacy. It also provided the basis by which to win before the United States Supreme Court.

If the Hawai'i Supreme Court had merely awarded the State a public trust over the waters and not corporeal ownership, there was no "taking," for nothing had been given to the State of Hawai'i.[145] If nothing had been (judicially) taken, and no action had been taken to enforce the *McBryde*

---

[141] Motion to Recuse the Honorable William S. Richardson at 7, Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982) (No. 8241) ("As detailed herein and in the affidavit submitted herewith the Honorable William S. Richardson appeared as amicus curiae in the Ninth Circuit proceedings in this case. The appellees by their attorneys respectfully submit that Chief Justice Richardson is under a duty to recuse himself from participating in this Court's proceedings on the certified questions.").

[142] *See* Order of the Supreme Court of the State of Hawai'i, Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982) (No. 8241) ("The questions asked by the Ninth Circuit relate in part to the interpretation of a 1973 decision by this court in which the Chief Justice participated. It would seem appropriate for him to continue to sit in the instant proceeding to assist in giving the Ninth Circuit meaningful answers to questions which they have asked this court to answer. If he were to recuse himself, that would seem to undermine or partially frustrate the purposes of the certification by the Ninth Circuit. Therefore, under the circumstances of this proceeding, we find insufficient grounds for recusal of the Chief Justice.").

[143] *See* Robinson v. Ariyoshi, 65 Haw. 641, 647, 658 P.2d 287, 294 (1982) (listing the certified questions).

[144] *Id.* at 667, 658 P.2d at 306.

> A part of Hawaii's case law, however, appears to have departed from this model by treating "surplus water" as the property of a private individual. We do not believe the departure represented "settled" law. Instead, as the following review of the relevant caselaw and its impact demonstrates, Hawaii's law regarding surplus water was at the time of *McBryde* in such a state of flux and confusion that it undoubtedly frustrated those who sought to understand and apply it. The difficulty of insuring an equitable distribution of unevenly flowing waters in the face of competing claims and increasing demands made the delineation and application of a simplistic doctrine of ownership well nigh impossible. *McBryde* was brought to use for decision in this context.

Id. at 667-68, 658 P.2d at 306 (footnote omitted).

[145] *See* Chang, *Unraveling*, *supra* note 21, at 86-87.

decision, then the complaint filed in the federal district court had been premature. The federal case was not ripe—not ready to be heard.[146] The Supreme Court of the United States now had a basis by which to rule and avoid the difficult constitutional question of whether or not the Hawai'i Supreme Court had taken the plaintiffs' property. A ruling based on ripeness would not, in a technical sense, forever foreclose plaintiffs' from seeking relief. The sugar companies could file suit when property had "really" been taken, namely at some future time when the State stopped the sugar companies from withdrawing water.

The intuition that the United States Supreme Court did not want to rule on the constitutional issue of a judicial taking proved accurate.[147] The United States Supreme Court granted certiorari but vacated the injunction against the Hawai'i Supreme Court, remanding to the Ninth Circuit on the basis of a lack of ripeness.[148] A win was a win. If the federal injunction was set aside on any ground, the jurisprudence of Chief Justice Richardson would remain intact. It was much better to win on ripeness grounds than to risk everything on the chance that the United States Supreme Court would hold that federal courts were absolutely free to overrule earlier state court decisions.[149]

The Ninth Circuit remanded to Judge Pence. However, Judge Pence refused to follow the Supreme Court's suggestion that the case was not ripe. Sticking to his guns, Judge Pence argued that the Solicitor General had little knowledge of Hawai'i.[150] Pence even asserted that the Supreme Court

---

[146] *Id.* at 87.

[147] The Supreme Court had never definitively ruled on the issue of whether state courts could take property. *See id.* at 68-71 (discussing Edward A. Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 MICH. L. REV. 30 (1939); Muhlker v. N.Y. & Harlem R.R. Co., 197 U.S. 544 (1905)).

[148] *See* Ariyoshi v. Robinson, 477 U.S. 902 (1986) ("Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)."). *Williamson County* was a ripeness decision.

[149] Thus, in 1986 the United States Supreme Court remanded the case to the Ninth Circuit to examine whether Judge Pence had acted prematurely—whether the case was ripe. The Supreme Court completely avoided the takings claim. The case was not ripe, for no action had been taken on the original 1973 Abe decision. No waters had yet been seized.

[150] Robinson v. Ariyoshi, 676 F. Supp. 1002, 1004 (D. Haw. 1987).

> A review of the record and briefs filed with the Supreme Court shows that less than one month from the time The Court received the Solicitor General's brief, and only 14 days before the end of its 1985 term, it issued the above remand. . . . Since, as indicated, this judge has concluded that it was the brief of the Solicitor General and his uncritical assumption of "unripeness" of this case which triggered The Court's granting certiorari and remand, therefore, this judge in this decision will primarily address the position taken by the Solicitor General in his Amicus Brief.

had acted hastily—being too busy in June to give the case its full attention.[151] Judge Pence reaffirmed his earlier opinion, holding that a taking had occurred regardless of Chief Justice Richardson's answers to the certified questions in *Robinson v. Ariyoshi*. In doing so, Judge Pence vehemently denounced the Richardson Court:

> The Richardson Court's discussion of the takings issue sharply illustrates the obfuscation and evasiveness of the Answers of that Court.[152]
>
> One can only conclude that the above statements were deliberately and grossly misleading (and, if presented in the federal courts, would mandate F. R. Civ. P. Rule 11 sanctions). It was only in this federal court that the plaintiffs had a full and uncircumscribed opportunity to raise the constitutional questions.[153]
>
> When one reviews the 30-printed-page response of the Richardson Court to the six questions, it becomes manifest that it was endeavoring, by misdirection, misinformation, misapplication, and misconstruction of facts and law to save its *McBryde* decisions and avoid the constitutional consequences of its unprecedented radical and violent change in the law on waters in the State of Hawaii. Cutting like a strand of barbed wire in the fabric of the Richardson Court's artfully manufactured Answers is that Court's adamant refusal to modify any rule set forth in McBryde.[154]
>
> *Reppun* clearly and finally implemented *McBryde's* destruction of the value of the water rights owned by several of the small owners, as well as G & R and McBryde, who had purchased the same from owners of such appurtenant rights, when it held that "the riparian water rights . . . cannot be severed from the land in any fashion.["][155]
>
> As repeatedly and vehemently expressed above, after the court of appeals had received the verbose and evasive Answers, it was clear to that court that

---

Id.

[151] *Id.*

This judge draws the conclusion that The Court, "caught in the end of the term crunch," and, having a high regard for all briefs filed by the Solicitor General of the United States, simply followed the Solicitor General's recommendation that the "petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of *Williamson County Regional Planning Commission v. Hamilton Bank*," opting not to decide the case at that time, and thus postponing, indefinitely, the time-consuming effort involved in the ultimate disposition of the case.

Id.

[152] *Id.* at 1017-18.

[153] *Id.* at 1018.

[154] *Id.* at 1019.

[155] *Id.* at 1020.

McBryde I and *II* constituted a final judgment, taking away property of the plaintiffs in violation of their constitutional rights.[156]

Judge Pence did not stop with that opinion. In parallel proceedings he awarded four million dollars in attorneys' fees to the sugar companies.[157]

Predictably, the Ninth Circuit, based on the instructions of the United States Supreme Court, reversed Judge Pence and directed him to dismiss the complaint based on a lack of ripeness.[158] The Ninth Circuit also reversed Judge Pence's ruling on attorneys' fees.[159]

At long last, the jurisprudence of Chief Justice Richardson was safe. It had survived constitutional attack. As a personal matter, Richardson, as chief justice, could not, and never did, publicly speak about the controversy.[160] He preferred to let counsel speak for him in public. Even ten years after leaving the bench, in 1992, he refused to criticize Judge Pence, noting only that Judge Pence had come down "pretty hard" on Justice Abe.[161]

The jurisprudence of Chief Justice Richardson, attacked on a broad front,[162] would ultimately prevail. Today, some twenty years hence, the

---

[156] *Id.*

[157] Robinson v. Ariyoshi, 703 F. Supp. 1412 (D. Haw. 1989).

[158] Robinson v. Ariyoshi, 887 F.2d 215, 216 (9th Cir. 1989), *rev'g* 676 F. Supp. 1002 (D. Haw. 1987).

[159] Robinson v. Ariyoshi, 933 F.2d 781 (9th Cir. 1991), *rev'g and vacating* 703 F. Supp. 1412 (D. Haw. 1989).

[160] DODD, *supra* note 20, at 61. Dodd described the Chief Justice thus:

> Throughout reactive developments stemming from the Supreme Court's reversal of the 1959 decision of the Kauai court, Richardson remained quietly confident. He refused to disqualify himself from the case. He was certain that his Court's McBryde decision was justified. In private conversations with his friends, Richardson expressed feelings of hurt and disappointment at Pence's injunction and statements to the press. It seemed to the Chief Justice that Pence's written and spoken language was injudicious and inappropriate, aimed personally at Richardson himself rather than at the issues in the case.

Id.

[161] Richardson Interview, *supra* note 27 ("Well, I thought he wrote some opinions that used language that he should not have used. And I answered one of them just before I left and that was one on the water rights case. And he was pretty tough on Justice Kazuhisa Abe, and should not have been.").

[162] The first of the shoreline boundary cases, *In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), also raised a firestorm of controversy. Justice Marumoto wrote a particularly pointed dissent to Chief Justice Richardson's opinion. *See id.* at 318-46, 440 P.2d at 78-95 (Marumoto, J., dissenting). Among the bar there were powerful leaders who criticized the *Ashford* decision. J. Russell Cades, a partner in one of the most prominent of Hawai'i's law firms, wrote:

> Again the floodgates of uncertainty have been let open and established precedent is, in effect, overturned. What was believed to be the law of Hawaii virtually since the

jurisprudence of Chief Justice Richardson is alive and thriving. Most important, the "golden age" still lives. In *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, the Hawai'i Supreme Court resurrected section 7-1 and the 1850 statute awarding the people various gathering and access rights.[163]

McBryde, *Sotomura*, and *Zimring* were not radical departures from state law. They were, if anything, the preference of Kingdom law over Territory law. Territorial law was colonial law—an aberration.

The decisions rendered by Chief Justice Richardson were choice of law decisions.[164] Chief Justice Richardson, in overturning territorial precedent, faced a conflict of laws situation. The Supreme Court of the State of Hawai'i faced issues of shoreline boundaries, water rights, and volcanic accretion, and in deciding those cases it had to choose from among competing "jurisdictions"—whether to apply the law of the Kingdom of Hawai'i, the Provisional Government of Hawai'i, the Republic of Hawai'i, or the Territory of Hawai'i.

The court was not making up law. The court was not reaching results which no court had ever reached. The court was choosing law, not making law. In addition, in this sense, as a conflict of laws problem, the appropriate measure of the constitutionality of that choice should be the limitations the United States Supreme Court has imposed on state supreme courts.

In a number of cases, the United States Supreme Court has sought to define the limits by which state supreme courts may choose to apply the law of one jurisdiction over another.[165] There is only one case in which the Supreme Court has held that it is a violation of substantive due process for a court to apply the law of a foreign jurisdiction—and that is where there were no connections or contacts whatsoever between the law to be applied and the

---

> organized government of Hawaii has been established has been cast into darkness. Every private title bordering on the sea, whether registered or unregistered, is affected by this decision, and the titleholders, at least thus far, have had no opportunity to be heard before any deliberative body.

Cades, *supra* note 9, at 65.

[163] *See* Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n, 79 Haw. 425, 903 P.2d 1246 (1995).

[164] *See* LEA BRILMAYER & JACK GOLDSMITH, CONFLICT OF LAWS: CASES AND MATERIALS 341-93 (5th ed. 2002).

[165] Alllstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Watson v. Emp'r Liab. Assurance Corp., 348 U.S. 66 (1954); Skiriotes v. Florida, 313 U.S. 69 (1941); Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal., 294 U.S. 532 (1935); Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

facts of the case.[166] Here, there is clearly a political connection between the common law of statehood and that of the Kingdom. Section 1-1 of the Hawai'i Revised Statutes provides sufficient contacts between the State of Hawai'i and the laws of the Kingdom of Hawai'i.[167]

In each of the critical property cases, the Chief Justice applied the law of the Kingdom of Hawai'i, instead of the law of the Territory or the Republic.[168] Section 1-1 commands the state court to look back to and apply Hawaiian precedent, custom and usage, when and where such sources are available. If, in applying section 1-1, the court chooses to overturn intervening law, it may do so because it has the right and the power to do so. The implications of section 1-1 and footnote 25 of *Robinson v. Ariyoshi* may raise eyebrows, but they are not unconstitutional.

V. CONCLUSION

William S. Richardson had a destiny. By ancestry, experience, and temperament, he would prove to be the right person, at the right place, at the right time. The man was made for the moment, and the moment was made for the man.

The moment was statehood. How would the common law of property evolve? Would the court borrow the common law of the continental United States? Would the court simply persist in applying the property law fashioned during the territorial period? Some believed that statehood, like annexation in 1898, provided a fresh start, a blank slate, by which the Hawai'i Supreme Court would rely solely on English and American common law.

To Chief Justice Richardson, the slate was not blank. Hawai'i was completely unique in American history. Hawai'i had once been a Kingdom, a sovereign and independent nation. Property law was not free to evolve. Rather, Hawai'i had an existing property law rooted in the Kingdom of Hawai'i. In the flush of statehood, some in Hawai'i forgot the significance of the Kingdom as the basis for property law.

Richardson looked to the Kingdom as shaping the law of property; this was the command of section 1-1 of the Hawai'i Revised Statutes. It declared that Hawaiian judicial precedent, tradition, and usage were the law of Hawai'i. Hawaiian law was primary. English and American common law were incorporated only when not in conflict with Hawaiian law. Using section 1-1, Richardson corrected erroneous precedents arising from the

---

[166] *Home Ins. Co.*, 281 U.S. 397.

[167] *See* HAW. REV. STAT. § 1-1 (2009).

[168] *See* cases cited *supra* note 64 and accompanying text.

territorial period and restored the principles and values that underlay the concept of property established during the Kingdom of Hawai'i.

This intuition flowed naturally from his being Hawaiian. The Hawaiian sense of the future is rooted in understanding the past. As one Hawaiian scholar has written about the Hawaiian concept of the present:

> It is interesting to note that in Hawaiian, the past is referred to as Ka wā mamua, or "the time in front or before." Whereas the future, when thought of at all, is Ka wā mahope, or "the time which comes after or behind." It is as if the Hawaiian stands firmly in the present, with his back to the future and his eyes fixed on the past, seeking historical answers to present day dilemmas. Such an orientation is an eminently practical one, for the future is always unknown, whereas the past is rich in glory and knowledge. It also bestows upon us a natural propensity for the study of history.[169]

As William S. Richardson faced the future he looked to the past. He relied on the concepts and practices of ancient Hawaiians to shape modern property law. Life on an island, after all, is cyclical. The waters that wash the shores, the rains that come and go, do so with an inevitable regularity. What was good practice in the past, what worked yesterday as a way of life, would work today. Hawaiians well knew how to live on islands. Their property law was based in principles of communal ownership and stewardship. This was the core of a successful and thriving society. For the Chief Justice, the past was a guide for the future.

---

[169] KAME'ELEIHIWA, *supra* note 59, at 22-23.

Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure

Rachel E. Rosenbloom*

TABLE OF CONTENTS

---

* Assistant Professor of Law, Northeastern University School of Law. Special thanks to Daniel Kanstroom, Nancy Morawetz, Beth Werlin, Trina Realmuto, Rebecca Sharpless, and Mary Holper for comments on earlier drafts of this article; to Jeannie Bowker, Cecilia Candia, Adam Collicelli, Freya Irani, and Kate Richardson for their dedicated research assistance; and to Christopher Leong and the University of Hawai'i Law Review staff for their excellent editorial work. Parts of this article were presented at the 2010 Immigration Law Teacher's Workshop and the 2010 New England Junior Scholars Conference; I am thankful to the participants in those workshops for their helpful comments and suggestions. I was the Supervising Attorney at the Post-Deportation Human Rights Project from 2006 to 2009 and was co-counsel to the petitioners in *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), and *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009). The views expressed in this article are my own.

I. INTRODUCTION

The Department of Homeland Security (DHS) deported nearly 400,000 people in 2010, up from 50,924 in 1995.[1] This steep increase can be traced to two sources: legislative changes in 1996 that transformed the deportation laws[2] and an unprecedented new emphasis on immigration enforcement.[3]

One result of the recent surge in removals is an expanding diaspora of deportees, many of them former longtime legal residents whose familial, cultural, and community ties lie primarily in the United States. Scholars in a variety of disciplines are just beginning to consider the implications of this new migration flow.[4]

This article addresses one particular issue within this emerging field of inquiry: the plight of deportees whose removal orders are without legal basis.[5] My starting point is a pair of Department of Justice (DOJ) regulations that purport to bar immigration judges and the Board of Immigration Appeals (BIA) from correcting errors in removal proceedings once a deportee has left the United States.[6] This so-called "departure bar" on reopening and

---

[1] In 1996, Congress consolidated proceedings formerly known as "exclusion" and "deportation" under the new term "removal." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, § 304(a)(3). In this article, I use the term "deportation" in its colloquial sense to refer collectively to orders of deportation, exclusion, and removal. In fiscal year (FY) 1995, 50,924 people were deported. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2009 YEARBOOK OF IMMIGRATION STATISTICS 95 tbl. 36 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf. The corresponding number for FY 2010 was 392,862. *See* Andrew Becker, *Unusual methods helped ICE break deportation record, e-mails and interviews show*, WASH. POST, Dec. 6, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/05/AR2010120503230.html.

[2] *See infra* notes 56-69 and accompanying text.

[3] *See, e.g.*, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SECURITY, ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012, at 1-2 (2003) (stating the intention of DHS to "remove every removable alien").

[4] *See, e.g.*, Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195 (2007); Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCI. 341 (2010); Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55 (2007); KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY (David C. Brotherton & Philip Kretsedemas eds., 2008); Bernard Headley, *Giving Critical Context to the Deportee Phenomenon*, 33 SOC. JUST. 1 (2006).

[5] For a discussion of types of wrongful deportations, *see infra* Part II.B.

[6] I have chosen to focus on the departure bar because motions to reopen or reconsider are the chief mechanism available to those with final removal orders who seek to vacate the order

reconsideration creates a stark divide between those still on United States soil and those who have crossed the border. For example, a lawful permanent resident who is ordered removed on the basis of a criminal conviction stands a good chance of having her permanent resident status restored if the criminal court vacates the conviction on the merits.[7] However, if she has been physically deported, even just one day before the criminal court acts to vacate the conviction, no such relief is possible. The same holds true when someone is ordered removed on the basis of a conviction that a federal court later rules should not have triggered removal in the first place. Those who happen to be in the United States at the time of the new precedent or have a petition for review pending will be restored to permanent resident status, while others will have no means available to address the error.

After many years of relative obscurity, the departure bar is enjoying newfound attention. A circuit split has emerged over the last few years on both the meaning and validity of the regulations that form the basis for the departure bar, and a petition for certiorari is currently pending before the Supreme Court.[8] The *New York Times* recently ran a front-page story on erroneous deportations,[9] and a coalition of individuals and advocacy groups has filed a

---

on the basis of a change in law, a vacated conviction, or other ground relevant to the types of cases discussed in this article. Although removal orders may be reviewed by a federal appeals court on a petition for review, such petitions are subject to a strict thirty-day filing deadline in addition to numerous other restrictions. *See* Immigration and Nationality Act (INA) § 242, 8 U.S.C. § 1252 (2006). In 2005, Congress eliminated habeas jurisdiction to review orders of removal. *See* REAL ID Act § 106(a)(1)(B), Pub. L. No. 109-13, 119 Stat. 231 (codified at INA § 242(a)(5), 8 U.S.C. § 1252(a)(5) (2006)). Prior to passage of the REAL ID Act, courts generally rejected arguments that deportees were "in custody" for purposes of habeas jurisdiction. *See* Peter Bibring, *Jurisdictional Issues in Post-Removal Habeas Challenges to Orders of Removal*, 17 GEO. IMMIGR. L.J. 135 (2002). *But see* Rivera v. Ashcroft, 394 F.3d 1129, 1137-39 (9th Cir. 2005) (holding deportee to be "in custody" for purposes of habeas jurisdiction where colorable claim to United States citizenship had been stated); Gutierrez v. Gonzales, 125 F. App'x 406 (3d Cir. 2005) (holding deportee to be "in custody" for purposes of habeas jurisdiction where individual seeking relief was erroneously denied the ability to seek a waiver of deportation by immigration judge and BIA, and was unable to have that error reviewed because of the egregious behavior of his counsel).

[7] *See infra* notes 80-84 and accompanying text.

[8] *See* Estalita v. Holder, 382 F. App'x. 711 (10th Cir. 2010), *petition for cert. filed*, 2010 WL 4090962 (U.S. Oct. 15, 2010) (No. 10-517). The Supreme Court recently denied petitions for certiorari in two other cases raising challenges to the validity of the departure bar. *See* Rosillo-Puga v. Holder, 580 F.3d 1147 (10th Cir. 2009), *cert denied*, 131 S. Ct. 502 (2010); Mendiola v. Holder, 585 F.3d 1303 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010).

[9] Nina Bernstein, *For Those Deported, Court Rulings Come Too Late*, N.Y. TIMES, July 21, 2010, at A1. *See also* Rachel E. Rosenbloom, *Bring Back the Wrongly Deported*, NAT'L L.J., Aug. 2, 2010, *available at* http://www.law.com/jsp/article.jsp?id=1202464045164.

petition requesting that the Attorney General eliminate the departure bar through administrative rulemaking.[10]

This article, the first to consider the phenomenon of wrongful deportation and the arguments for and against the departure bar, adds a new dimension to this debate. In line with the pending petitions for certiorari and for administrative rulemaking, I argue that the departure bar should be eliminated. I also, however, introduce a new notion: that amending or invalidating the relevant regulations will not, in itself, provide a meaningful remedy for many of those who are in need of one. In other words, even if the Supreme Court strikes down the departure bar or DOJ amends the regulations, those who have been wrongly deported will still face significant barriers in seeking to return to the United States.

This prediction is based on my analysis of recent BIA adjudications of post-departure motions, which reveals that the BIA has continued to deny relief to deportees even in circuits that have struck down or narrowly interpreted the regulatory departure bar.[11] The BIA has done so, in part, by invoking its authority to ignore judicial interpretations of agency regulations in favor of its own interpretation. More radically, the BIA has continued to use departure-based grounds to deny post-departure motions even where circuit precedent has struck down the regulations entirely. The BIA has, in effect, erected a phantom departure bar that lives on in the absence of a regulatory basis.

It is this phantom bar, rather than the regulatory departure bar, that lies at the heart of my analysis. I argue that any meaningful remedy for those who have been wrongly deported must address not only the relevant regulations but also the deep-seated assumptions that underlie the Board's reluctance to grant post-departure reopening or reconsideration. The aim of this article is to lay the groundwork for doing so, in large part by addressing the arguments offered by the BIA in its 2008 decision in *In re Armendarez-Mendez*.[12] In *Armendarez-Mendez*, the BIA provided a detailed defense of its view that physical removal from the United States is "a transformative event that fundamentally alters the alien's posture under the law."[13] I argue here that this conceptual framework is neither justified under current doctrine nor sound as a matter of policy.

When a deportee leaves the United States, the act of crossing the border signifies a territorial transition from United States soil to foreign territory. I thus begin my inquiry into the meaning of departure by considering what the territorial shift from "inside" to "outside" has meant for non-citizens in other

---

[10] National Immigration Project of the National Lawyers Guild et al., Petition for Rulemaking to Amend Regulations Governing Motions to Reopen and Reconsider Removal Proceedings for Noncitizens who Depart the United States (Aug. 6, 2010) (on file with author).

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

[12] 24 I. & N. Dec. 646 (B.I.A. 2008).

[13] *Id.* at 656.

legal contexts. I look at the way that the Supreme Court has understood departure with regard to the constitutional and statutory rights of noncitizens returning to the United States from trips abroad and at how departure affects the availability of administrative and judicial review of removal orders. These comparisons, I argue, support a flexible approach to departure that is at odds with the BIA's approach in *Armendarez-Mendez*.

At the same time, departure signifies the execution of the removal order.[14] Any inquiry into the meaning of departure must thus contend with what departure means from the perspective of finality–in other words, with what it means to *deport* as well as what it means to *depart*. Looking at the particular ways that the execution of an order functions within the removal context and drawing on analogies from civil and criminal procedure, I argue that finality concerns do not provide a persuasive basis for distinguishing among those with final orders of removal solely on the basis of whether they have left the United States.

The article proceeds in the following steps. Part II provides an overview of the removal process and sketches out several ways in which a wrongful deportation might occur, with a particular focus on lawful permanent residents who have been removed on the basis of erroneous applications of the statutes governing the immigration consequences of crimes. This category of wrongful deportations has become increasingly significant in the wake of a series of Supreme Court cases interpreting the scope of sweeping amendments to the immigration laws enacted in 1996. Part III describes the regulatory basis for the departure bar and the ways in which the BIA has continued to rely on departure-based distinctions even in circuits that have struck down the relevant regulations–giving rise to what I call a "phantom" departure bar.

The remainder of the article presents an argument for eliminating the departure bar in both its formal and phantom forms. In Part IV, I consider departure from the perspective of territoriality, looking at how departure from the United States affects (or, more importantly, does not affect) the rights of noncitizens in other immigration-related contexts. I argue that the variety of approaches to departure that emerge from these examples undermines the BIA's view of departure as inherently transformative and that there is thus little to justify departure-based distinctions in the absence of a congressional mandate.[15] In Part V, I consider the departure bar from the perspective of finality. I argue that the Immigration and Nationality Act (INA)[16] and agency

---

[14] *See infra* note 23 and accompanying text.

[15] Although this article focuses primarily on the lack of justification for the departure bar in the absence of a congressional mandate, it should be noted that even a statutory departure bar might raise due process concerns. *See infra* notes 196-198 and accompanying text.

[16] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)).

regulations provide a host of mechanisms to address finality concerns in the context of reopening and reconsideration and that the imposition of additional limitations on post-departure motions is both unjust and unnecessary. Part VI addresses the prudential concerns that the BIA has cited in defense of the departure bar, including administrative efficiency and the territorial limitations of its own authority. I conclude by arguing that the elimination of the departure bar, whether through judicial invalidation, administrative rulemaking, or even legislation, must be accompanied by additional measures to ensure that all motions to reopen or reconsider are adjudicated under the same substantive standard regardless of territorial location.

II. WRONGFUL DEPORTATION

A. Removal and Its Consequences

Removal proceedings[17] commence with the issuance of a Notice to Appear (NTA) by one of the enforcement agencies within the Department of Homeland Security.[18] A noncitizen who has been issued an NTA then appears before an immigration judge with the opportunity to contest both alienage and deportability and to apply for the forms of relief for which she is eligible.[19]

---

[17] This article focuses on "traditional" removal proceedings conducted by immigration judges pursuant to INA § 240, 8 U.S.C. § 1229a (2006). Although removals of lawful permanent residents (LPRs) (the chief focus of this article) generally occur through such proceedings, it should be noted that a growing number of removals take place through other procedures. *See* INA § 235(b), 8 U.S.C. § 1225(b) (2006) (expedited removal); INA § 238(b), 8 U.S.C. § 1228(b) (2006) (administrative removal); INA § 238(c), 8 U.S.C. § 1228(c) (2006) (judicial removal); INA § 240(d), 8 U.S.C. § 1229a(d) (2006) (stipulated order of removal); INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2006) (reinstatement of removal following reentry). These "fast-track" procedures, which bypass the immigration courts and include fewer procedural safeguards than traditional removal proceedings, raise additional issues outside the scope of the present article. For a discussion of wrongful deportations that occur through expedited removal, *see* Michele R. Pistone & John J. Hoeffner, *Rules are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167 (2006) (estimating that between 1996 and 2005, approximately 20,000 bona fide asylum seekers were wrongly turned away from United States borders).

[18] On March 1, 2003, the Immigration and Naturalization Service (INS) was dissolved. The responsibilities of the INS were divided among three separate agencies within the newly created Department of Homeland Security: Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[19] For LPRs facing removal, the most significant form of relief is cancellation of removal, which results in the termination of the proceedings and the continuation of permanent resident status. *See* INA § 240A(a), 8 U.S.C. § 1229b(a) (2006).

Although the right to counsel in removal proceedings is guaranteed by statute,[20] counsel is not provided by the government, and the majority of respondents are pro se.[21]

A removal order becomes administratively final upon decision of the Board of Immigration Appeals or, absent appeal, upon the expiration of the deadline for filing an appeal.[22] At the moment that the person subject to the order physically departs the United States, the order is deemed executed.[23]

Removal carries with it a number of lasting consequences. A final order of removal deprives a noncitizen of the lawful immigration status he or she may have previously enjoyed.[24] In addition, departure from the United States while subject to an order of removal triggers future grounds of inadmissibility ranging from a five-year bar to lifetime inadmissibility.[25] As discussed in more detail below, departure also cuts off the authority of an immigration judge or the BIA to correct errors in the proceeding or to take account of changed circumstances, except in circuits that have invalidated the relevant regulations.[26]

The continuing effects of a removal order extend beyond inadmissibility and the departure bar. Under federal law, illegal re-entry following removal is a felony offense, and penalties range from two to twenty years of confinement for those who enter, attempt to enter, or are found in the United States following removal without prior agency consent to reapply for admission.[27]

---

[20] *See* INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2006); INA § 292, 8 U.S.C. § 1362 (2006).

[21] In proceedings completed during FY 2009, thirty-nine percent of respondents were represented by counsel. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEPT. OF JUSTICE, FY 2009 STATISTICAL YEAR BOOK, at G1 (2010), *available at* http://www.justice.gov/eoir/statspub/fy09syb.pdf.

[22] *See* INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47)(B) (2006); 8 C.F.R. §§ 1003.3, 1003.39 (2010).

[23] *See* Stone v. INS, 514 U.S. 386, 399 (1995); Mrvica v. Esperdy, 376 U.S. 560, 563-64 (1964). INA § 101(g), 8 U.S.C. § 1101(g) (2006), provides that "any alien ordered deported or removed . . . who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed."

[24] *See* INA § 241(a)(1), 8 U.S.C. § 1231(a)(1) (2006) (mandating removal within 90 days of date removal order becomes administratively final). Although INA § 241(a)(7), 8 U.S.C. § 1231(a)(7) (2006), provides employment authorization for those whose removals cannot be carried out, the statute does not provide for any other status for those with final orders of removal.

[25] *See* INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2006).

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

[27] *See* INA § 276(a)-(b), 8 U.S.C. § 1326(a)-(b) (2006).

B. Errors in Removal Proceedings

Josue Leocal came to the United States from Haiti in 1980, at the age of 24, and subsequently became a lawful permanent resident.[28] Two decades after he arrived in the United States, he was involved in a car accident in which two individuals were injured.[29] He pleaded guilty to two counts of driving under the influence of alcohol and causing serious bodily injury and was sentenced to two and a half years in prison.[30] Upon his release in April 2002, he was taken into immigration custody and placed in removal proceedings on the basis of the conviction.[31]

Leocal's case raised a key question about the scope of the INA provisions governing the immigration consequences of crimes. An immigration judge ruled that Leocal had been convicted of an "aggravated felony,"[32] and that he was therefore subject to mandatory deportation without the right to apply for discretionary relief.[33] The BIA affirmed the immigration judge's decision, and Leocal filed a petition for review in the Eleventh Circuit.[34] While the petition was pending, Leocal was deported to Haiti,[35] leaving behind his wife and four children, all United States citizens.[36] Leocal lost at the Eleventh Circuit but ultimately prevailed in 2004 when a unanimous Supreme Court held in *Leocal*

---

[28] Leocal v. Ashcroft, 543 U.S. 1, 3-4 (2004).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006) (defining "aggravated felony"). Leocal's offense was deemed to be an aggravated felony under § 101(a)(43)(F) ("[A] crime of violence (as defined in section 16 of title 18 [of the United States Code]) for which the term of imprisonment is at least one year[.]"). *Leocal*, 543 U.S. at 3-4.

[33] *Leocal*, 543 U.S. at 3. An aggravated felony conviction renders a lawful permanent resident ineligible for several different forms of relief from removal. *See* INA §240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2006) (barring those with aggravated felonies from cancellation of removal); INA § 212(h), 8 U.S.C. § 1182(h) (2006) (barring those with aggravated felonies from waivers of criminal grounds of inadmissibility); INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2006) (barring those who have been convicted of a "particularly serious crime" from asylum); INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (2006) (deeming "an alien . . . convicted of an aggravated felony . . . to have been convicted of a particularly serious crime").

[34] *Leocal*, 543 U.S. at 5.

[35] *Id.*

[36] Brief of Petitioner-Appellant at 2, Leocal v. Ashcroft, 543 U.S. 1 (2004) (No. 03-583).

v. Ashcroft that his conviction was not an aggravated felony.[37] By that point, he had been in Haiti for two years.[38]

Leocal was, in short, removed on the basis of a conviction that did not render him deportable. His return to the United States is the exception rather than the rule.[39] If the Court had denied Leocal's petition for certiorari and instead decided the DUI question in another case the following year, Leocal would, like the vast majority of people in such circumstances, be unable to return home to his family in the United States. As the following section explains, DOJ regulations provide that a motion to reopen or reconsider "shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States."[40]

The effect of the departure bar is illustrated by two cases with similar facts but contrasting outcomes. Manuel Navarro-Miranda was ordered removed by an immigration judge in Texas in January 1999 on the basis of a DUI conviction and was physically removed to Mexico following the October 1999 denial of his administrative appeal.[41] Less than two years later, the Fifth Circuit held that a DUI conviction is not an aggravated felony.[42] Within a few months of the Fifth Circuit's decision, Navarro-Miranda sought reopening from the BIA.[43] The BIA denied the motion on jurisdictional grounds due to his departure from the United States, and the Fifth Circuit affirmed.[44]

---

[37] *Leocal*, 543 U.S. at 11-13. Leocal was charged with deportability solely on the ground of an aggravated felony conviction. *Id.* at 4-5. Thus, the Court's holding meant that he was no longer subject to removal.

[38] Leocal was removed to Haiti on November 18, 2002. *See* Brief of Petitioner-Appellant at 2, Leocal v. Ashcroft, 543 U.S. 1 (2004) (No. 03-583). The Supreme Court issued its decision on November 9, 2004. *See Leocal*, 543 U.S. at 1.

[39] Leocal's case stands out from others in several respects. First, he not only filed an administrative appeal but also sought judicial review of the BIA's decision and then petitioned for certiorari after losing at the Court of Appeals. Many others, lacking access to legal representation and facing the prospect of prolonged detention as a condition for pursuing their rights, have given up meritorious appeals. *See infra* notes 62-63 and accompanying text. In addition, the Supreme Court granted certiorari in his case, which it does in only a tiny fraction of the cases it receives every year. *See The Supreme Court, 2008 Term: The Statistics*, 123 HARV. L. REV. 382, 389 (2009) (noting that only 87 petitions for certiorari were granted out of 7,868 filed for the October 2008 Term).

[40] 8 C.F.R. §§ 1003.2(d) (with regard to BIA), 1003.23(b)(1) (2010) (with regard to immigration judge). This regulation has been struck down in several circuits. *See infra* Part III.B.

[41] *See* Navarro-Miranda v. Ashcroft, 330 F.3d 672, 675-76 (5th Cir. 2003); *In re* Navarro-Miranda, No. A41 310 520, 2007 WL 4699892 (B.I.A. Dec. 7, 2007) (recounting procedural history of 2001 motion to reopen).

[42] *See* United States v. Chapa-Garza, 243 F.3d 921, 926-927 (5th Cir. 2001).

[43] Chapa-Garza was decided on March 1, 2001. *See id.* at 921. The BIA issued its decision

Like Navarro-Miranda, Juan Francisco Gomez was also ordered removed by an immigration judge in Texas in 1999 on the basis of a DUI conviction and was unsuccessful in his appeal to the BIA.[45] Unlike Navarro-Miranda, however, he was not physically removed, for reasons that are not entirely clear from the record.[46] In 2008, nine years after his removal order became final and seven years after the Fifth Circuit held that a DUI conviction is not an aggravated felony, Gomez sought reopening.[47] The BIA noted the untimeliness of the motion, but found that the Fifth Circuit's 2001 decision constituted exceptional circumstances warranting reopening.[48] Citing the fact that "the basis for the respondent's order of removal and the denial of relief no longer exists," the BIA vacated the removal order and terminated the removal proceeding, restoring Gomez to his status as a lawful permanent resident.[49] The BIA noted in its decision that this action was possible only because Gomez remained on United States soil.[50]

It would be difficult to arrive at an estimate of the overall number of former permanent residents who, like Navarro-Miranda, are barred from the United States as a result of removal orders that have no legal basis.[51] One can begin,

---

on Navarro-Miranda's motion to reopen on January 25, 2002, *see In re* Navarro-Miranda, No. A41 310 520, 2007 WL 4699892 (B.I.A. Dec. 7, 2007), which means that Navarro-Miranda must have filed his motion prior to that date.

[44] *Navarro-Miranda*, 330 F.3d at 675-76.

[45] *See In re* Gomez, No. A91 200 176, 2008 WL 2783059 (B.I.A. June 11, 2008).

[46] *Id.* at *1. The decision does not indicate why removal was not carried out. Gomez was taken into immigration custody following the completion of his criminal sentence in December 2000, but was released in May 2001. *Id.* He was subsequently incarcerated again from 2003 to 2008; although Immigration and Customs Enforcement placed a detainer on him during his incarceration, the detainer was lifted in 2006 and no further attempts were made to remove him. *Id.* He sought reopening after being released on parole from his criminal sentence in 2008. *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] A first step in making such an estimate would be to calculate the number of permanent residents removed on criminal grounds and the nature of the convictions at issue in their removals. Human Rights Watch, together with the Post-Deportation Human Rights Project at Boston College, filed a request under the Freedom of Information Act in 2006 for ICE data regarding removals based on criminal convictions. The agency's lack of response to this request is detailed in Appendix: A History of Human Rights Watch's FOIA Request for Deportation Data, *in* HUMAN RIGHTS WATCH, FORCED APART (2007), *available at* http://www.hrw.org/en/node/10856/section/10 [hereinafter FORCED APART]. After two and a half years, the agency finally responded to a revised request with records of 897,099 people who were removed on criminal grounds between April 1, 1997 and August 1, 2007. *See* Analyzing the ICE Data Set, *in* HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS) (2009), *available at* http://www.hrw.org/en/node/82159/section/6 [hereinafter FORCED APART (BY THE NUMBERS)]. In its analysis of this data set, Human Rights Watch found significant gaps in the

however, by considering the potential scope of just the one question of statutory interpretation at issue in his case: the erroneous designation of DUI convictions as aggravated felonies. In 2001, the year that the Fifth Circuit put a stop to such removals,[52] a spokesperson for the former Immigration and Naturalization Service (INS) stated that 400 to 500 noncitizens were being deported annually from the INS Central Region, comprising eighteen states, on the basis of such convictions.[53] Removals based on DUI convictions continued in the Eighth and Eleventh Circuits until the Supreme Court decided *Leocal* in 2004.[54] It is quite possible that several thousand people were removed on the basis of DUI convictions between April 1997, when the new aggravated felony definition went into effect, and 2004, when *Leocal* was decided.

Wrongful deportations are not a new phenomenon.[55] However, it is likely that they have become more frequent in recent years. Beyond the rise in errors that would presumably accompany any surge in immigration enforcement, there are particular characteristics of recent removals that may make them more prone to error than the deportations of years past. Congress enacted substantial changes to the INA in 1996 through passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)[56] and the Illegal Immigration

---

data. *Id.* Immigration status was not indicated for 7% of the individuals, and the nature of the criminal conviction that formed the basis for removal was not indicated for 44% of the individuals. *Id.*

[52] *See* United States v. Chapa-Garza, 243 F.3d 921, 926-927 (5th Cir. 2001).

[53] *See* Edward Hegstrom, *INS Ignores Ruling, Will Deport DWI Violators*, HOUS. CHRONICLE, Mar. 3, 2001 at A1. The Central Region of the former INS comprised eighteen states stretching from New Mexico to the Dakotas and Wisconsin to Texas. *See* Teresa Puente, *Congressmen Oppose INS 'Hubs,'* CHI. TRIBUNE, Apr. 16, 1999, at N6 (describing geographic span of Central Region). Another indication of the scope of these removals is the fact that in one three-day period in 1998, in a sweep dubbed "Operation Last Call," the INS rounded up over 500 noncitizens with DUI convictions in Texas and placed them in removal proceedings. *See Texas drunken drivers arrested for deportation 537 legal immigrants with 3 convictions are rounded up by INS*, BALT. SUN, Sept. 4, 1998, at 4A. *See also* Maro Robbins, *Judge halts DWI deportation; The decision to dismiss the case fuels controversy over removing convicted immigrants*, SAN ANTONIO EXPRESS-NEWS, Apr. 5, 2001, at 1B. It should be noted that some of those deported for DUI convictions may have been deportable on other grounds, including lack of lawful status.

[54] *See* Leocal v. Ashcroft, 543 U.S. 1, 6 (2004) (discussing circuit split).

[55] *See, e.g.*, *In re* Farinas, 12 I. & N. Dec. 467 (B.I.A. 1967); *In re* Malone, 11 I. & N. Dec. 730 (B.I.A. 1966). *See also In re* S-----, 3 I. & N. Dec. 83 (B.I.A. 1947) (citing several unpublished decisions in which deportees were successful in collateral challenges to prior orders of deportation or exclusion). For an account of the wrongful deportation of Mexican-Americans in the 1930s and 40s, *see* Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1 (2005).

[56] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 40, 42, and 50 U.S.C.).

Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[57] greatly expanding the grounds of deportability and reducing the availability of discretionary relief.[58] The 1996 legislation was hastily drafted and included numerous ambiguities.[59] In the wake of its passage, government attorneys aggressively pursued broad interpretations of the new laws[60]—interpretations that in many cases were later rejected by the courts.[61] In addition, the 1996 amendments created new obstacles to legal representation[62] and discouraged

---

[57] Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C).

[58] Together, AEDPA and IIRIRA transformed the statutory scheme governing removal on the basis of criminal convictions. One of the most significant changes was the expansion of the scope of the definition of "aggravated felony," a term of art under the INA. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006). The definition now encompasses many offenses classified as misdemeanors under state law. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-43 (2000).

[59] *See* FORCED APART, *supra* note 51, at Part IV (discussing drafting ambiguities in IIRIRA and AEDPA). AEDPA has been widely criticized for its poor drafting by commentators in the field of criminal procedure. *See* John H. Blume, *AEDPA: The 'Hype' and the 'Bite,'* 91 CORNELL L. REV. 259 (2006) (noting that AEDPA was "poorly drafted" and that "the use of new statutory language combined with the speed with which Congress enacted AEDPA left the Supreme Court, and lower federal courts, with little guidance regarding Congress's intent"); LARRY YACKLE, FEDERAL COURTS: HABEAS CORPUS 57 (2003) ("AEDPA is notorious for its poor drafting. The Act is replete with vague and ambiguous language, apparent inconsistency, and plain bad grammar."). *See also* Lindh v. Murphy, 531 U.S. 320, 336 (1997) ("[I]n a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting."). With regard to IIRIRA, *see* 142 Cong. Rec. S11514-01, 1996 WL 565566 (Sept. 27, 1996) (statement of Sen. Robert Graham) ("[W]e have a product today which has not had the kind of thoughtful dialog and debate which we associate with a conference report which is presented to the US Senate for final consideration.").

[60] *See* Hegstrom, *supra* note 53 (paraphrasing an INS spokesperson, in the wake of the Fifth Circuit's decision holding that DUI convictions are not aggravated felonies, as stating that "instead of changing its policy based on the 5th Circuit ruling, the agency will wait until the issue works its way down to immigration judges. Even then, the INS will likely appeal any ruling not in its favor.").

[61] Immigrants challenging the government's interpretation of the aggravated felony definition have won several decisive victories at the Supreme Court. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (7 justices in the majority, 2 concurring); Lopez v. Gonzales, 549 U.S. 47 (2006) (8-1 decision); Leocal v. Ashcroft, 543 U.S. 1 (2004) (unanimous).

[62] Chief among these obstacles is the mandatory detention provision added in 1996. *See* INA § 236(c), 8 U.S.C. § 1226 (2006). Detention, and in particular the transfer of detainees to remote locations far from where they were taken into custody, creates significant barriers to representation. *See* HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 4 (2009), http://www.hrw.org/sites/default/files/reports/us1209web.pdf (noting that "challenges inherent in conducting legal representation across thousands of miles can completely sever the attorney-client relationship.") [hereinafter LOCKED UP FAR AWAY]; *see also* Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29

those in removal proceedings from appealing adverse decisions,[63] while a subsequent reorganization of the BIA greatly reduced its ability to function as an administrative safeguard.[64]

Navarro-Miranda provides an example of one type of wrongful deportation: removal on the basis of a conviction that should not have triggered grounds of inadmissibility or deportability.[65] A related scenario involves someone who

---

CONN. L. REV. 1647, 1664-65 (1997).

[63] For an extreme example of the effect that detention can have on a respondent in removal proceedings, *see In re* Cortez-Rodriguez, No. A37 200 195, 2006 WL 2427914 (B.I.A. July 21, 2006). Cortez-Rodriguez, a lawful permanent resident who faced removal on the basis of criminal convictions, appeared pro se in his removal proceeding. *Id.* at *1. The immigration judge initially found that Cortez-Rodriguez was ineligible for cancellation of removal due to not having the requisite length of residence in the United States. *Id.* The BIA decision (which concerned a post-departure appeal by Cortez-Rodriguez) notes that "[t]he Immigration Judge fully explained to the respondent the process for filing an appeal with the Board" but that "[w]hen the respondent learned that he was going to be held in custody, he decided to waive his right to appeal to the Board." *Id.* (citing hearing transcript). Subsequently, the immigration judge realized that he had made an error and called Cortez-Rodriguez back, explaining that he was, in fact, eligible to apply for cancellation of removal. *Id.* The BIA decision notes that Cortez-Rodriguez "then asked whether he would remain in detention until the cancellation heating. When told that he would remain incarcerated, the respondent decided to waive his right to submit a cancellation application." *Id.* (citing transcript). Another example, described in a newspaper article, is "Carlos Roybal," a former detainee who explained to the reporter that "[a]fter five months at the Port Isabel Detention Center near Brownsville and the South Texas Detention Center in Pearsall, he gave in. 'I had no shoes for two-and-a-half weeks, and the food was so awful I wouldn't even feed it to a dog,' he says. 'They just wore you down.'" Melissa del Bosque, *Deportation Madness*, TEX. OBSERVER, July 21, 2010, *available at* http://www.texasobserver.org/cover-story/deportation-madness. The individual profiled in the article was deemed an aggravated felon on the basis of a conviction for possession of half of a marijuana cigarette. *Id.* The immigration judge made the determination based on the fact that the conviction was a second drug possession offense. *Id.* It is now clear, under the Supreme Court's decision in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), that someone in these circumstances should have been deemed eligible for relief.

[64] Changes to the BIA implemented by Attorney General John Ashcroft in 2002 have been subject to widespread criticism. *See* Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1657-1665 (2010); Susan Benesch, *Due Process and Decision-Making in U.S. Immigration Adjudication*, 59 ADMIN. L. REV. 557 (2007); Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 417-423 (2007); Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481 (2005).

[65] An LPR apprehended within the United States will be placed in removal proceedings on grounds of deportability, contained in INA § 237(a), 8 U.S.C. § 1227(a) (2006). If placed in removal proceedings upon return from a trip abroad, an LPR will be subject to removal on grounds of inadmissibility, contained in INA § 212(a), 8 U.S.C. 1182(a) (2006). The criminal grounds included in sections 237(a)(2) and 212(a)(2) overlap to a large extent but are not identical.

falls within the grounds of deportability or inadmissibility but is erroneously denied the opportunity to apply for relief from removal.[66] This category includes those who have convictions that predate the effective date of the 1996 amendments and who were denied the opportunity to apply for relief under the erroneous conclusion that the 1996 amendments applied retroactively to old convictions.[67] It also includes those who were barred from applying for relief because their convictions were erroneously deemed to be aggravated felonies (for example, those with certain types of drug possession convictions).[68] Fourteen years after IIRIRA went into effect, the courts are still answering

---

[66] For purposes of the removals at issue in this article, the most significant form of relief is cancellation of removal, which is available to lawful permanent residents who have had LPR status for at least five years and have resided in the United States continuously for at least seven years. *See* INA § 240A(a), 8 U.S.C. § 1229b(a) (2006). Those with aggravated felony convictions are barred from seeking cancellation of removal. *See* INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2006). Thus, it is possible that an immigration judge might make an accurate determination that an LPR is removable, but deny the person an opportunity to apply for relief based on an erroneous determination that the conviction in question is an aggravated felony.

[67] Former section 212(c) provided a means for immigration judges to take into account family ties, rehabilitation, and other equities in deciding whether to grant relief to longtime lawful permanent residents facing deportation. *See* INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996). The Supreme Court ruled in 2001 that those who pleaded guilty to criminal charges prior to the 1996 amendments remain eligible to apply for the waiver if it would have been available at the time of the plea. *See* INS v. St. Cyr, 533 U.S. 289, 326 (2001). In *St. Cyr*, the Court cited statistics indicating that in the years 1989-1995, 51.5% of applications for 212(c) relief were granted. *Id.* at 296 n.5 (citing Julie K. Rannik, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. MIAMI INTER-AM. L. REV. 123, 150 n.80 (1996)). The Court noted the likelihood that an even higher proportion of such applications would be granted post-1996, in light of the fact that many individuals with minor or old convictions were now being placed in removal proceedings. *Id.* at 296 n.6.

[68] In *Lopez v. Gonzales*, the Court held that a first-time conviction for simple drug possession is not an aggravated felony even if classed as a felony under state law. 549 U.S. 47, 60 (2006). In *Carachuri-Rosendo v. Holder*, the Court held that a second or subsequent conviction for simple possession of a controlled substance does not constitute an aggravated felony unless charged as a recidivist offense. 130 S. Ct. 2577, 2589 (2010). Although such convictions will render an LPR deportable, they will not bar her from cancellation of removal. *See supra* note 66. An example of an LPR removed on the basis of an erroneous determination of ineligibility for relief is Ruben Ovalles, who was convicted of attempted possession of a controlled substance and sentenced to probation. *See* Ovalles v. Holder, 577 F.3d 288 (5th Cir. 2009) (affirming BIA denial of post-departure motion to reopen). An immigration judge found Ovalles subject to removal under the controlled substance ground of deportability, but granted him cancellation of removal. *Id.* at 291. The BIA reversed, holding that the conviction, although it was a first-time simple possession conviction that carried no jail time, was an aggravated felony. *Id.* Mr. Ovalles was removed in 2004. *Id.* In 2006, the Supreme Court held in *Lopez* that a first-time drug possession conviction is not an aggravated felony. Thus, the immigration judge had been correct in granting Mr. Ovalles relief, and the BIA's reversal was based on an erroneous interpretation. For an account of three other individuals erroneously found ineligible for relief on the basis of drug convictions, *see* Bernstein, *supra* note 9.

questions about the scope of the 1996 amendments,[69] and thus new categories of wrongful deportations may well emerge in the future.

Other scenarios that might be categorized as wrongful deportations include a removal order predicated on a criminal conviction that has since been vacated;[70] an in absentia removal order where the respondent's absence was due to lack of notice of the hearing or exceptional circumstances; and a removal order based on a proceeding in which the respondent was prejudiced by ineffective assistance of counsel.[71]

III. THE DEPARTURE BAR ON REOPENING AND RECONSIDERATION

A. Motions to Reopen and Reconsider

Motions to reopen and to reconsider (MTRs) provide an important means of correcting errors in removal proceedings, and the only available means of taking into account changed circumstances or new legal precedent. A person subject to a final order of removal may seek reopening or reconsideration from the forum that last had jurisdiction over the case—either the immigration judge or the BIA.[72] Motions to reopen address new facts unavailable in the original proceeding,[73] while motions for reconsideration address legal or factual errors

---

[69] A recent example is *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, decided in June 2010.

[70] For example, Fredy Pena Muriel, a lawful permanent resident since the age of one, was deemed an aggravated felon and deported to Bolivia based on a domestic assault conviction for which he had received a suspended sentence. *See* Pena-Muriel v. Gonzales, 489 F.3d 438, 440 (1st Cir. 2007). The conviction was later vacated. *Id.* However, Pena-Muriel was barred from seeking reopening of the removal proceeding due to his departure from the United States. *Id.* (denying petition for review of the BIA's denial of his motion to reopen). The Supreme Court's recent decision in *Padilla v. Kentucky* may result in the vacatur of many convictions that resulted in removal. *See* Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (holding that criminal defendants may bring ineffective assistance of counsel claims based on counsel's failure to properly advise on immigration consequences of guilty plea).

[71] There are undoubtedly other scenarios that may fit within the rubric of wrongful deportation, some of which raise additional issues that are beyond the scope of this article. One such scenario would be an asylum-seeker who is erroneously denied an individualized consideration of the merits of her claim. *See* Pistone & Hoeffner, *supra* note 17.

[72] The BIA's authority to reopen removal proceedings and reconsider a prior decision is governed by 8 C.F.R. § 1003.2 (2010). The authority of immigration judges to do so is governed by 8 C.F.R. § 1003.23 (2010). Since passage of IIRIRA, motions to reopen and reconsider have also been governed by statute. *See* INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2006) (motions to reopen); INA § 240(c)(6)(C), 8 U.S.C. § 1229(c)(6)(C) (2006) (motions to reconsider).

[73] A motion to reopen is based on "facts or evidence not available at the time of the original decision." Patel v. Ashcroft, 378 F.3d 610, 612 (7th Cir. 2004). It must be supported by affidavits or other evidence, and must establish that the evidence is material, was unavailable at

in the original proceeding.[74] The Supreme Court has recognized that motions to reopen are "an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings."[75]

Prior to the passage of IIRIRA, Congress and the courts expressed anxiety on several occasions about the potential for abuse of such motions by those seeking to delay their departure.[76] These concerns led to the promulgation of regulations imposing new time and number limits on MTRs.[77] These limits were incorporated into the statute in 1996, when Congress codified for the first time the right to file such motions.[78] In the post-IIRIRA era, a person who has

---

the time of original hearing, and could not have been discovered or presented at the original hearing. *See* INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2006); 8 C.F.R. § 1003.2(c)(1) (2010); *see also* Kaur v. BIA, 413 F.3d 232, 234 (2d Cir. 2005).

[74] A motion to reconsider asks that a decision be reexamined "in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case that was overlooked earlier," including errors of law or fact in the previous order. *In re* Ramos, 23 I. & N. Dec. 336, 338 (B.I.A. 2002). *See* INA § 240(c)(6)(C), 8 U.S.C. § 1229a(c)(6)(C) (2006); 8 C.F.R. § 1003.2(b)(1) (2008).

[75] Kucana v. Holder, 130 S. Ct. 827, 834 (2010) (quoting Dada v. Mukasey, 554 U.S. 1, 18 (2008)) (internal quotation marks omitted).

[76] *See* INS v. Abudu, 485 U.S. 94, 107 (1988) ("There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases."); INS v. Doherty, 502 U.S. 314, 323 (1992) ("This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.") (citing INS v. Rios-Pineda, 471 U.S. 444, 450 (1985)). In the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, Congress directed the Attorney General to "issue regulations with respect to . . . the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations [should] include a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions." *Id.* § 545(d)(1), 104 Stat. at 5066. Congress issued this directive in order to "reduce or eliminate . . . abuses" of regulations that, at that time, permitted respondents to file an unlimited number of motions to reopen without any limitations period. *See* Stone v. INS, 514 U.S. 386, 400 (1995). There is evidence that the agency did not share this concern. *See* Zhang v. Holder, 617 F.3d 650, 657 (2d Cir. 2010) (quoting Dada v. Mukasey, 554 U.S. 1, 13 (2008)) ("Although the Attorney General expressed doubt about the need to impose such limitations because there was 'little evidence of abuse,' she ultimately promulgated regulations that, subject to certain exceptions, permitted an alien to 'file one motion to reopen within 90 days.'"). For a discussion of the Court's continuing preoccupation with the use of dilatory tactics by noncitizens facing deportation, *see* Peter J. Spiro, *Leave for Appeal: Departure as a Requirement for Review of Deportation Orders*, 25 SAN DIEGO L. REV. 281 (1988); Daniel Kanstroom, *The Long, Complex, and Futile Deportation Saga of Carlos Marcello, in* IMMIGRATION STORIES 113 (David A. Martin & Peter H. Schuck eds., 2005).

[77] *See Stone*, 514 U.S. at 400 (discussing congressional directive to agency to promulgate regulations).

[78] *See* INA § 240(c)(6)(B), 8 U.S.C. § 1229(c)(6)(B) (2006) (motion to reconsider); INA § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i) (2006) (motion to reopen).

been ordered removed has the statutory right to file one motion to reopen within ninety days of the decision by the immigration judge or the BIA, and one motion to reconsider within thirty days.[79]

Although MTRs are subject to time and number limits, there are circumstances in which a person ordered removed may have hope of vacating the removal order regardless of timeliness or of how many prior motions have been filed. The INA carves out a number of exceptions to time and number limits,[80] and DOJ regulations provide that immigration judges and the BIA have sua sponte authority to reopen or reconsider any case in which they have made a decision "at any time."[81] In addition, several circuits have held that deadlines for MTRs are subject to equitable tolling.[82] Between statutory exceptions, equitable tolling, and the established practice of the immigration courts, untimely MTRs are commonly granted in a number of circumstances that are relevant to those who have been wrongly deported, including vacatur of a conviction that formed the basis for the removal order[83] and a subsequent change in law.[84]

B. The Regulatory Departure Bar

While time and number limits may yield under compelling circumstances, the obstacle posed by departure from the United States has proven to be far less

---

[79] *See* INA § 240(c)(6)(B), 8 U.S.C. § 1229(c)(6)(B) (2006) (establishing thirty-day deadline for filing motion to reconsider); INA § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i) (2006) (establishing ninety-day deadline for motion to reopen).

[80] *See, e.g.*, INA § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii) (2006) (allowing motion to reopen asylum application based on changed country conditions to be filed at any time); INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv) (2006) (allowing battered spouses and children seeking certain forms of relief under the Violence Against Women Act to file motion to reopen within one year, or at any time under enumerated circumstances); INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) (2006) (allowing motion to reopen in absentia proceeding to be filed at any time if the basis for reopening is lack of notice of the hearing, or confinement in federal or state custody and the failure to appear was no fault of the person subject to the order; or within 180 days if basis for reopening is exceptional circumstances).

[81] 8 C.F.R. §§ 1003.23(b)(1), 1003.2 (2010). The immigration judge may reopen only if jurisdiction has not vested with the BIA. 8 C.F.R. § 1003.23(b)(1) (2010).

[82] *See* Pervaiz v. Gonzales, 405 F.3d 488 (7th Cir. 2005); Borges v. Gonzales, 402 F.3d 398 (3d Cir. 2005); Harchenko v. INS, 379 F.3d 405 (6th Cir. 2004); Riley v. INS, 310 F.3d 1253 (10th Cir. 2002); Socop-Gonzalez v. INS, 272 F.3d 1176 (9th Cir. 2001); Iavorski v. INS, 232 F.3d 124 (2d Cir. 2000). *But see* Anin v. Reno, 188 F.3d 1273 (11th Cir. 1999).

[83] *See* Cruz v. Attorney Gen., 452 F.3d 240, 242 (3d Cir. 2006) (observing that "[i]n cases where the BIA has found an alien's conviction vacated for purposes of the INA, it has routinely considered this fact to be an 'exceptional situation' that provides the basis for granting a motion to reopen sua sponte, without regard to the timing of the filing").

[84] *See In re* Vasquez-Muniz, 23 I. & N. Dec. 207, 208 (B.I.A. 2002).

flexible. Two regulations, 8 C.F.R. § 1003.23(b)(1) and 8 C.F.R. § 1003.2(d), form the basis of the departure bar. They apply respectively to the jurisdiction of immigration judges and the BIA and contain identical language providing that a motion to reopen or reconsider "shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States."[85] The regulations also provide that departure from the United States during the pendency of such a motion shall constitute a withdrawal of the motion.[86]

From the inception of the departure bar in 1952, the BIA has interpreted it as jurisdictional.[87] In 2008, in response to the invalidation of the departure bar in

---

[85] 8 C.F.R. §§ 1003.2(d) (with regard to the BIA), 1003.23(b)(1) (2010) (with regard to an immigration judge). The departure bar first entered the regulations in 1952. *See* 17 Fed. Reg. 11469, 11475 (Dec. 19, 1952) (codified at 8 C.F.R. § 6.2). In 1961, following amendments to the INA, the DOJ re-promulgated the departure bar. *See* 27 Fed. Reg. 96, 96-97 (January 5, 1962) (redesignating 8 C.F.R. § 6.2 as 8 C.F.R. § 3.2). Former 8 C.F.R. § 3.2, which applied to the BIA, provided that "a motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion." This language was moved in 1996 to a newly created subsection (d) of 8 C.F.R. § 3.2. *See* 61 Fed. Reg. 18900 (Apr. 29, 1996). The DOJ promulgated regulations implementing IIRIRA in 1997, retaining the departure bar and only slightly modifying the wording of the regulation to read as follows:

> *Departure, deportation, or removal.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

This regulation was later redesignated as 8 C.F.R. § 1003.2(d) in 2003. *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003). Following the creation of immigration judges in 1983—replacing former INS Special Inquiry Officers—the DOJ promulgated regulations for the adjudication of MTRs by immigration judges, and included the departure bar. *See* 52 Fed. Reg. 2931 (Jan. 29, 1987) (codified at 8 C.F.R. § 3.22 (1988)). Section 3.22 was redesignated as § 3.23 in 1992. *See* 57 Fed. Reg. 11568 (Apr. 6, 1992). It was redesignated as § 1003.23 in 2003. *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

[86] 8 C.F.R. §§ 1003.2(d) (with regard to the BIA), 1003.23(b)(1) (2010) (with regard to an immigration judge). In addition, a separate departure bar appears in a regulation promulgated in the wake of the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). *See* 8 C.F.R. § 1003.44(k) (2010). The regulation created a special motion to reopen for those erroneously denied the opportunity to apply for section 212(c) relief, but barred those who "have departed the United States and are currently outside the United States," those who have been deported or removed and "then illegally returned to the United States[,]" and "those who have not been admitted or paroled." *Id.* § 1003.44(k)(1)-(3).

[87] *See, e.g.*, *In re* G- Y- B-, 6 I. & N. Dec. 159 (B.I.A. 1954); *In re* G-N-C-, 22 I. & N. Dec.

two circuits, the BIA set forth its first detailed defense of the bar. In *In re Armendarez-Mendez*, the BIA concluded that the bar not only prevents a deportee from filing a post-departure motion to reopen or reconsider, but also trumps the sua sponte jurisdiction that the immigration judge or BIA would otherwise have to reopen or reconsider.[88] The BIA reasoned that its inability to entertain post-departure motions is "not just a matter of administrative convenience."[89] Rather, it is "an expression of the limits of our authority within the larger immigration bureaucracy. Removed aliens have, by virtue of their departure, literally passed beyond our aid."[90] In the BIA's view, physical removal from the United States is "a transformative event that fundamentally alters the alien's posture under the law."[91] The consequence of a deportee's departure is "a nullification of legal status, which leaves him in no better position after departure than *any other alien* who is outside the territory of the United States."[92]

The BIA has carved out only one exception to this reading of the departure bar. Concurring with a conclusion reached earlier by the Eleventh Circuit,[93] the BIA held in 2009 in *In re Bulnes-Nolasco* that a person who seeks to challenge an in absentia order of removal based on lack of notice retains the right to seek reopening and rescission of the order from outside the United States.[94]

The Supreme Court has yet to consider the departure bar,[95] and the lower courts have reached varying conclusions about both the bar's scope and its

---

281, 288 (B.I.A. 1998); Matter of Okoh, 20 I. & N. Dec. 864, 864-65 (B.I.A. 1994); *In re* Estrada, 17 I. & N. Dec. 187, 188 (B.I.A. 1979), *rev'd on other grounds*, Estrada-Rosales v. INS, 645 F.2d 819 (9th Cir. 1981); *In re* Palma, 14 I. & N. Dec. 486, 487 (B.I.A. 1973); *accord In re* Wang, 17 I. & N. Dec. 565 (B.I.A. 1980).

[88] 24 I. & N. Dec. 646, 660 (B.I.A. 2008) (citation omitted).

[89] *Id.* at 656.

[90] *Id.*

[91] *Id.*

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

[93] *See* Contreras-Rodriguez v. Attorney Gen., 462 F.3d 1314 (11th Cir. 2006).

[94] 25 I. & N. Dec. 57 (B.I.A. 2009). *See infra* Part IV.D.

[95] A petition for certiorari is currently pending. *See supra* note 8. Although the Court has not yet directly addressed the departure bar, it has alluded to post-departure issues in a number of recent cases. In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Court found that the question of Lopez's eligibility for relief on remand was not moot because Lopez could pursue his reopened proceedings from Mexico. *See infra* note 253 and accompanying text. *See also* Transcript of Oral Argument at 3-6, Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (No. 09-60) (discussing effects of illegal reentry following removal on ability to apply for discretionary relief upon remand to immigration judge). In *Dada v. Mukasey*, 554 U.S. 1 (2008), the Court suggested in dictum that DOJ should consider elimination of the departure bar, and Chief Justice Roberts suggested at oral argument that he might question the validity of the departure bar should it come under review. *See infra* note 201.

validity. The Fourth,[96] Sixth,[97] Seventh,[98] and Ninth[99] Circuits have held under various theories that immigration judges and the BIA retain jurisdiction over motions to reopen and reconsider following departure, while the First,[100]

---

[96] The Fourth Circuit struck down the departure bar as ultra vires on the grounds that it directly conflicts with the plain meaning of INA § 240(a)(7)(A), 8 U.S.C. § 1229a(c)(7)(A) (2006), which provides that "[a]n alien may file one motion to reopen proceedings" within ninety days of the date of entry of a final administrative order of removal, without reference to territorial location. *See* William v. Gonzales (*William I*), 499 F.3d 329, 332 (4th Cir. 2007).

[97] As this article was going to press, the Sixth Circuit held that the BIA, as an administrative agency, does not have the authority to limit its own jurisdiction. *See* Pruidze v. Holder, 632 F.3d 234 (6th Cir. 2011).

[98] The Seventh Circuit has confronted the departure bar in two recent cases. In *Marin-Rodriguez v. Holder*, the court struck down the departure bar on the grounds that the BIA, as an administrative agency, does not have the authority to limit its own jurisdiction. *See* Marin-Rodriguez v. Holder, 612 F.3d 591 (7th Cir. 2010). Previously, in *Munoz de Real v. Holder*, the court found the motion in question to be time-barred, and therefore declined to consider the validity of the departure bar. *See* Munoz de Real v. Holder, 595 F.3d 747, 749 (7th Cir. 2010). However, the court appeared to accept the proposition that immigration judges retain jurisdiction to reopen or reconsider following a respondent's departure under the broad grant of sua sponte authority, and applied an abuse of discretion standard to the review of the judge's decision. *See id.* at 750 ("The [immigration judge]'s decision makes clear, however, that she did in fact reach the question of whether to exercise her discretion to reopen the case but chose not to do so. Munoz de Real offers nothing that suggests that this finding was an abuse of discretion, and we see no reason to overturn it.").

[99] The Ninth Circuit has adopted a novel reading of the regulatory language, holding that the bar does not apply to someone who has departed the United States subsequent to being ordered removed because such a person is no longer "the subject of" removal proceedings. *See* Lin v. Gonzales, 473 F.3d 979 (9th Cir. 2007) (interpreting 8 C.F.R. § 1003.23(b)(1)); Reynoso-Cisneros v. Gonzales, 491 F.3d 1001 (9th Cir. 2007) (interpreting 8 C.F.R. § 1003.2(d)). The Ninth Circuit has also held that a related provision within the regulation, deeming a motion to reopen to be withdrawn upon the departure of the respondent, is ultra vires. Coyt v. Holder, 593 F.3d 902, 906-07 (9th Cir. 2010). Because the two parts of the regulation are so closely related, the court's decision in *Coyt* suggests that the court would find the other manifestations of the departure bar to be ultra vires as well. Finally, in a long line of cases covering a variety of contexts, the Ninth Circuit has held that where a conviction that formed a "key part" of the deportation or removal proceeding has been vacated, the deportation or removal has not been legally executed and the departure bar therefore does not apply. *See* Wiedersperg v. INS, 896 F.2d 1179, 1183 (9th Cir. 1990); Estrada-Rosales v. INS, 645 F.2d 819, 821-22 (9th Cir. 1981). The court has reaffirmed the continuing relevance of this line of cases post-IIRIRA. *See* Cardoso-Tlaseca v. Gonzales, 460 F.3d 1102, 1107 (9th Cir. 2006).

[100] The First Circuit has held that Congress did not implicitly repeal the departure bar to reopening through its 1996 repeal of the statutory bar to judicial review. *See* Pena-Muriel v. Gonzales, 489 F.3d 438 (1st Cir. 2007). However, the court did not consider the argument that the regulation conflicts with the statute governing motions to reopen. *See* Pena-Muriel v. Gonzales, 510 F.3d 350, 350 (1st Cir. 2007) (denying petition for rehearing and noting that ultra vires argument was not raised by the parties).

Second,[101] Fifth,[102] and Tenth[103] Circuits have upheld the BIA's interpretation of the regulations to varying degrees.

C. The Phantom Departure Bar

While the circuit split is notable, the more interesting story lies in the fact that the BIA has continued to apply the departure bar even in circuits that have narrowly interpreted or eliminated the relevant regulations. The BIA has done so in two distinct ways.

First, the BIA has rejected judicial interpretation of the regulations in favor of its own reading of the regulatory language. In *Armendarez-Mendez*, the Board announced that it would not apply the Ninth Circuit's extremely narrow reading of the departure bar[104] even in the Ninth Circuit. It did so by invoking its interpretive authority under *National Cable & Telecommunications Association v. Brand X Internet Services*.[105] A review of recent BIA cases arising in the Ninth Circuit reveals that the BIA has stuck to its word since *Armendarez-Mendez*, denying post-departure motions and reversing cases in which immigration judges have granted them.[106]

---

[101] The Second Circuit considered the departure bar in the context of an untimely motion and thus did not reach the question whether the regulation is ultra vires. *See* Zhang v. Holder, 617 F.3d 650, 664 (2d Cir. 2010). With regard to the effect of the departure bar on the BIA's sua sponte authority to reopen, the court deferred to the BIA's interpretation of the regulation while suggesting its own disagreement with the BIA's conclusion. *See id.* at 660 ("Were we writing on a blank slate, we might reach a different conclusion than that of the BIA regarding the relationship between these portions of 8 C.F.R. § 1003.2.").

[102] The Fifth Circuit has reserved consideration of the ultra vires question, upholding the departure bar only insofar as it is applied to untimely motions on the grounds that the relationship between the departure bar and sua sponte authority to reopen or reconsider is ambiguous and that the agency's interpretation is reasonable. *See* Ovalles v. Holder, 577 F.3d 288, 296 (5th Cir. 2009); Navarro-Miranda v. Ashcroft, 330 F.3d 672, 675-76 (5th Cir. 2003). *See also* Mansour v. Gonzales, 470 F.3d 1194 (6th Cir. 2006) (favorably citing *Navarro-Miranda* in dicta).

[103] The Tenth Circuit is the only court to have directly disagreed with the Fourth Circuit's conclusion that the departure bar is ultra vires. *See* Rosillo-Puga v. Holder, 580 F.3d 1147, 1156 (10th Cir. 2009). It did so, however, in a fractured opinion that included a lengthy dissent finding the regulation to be ultra vires, and a concurrence by the third member of the panel stating that he would have preferred to decide the case on the narrower grounds cited in the Fifth Circuit's decision, but that he joined the majority opinion only to avoid leaving the issue unresolved in the circuit. *See id.* at 1171 (Lucero, J., dissenting); *id.* at 1161 (O'Brien, J., concurring).

[104] *See supra* note 98.

[105] *In re* Armendarez-Mendez, 24 I. & N. Dec. 646, 650-53 (B.I.A. 2008) (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 976 (2005)).

[106] *See, e.g.*, *In re* Chong-Verduzco, No. A090 834 756, 2010 WL 1607009 (B.I.A. Mar. 30, 2010) (denying MTR where order was based on erroneous denial of opportunity to apply for

Second, where the regulations have been struck down entirely, the BIA has resurrected the departure bar through alternative means. In *Armendarez-Mendez*, the BIA expressed its "respectful disagreement" with the Fourth Circuit's decision striking down the departure bar in *William v. Gonzales (William I)* and declared its intention not to follow *William I* outside of the Fourth Circuit.[107] Subsequent developments in the Fourth Circuit, however, show that *William I* has had little effect even within the circuit.

In *William I*, the Fourth Circuit considered the relationship between the departure bar and the statute governing motions to reopen.[108] Tunbosun Olawale William, a lawful permanent resident married to a United States citizen, was ordered removed in 2002 based on a conviction for receipt of a stolen credit card.[109] Following the denial of his BIA appeal, William was physically removed from the United States in July 2005.[110] He sought reopening five months later, soon after the criminal court vacated his criminal conviction.[111] The BIA denied his motion on the ground that it lacked jurisdiction due to his departure from the United States.[112] On a petition for review, the Fourth Circuit struck down the departure bar as ultra vires, finding that it conflicted with the plain language of the statute, which imposes no territorial requirement on the filing of motions to reopen.[113] The court remanded the case to the Board to adjudicate on the merits.[114]

Two years after invalidating the departure bar in *William I*, the Fourth Circuit confronted two more petitions for review involving post-departure motions to

---

212(c) relief); *In re* Haro-Perez, No. A092 515 273, 2009 WL 2171613 (B.I.A. July 9, 2009) (denying MTR where order was based on erroneous determination that DUI constituted aggravated felony conviction); *In re* Alvarez-Briseno, No. A021 611 209, 2009 WL 773178 (B.I.A. Feb. 27, 2009) (denying MTR where order was based on erroneous determination that second drug possession conviction constituted aggravated felony conviction); *In re* Romero-Romero, No. A042 326 903, 2009 WL 263146 (B.I.A. Jan. 13, 2009) (denying MTR based on vacatur of underlying conviction); *In re* Ortiz-Romero, No. A076 713 230, 2008 WL 5181827 (B.I.A. Nov. 7, 2008) (denying MTR based on change of law); *In re* Estrada, No. A092 408 863, 2008 WL 5025206 (B.I.A. Oct. 27, 2008) (reversing immigration judge's grant of 212(c) relief in the context of post-departure MTR).

[107] *See* Armendarez-Mendez, 24 I. & N. Dec. at 653, 660.

[108] *William I*, 499 F.3d 329, 331-34 (4th Cir. 2007). The statute governing motions to reopen, added by IIRIRA, is INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2006).

[109] *William I*, 499 F.3d at 331.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at 333 (finding that "§ 1229a(c)(7)(A) clearly and unambiguously grants an alien the right to file one motion to reopen, regardless of whether he is present in the United States when the motion is filed").

[114] *Id.* at 334.

reopen. One was *Sadhvani v. Holder,*[115] which concerned an asylum application that an immigration judge had denied in 1998.[116] The immigration judge's decision was affirmed by the BIA in 2002.[117] Sadhvani subsequently filed a motion to reopen with the BIA, which was denied.[118] In December 2005, while still in the United States, Sadhvani filed a second motion to reopen, based on changed country conditions.[119] The BIA granted his second motion in March 2006, finding that Sadhvani "met the standards for reopening based on new evidence of changed circumstances."[120] However, the government then filed a motion to reconsider the grant of reopening, pointing out that Sadhvani had been removed to Togo two weeks after filing his motion to reopen and that, pursuant to 8 C.F.R. § 1003.2(d), Sadhvani's motion to reopen was to be considered withdrawn.[121] The BIA agreed and granted the government's motion to reconsider.[122] Sadhvani then sought review in the Fourth Circuit, which remanded the case to the BIA for further consideration in light of the court's recent decision in *William I.*[123]

Given that the departure bar had been struck down by the Fourth Circuit's decision in *William I*, it might be reasonable to assume that the BIA would reinstate its grant of Sadhvani's motion to reopen. After all, the BIA originally granted his motion on the merits before becoming aware of his departure, and then changed its decision solely on the basis of the now-invalidated regulation. But on remand, the BIA offered two new rationales for denying the motion. First, Sadhvani's motion was number-barred.[124] Second, the BIA found that even if the motion were not number-barred, it should be denied because under the statute governing asylum, only an alien who is "physically present in the United States" may apply for such relief.[125] Sadhvani once again sought review

---

[115] 596 F.3d 180 (4th Cir. 2009).

[116] *Id.* at 181.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 181-82.

[120] *Id.* at 182.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* This argument seems specious under the circumstances; it is entirely within the BIA's authority to grant a motion to reopen even if it is number-barred, and the BIA was fully aware of the procedural history when it initially granted Sadhvani's motion.

[125] *Id.* This interpretation of the asylum statute raises questions that are beyond the scope of this article and would be a worthy topic for future research. Briefly, however, at least two points could be raised in favor of allowing reopening under such circumstances. First, the fact that a person must be within the United States to *file* an application for asylum does not necessarily mean that the applicant must remain continuously in the United States thereafter; in particular, there may be grounds to excuse an absence when, as in Sadhvani's case, it is involuntary. Second, the issue of territorial presence could have been remedied by permitting

in the Fourth Circuit, but the court held that the BIA's decision was a valid exercise of discretion.[126]

The other case to raise a post-*William I* question was none other than *William II*.[127] On remand from the Fourth Circuit, the BIA acknowledged that, pursuant to the court's decision, it had jurisdiction over William's motion to reopen.[128] The BIA further acknowledged that it had authority to grant reopening sua sponte regardless of timeliness and noted that vacatur of a criminal conviction can justify invocation of such authority.[129] However, the BIA found that, in this case, vacatur of William's criminal conviction was not an exceptional circumstance warranting reopening:

> [W]hen a motion to reopen is filed long after the relevant removal order has become final, long after the statutory deadline for seeking reopening has passed and, indeed, long after the movant has in fact been physically removed from the United States (thereby consummating the removal proceedings in every legal sense), we believe the imperative of finality forbids reopening except upon a showing that enforcement of the removal order would constitute a gross miscarriage of justice.[130]

The BIA went on to explain that a removal order results in a gross miscarriage of justice "only if the order clearly could not have withstood judicial scrutiny under the law in effect at the time of its issuance or execution."[131] The BIA then noted that "the result might have been different if William sought vacatur before his removal or if the vacatur was based on new evidence that was not reasonably available until after he was removed."[132]

Sadhvani to return to the United States during the pendency of the reopened proceeding. The BIA has taken the position that it lacks the authority to order such a return. *See infra* Part VI.A. Even if this were the case, however, the BIA could have reopened the case and left Sadvhani to deal with the relevant agencies in order to secure his return. This is, in effect, what has happened where federal courts have granted petitions for review or habeas petitions deeming a deported respondent to be eligible to apply for discretionary relief. *See, e.g.*, Lopez v. Gonzales, 549 U.S. 47 (2006); Gutierrez v. Gonzales, 125 F. App'x 406 (3d Cir. 2005). It is rare that a person in such circumstances is able to secure permission to return to the United States while the removal proceeding is still pending (as opposed to after relief has been granted). However, I represented one client who obtained such permission and was able to appear in person at his hearing. Such cases suggest a model that is particularly relevant where, as in Sadhvani's case, the government might argue that the statute requires territorial presence.

[126] *Sadhvani*, 596 F.3d at 183.

[127] William v. Holder (*William II*), 359 F. App'x 370 (4th Cir. 2009) (per curiam).

[128] *Id.* at 372. The Fourth Circuit's decision in *William II* quotes extensively from the BIA's unpublished decision, *In re William*, No. A073 561 811, 2008 WL 5537807 (B.I.A. Dec. 23, 2008).

[129] *William II*, 359 F. App'x at 372-73 (citing BIA decision under review).

[130] *Id.* at 372 (quoting BIA decision under review).

[131] *Id.* (quoting BIA decision under review).

[132] *Id.* at 373 (quoting BIA decision under review).

Finally, the BIA asserted that even if it granted the motion to reopen, William would not be able to regain his lawful permanent resident status because "his 2005 removal [would preclude] him from seeking admission for a period of 10 years."[133]

There are several notable aspects of the BIA's reasoning. First, William sought reopening shortly after his conviction was vacated,[134] and the BIA routinely grants untimely motions to reopen in such circumstances when the individual in question is still in the United States.[135] Second, the "gross miscarriage of justice" standard has not traditionally been employed by the BIA in adjudicating ordinary motions to reopen.[136] Rather, this standard derives from cases involving collateral attacks on prior removal orders brought within a *new* proceeding after a deportee has reentered the United States.[137] Finally, it is simply untrue that William would, if successful before the BIA, be unable to reenter the United States. If the BIA were to vacate the removal order and terminate the proceedings, William would be restored to his permanent resident status and the removal order would be without legal effect. Other permanent residents have returned to the United States under precisely such circumstances.[138]

---

[133] *Id.* (quoting BIA decision under review). The ten-year bar in question can be found in INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2006), which provides for inadmissibility bars of varying lengths depending on the nature of a removal order.

[134] In ruling on the original petition for review, the Fourth Circuit noted that the government made clear at oral argument that the timeliness of the motion was not at issue in the case. *See William I*, 499 F.3d 329, 334 n.5 (noting that "the Government does not argue that a remand to the BIA would be futile because of a procedural or other defect in William's motion or that the BIA would necessarily refuse to exercise its discretion to reopen proceedings. In fact, at oral argument, the Government noted that none of the statutory or regulatory limitations [besides the departure bar] is currently at issue."). In addition, the Fifth Circuit subsequently distinguished a post-departure case from *William I* on the ground that *William I* concerned a timely filed motion. *See* Ovalles v. Holder, 577 F.3d 288, 295-96 (5th Cir. 2009).

[135] *See* Cruz v. Attorney Gen., 452 F.3d 240, 249 (3d Cir. 2006).

[136] Of the BIA decisions that are publicly available, there are only two other cases in which the standard has been invoked in the context of an MTR, and both are recent cases that involve post-departure MTRs. *See* Munoz de Real v. Holder, 595 F.3d 747 (7th Cir. 2010) (affirming BIA affirmance of the immigration judge's denial of a post-departure MTR on the basis of the "gross miscarriage of justice" standard); *In re* Sandoval-Ortiz, No. A092 538 275, 2010 WL 1251016 (B.I.A. Feb. 23, 2010) (denying MTR on the basis of "gross miscarriage of justice" standard where removal order was based on erroneous classification of DUI conviction as an aggravated felony). For further discussion of the BIA's application of this standard to MTRs, s*ee infra* Part V.E.

[137] *See infra* Part V.E.

[138] *See, e.g.*, Lopez v. Gonzales, 549 U.S. 47 (2006); Leocal v. Ashcroft, 543 U.S. 1 (2004). These cases are procedurally distinct in that they involved petitions for review rather than motions to reopen or reconsider; however, they provide examples of cases in which individuals who have departed the United States pursuant to administratively final orders of removal have

It is, in the end, only William's departure from the United States that distinguished his case from many others in which the BIA has granted reopening based on vacatur of the underlying conviction. William's second petition for review thus presented the Fourth Circuit with the same question it had confronted the first time around: can the agency impose an additional requirement (that is, territorial presence) not mandated by the enabling statute? Yet, this time, the BIA's decision survived. The court denied the petition for review on the grounds that the BIA's decision not to exercise sua sponte authority to reopen is one of unfettered discretion not amenable to judicial review.[139]

William II, even more clearly than *Sadhvani*, marks the advent of a new chapter in the evolution of the departure bar. The bar, struck down as ultra vires, has been reincarnated in phantom form under the guise of discretion.[140]

---

been permitted to return to the United States when such orders are vacated. They thus raise precisely the same issue with regard to the inadmissibility implications of a vacated order of removal. I am not aware of any cases in which the government has argued that a vacated order of removal renders an LPR inadmissible. In fact, the government argued just the opposite in *Lopez v. Gonzales*, and the Supreme Court agreed with the parties that the case was not moot because Lopez could continue to pursue relief from abroad. *See infra* note 253. In addition, the BIA has, on occasion, permitted consideration of discretionary relief on a post-departure motion to reopen when the government has consented to or sought such consideration. *See, e.g., In re* Campos-Mendez, No. A34 065 088, 2006 WL 3485570 (B.I.A. Oct. 27, 2006).

[139] *William II*, 359 F. App'x. 370, 373-74 (4th Cir. 2009). *See* 8 C.F.R. § 1003.2(a) (2010) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.").

[140] I am indebted to the work of Hiroshi Motomura for the notion of "phantom" norms. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). The BIA has repeatedly defended the departure bar as a jurisdictional limitation, and in this respect the BIA's decision on remand subsequent to *William I* marks the introduction of a new rationale for the bar. However, it is worth noting that the "jurisdictional" nature of the departure bar has always been somewhat questionable. While stating that it lacks jurisdiction over post-departure motions, the BIA has been willing on occasion to adjudicate such motions when the government has lent its support. It has even done so where the person seeking relief has reentered the United States without authorization prior to seeking reopening. *See In re* Campos-Mendez, No. A34 065 088, 2006 WL 3485570 (B.I.A. Oct. 27, 2006) (remanding to immigration judge for consideration of application for 212(c) relief, following Ninth Circuit's granting of government's motion to remand to BIA, where respondent was removed without being provided with the opportunity to apply for relief, and respondent subsequently reentered without authorization). Arguably, the regulation even in its broadest interpretation permits reopening or reconsideration under such circumstances, since it bars only those motions filed "by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States." 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) (2010). Yet this insight begs the question whether the "jurisdictional" nature of the bar extends to the BIA's own power to grant sua sponte reopening or reconsideration. *See also* Marin-Rodriguez v. Holder, 612 F.3d 591, 594-595 (7th Cir. 2010) (holding that the BIA,

IV. TERRITORIALITY AND THE SIGNIFICANCE OF DEPARTURE

The persistence of this phantom departure bar suggests that judicial invalidation of the relevant regulations—or even the elimination of the regulations through administrative rulemaking or legislation—will not necessarily provide deportees with an effective means of correcting erroneous removal orders. In the remainder of the article, I seek to lay the groundwork for a more comprehensive approach to dismantling the departure bar. Such an approach goes beyond arguments about the meaning or validity of the regulatory language and instead challenges the deep-seated assumptions that underlie the BIA's reluctance to grant post-departure reopening or reconsideration. The present section considers how the courts and Congress have grappled with the territorial aspects of departure in a number of other immigration law contexts, and the implications of these examples for administrative reopening and reconsideration. The sections that follow discuss finality and prudential considerations.

A. The "Exit Fiction" Doctrine

The notion that the reach of laws and of courts is territorially limited lies at the heart of the American legal system.[141] Within the realm of immigration law, the Bill of Rights has proven to be "a futile authority for the alien seeking admission for the first time to these shores."[142] However, "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies

---

as an administrative agency, does not have the authority to limit its own jurisdiction).

[141] Notions of territorial sovereignty have generally been traced back to the Treaty of Westphalia, in 1648, which ushered in a new era of secular nation-states, replacing the overlapping loyalties and allegiances of medieval Europe. *See generally* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) [hereinafter NEUMAN, STRANGERS TO THE CONSTITUTION]; Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 366-67 (2009); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2508-09 (2005). The Supreme Court did not hold that a constitutional right applied outside the United States until 1957, when it recognized that United States citizens living as civilians on military bases abroad could not be tried by court-martial. *See* Reid v. Covert, 354 U.S. 1, 5 (1957). The Court declined to extend constitutional protections to noncitizens outside United States borders on several occasions in the decades following *Reid v. Covert*. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Johnson v. Eisentrager, 339 U.S. 763 (1950). It is in the context of these cases that commentators have hailed the significance of the Court's recent decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), to extend habeas rights to detainees held at Guantanamo Bay.

[142] Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring). As the Court has famously stated, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[143]

Although this distinction is in a broad sense territorial, it does not run strictly along geographic lines.[144] An "arriving alien" who is detained on United States soil while awaiting a hearing on admissibility retains the legal status (or rather, lack thereof) that she had at the border.[145] So does a noncitizen who is paroled into the United States upon arrival.[146] This territorial sleight of hand is known as the "entry fiction" doctrine.[147] Through the entry fiction, the Court withholds due process protections within immigration proceedings from some noncitizens even if they are physically located within the territorial jurisdiction of the United States.[148] In effect, the border bends inward, carried along by a person who is physically present but not accorded the procedural protections associated with such presence.

In several cases ostensibly dealing with the meaning of "entry," the Supreme Court has also confronted the meaning of departure. In a line of cases stretching from the 1950s to the 1980s, the Court considered whether returning permanent residents could avoid the harsh statutory or constitutional

---

[143] Zadvydas v. Davis, 533 U.S. 678, 693 (2001). The Supreme Court has long held that a noncitizen who is territorially present and facing removal has the right to notice and an opportunity to be heard. *See* Yamataya v. Fisher, 189 U.S. 86, 101 (1903). On territorial personhood, *see generally* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006); NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 141.

[144] For insightful discussions of "moving borders," *see* Ayelet Shachar, *The Shifting Border of Immigration Enforcement*, 30 MICH. J. INT'L L. 809 (2009); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115 (2009).

[145] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953).

[146] Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).

[147] Although the Supreme Court has never used this term, the doctrine has been widely recognized in the lower courts. For recent examples, *see* Bayo v. Napolitano, 593 F.3d 495, 502 (7th Cir. 2010); Aguilera-Montero v. Mukasey, 548 F.3d 1248, 1253 (9th Cir. 2008). The constitutional implications of entry, and the development of the entry fiction doctrine, have attracted considerable commentary. *See, e.g.*, T. Alexander Aleinikoff, *Aliens, Due Process, and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237 (1983); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373 (2004); David Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983); Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017 (2007).

[148] This could be viewed as the denial of constitutional personhood, or alternatively as a diminished form of personhood. *See* Linda Bosniak, *Persons and Citizens in Constitutional Thought*, 8 INT'L J. CONST. L. 9, 14 (2010) ("Personhood may not be formally withdrawn, and yet it may be diminished in its effect, evaded, effaced, diluted, displaced. This is the real risk to constitutional personhood for noncitizens and for some citizens, as well; not outright removal but depreciation—at times specifically imposed by government and at others, perhaps, a function of the inherent incompleteness of the category itself.").

consequences of being outside a territorial border or having newly entered.[149] These cases provide examples of returning residents who avoided statutory grounds of exclusion[150] or deportation[151] that would have ensnared them if they were first-time entrants, or who were provided with the procedural protections that come with territorial presence.[152] Even in *Shaughnessey v. United States ex rel. Mezei*, a much-criticized case in which the Court held that a longtime legal resident had no greater rights upon return than a first-time entrant, the Court's decision was based not on any absolute rule regarding departure but rather on the Court's (highly questionable) conclusion that Mezei's nineteen-month stay "behind the Iron Curtain" was sufficiently suspicious to divest him of the privileges normally possessed by a returning resident.[153] Taken together, these cases demonstrate that the Supreme Court long ago confronted the question of the effects of departure from the United States. The Court's answer was a functional one rather than a formal one: that the determination hinges not on physical location but on the length and nature of the absence.[154]

These cases reveal, I would argue, an unstated doctrine that might be called the "exit fiction." Like the entry fiction, the exit fiction works a kind of

---

[149] In chronological order, these cases are *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), *Shaughnessey v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Landon v. Plasencia*, 459 U.S. 21 (1982).

[150] *See Fleuti*, 374 U.S. at 452. Fleuti, had his return to the United States been deemed an entry, would have been subject to exclusion for being "afflicted with psychopathic personality" (i.e. homosexuality), a ground of exclusion but not deportation. The Court held that a permanent resident whose absence is "brief, casual, and innocent" would not be deemed to be making an entry. *Id.*

[151] *See Delgadillo*, 332 U.S. at 390-91. Delgadillo, had he been deemed to have made an entry, would have been deportable for having committed a crime involving moral turpitude within five years of entry. *Id.*

[152] *See Plasencia*, 459 U.S. at 33-34 (holding that returning permanent resident had the right to procedural due process in exclusion proceeding, and applying the balancing test established by *Mathews v. Eldridge*, 424 U.S. 319, 336 (1976)); *Chew*, 344 U.S. at 600 (holding that former 8 C.F.R. § 175.57(b), which provided for exclusion without hearing of noncitizens deemed to be prejudicial to the public interest, did not apply to LPR returning from five-month voyage on United States merchant ship). Although *Chew* was technically a case of regulatory construction, its constitutional dimensions have been widely recognized. *See* Motomura, *supra* note 139, at 569-73 (discussing *Chew* as an example of the use of a "phantom" constitutional norm); *Plasencia*, 459 U.S. at 33 (noting that although the holding in *Chew* "was one of regulatory interpretation, the rationale was one of constitutional law").

[153] *See Mezei*, 345 U.S. at 214.

[154] The Court's decision in *Mezei* can be read as being based on both the length ("19 months") and nature ("behind the Iron Curtain") of Mezei's trip. *See id.* At least one court, however, has interpreted the Court's later decision in *Plasencia* to stand for the proposition that entitlement to due process is based solely on the length (and not the nature) of time spent outside the United States. *See* Rafeedie v. INS, 880 F.2d 506, 521-22 (D.C. Cir. 1989).

territorial magic, but in the opposite direction. While the entry fiction pulls the border inward with the person who is territorially but not yet constitutionally present, the exit fiction extends the border outward to envelop the returning resident who has left the territorial United States physically but not, in some sense, legally.[155] Just as (in the Court's view) not all of those who are territorially present benefit from constitutional or statutory protections, not all of those who are outside lose such protections. There is a difference, in other words, between having left the United States and having not yet arrived. This difference has been cast largely in terms of affiliation.[156] The "exit fiction" cases recognize that the ties accrued by those who are territorially present do not evaporate upon departure.

If this line of cases illustrates the Court's penchant for flexibility when it comes to the rights of returning permanent residents, an instructive counterpoint can be found in the Court's 1984 decision in *INS v. Phinpathya.*[157] The case concerned an undocumented immigrant who was seeking a form of relief that required a showing of continuous physical presence.[158] The government asked the Court to find, as the BIA had, that the applicant's three-month absence from the United States, during which she procured a visa under false pretenses, was not "brief, casual, and innocent" and thus precluded a finding of continuous physical presence.[159] The Court, however, went much

---

[155] The entry fiction and the exit fiction at times serve to cancel each other out: for example, a returning LPR is charged with inadmissibility, detained on United States soil or paroled into the United States, and given the procedural protections that come with being "inside" (which she in fact is) rather than "outside" (as the entry fiction would otherwise dictate). Importantly, though, the exit fiction doctrine is not merely an exception to the entry fiction doctrine–that is, a way for a territorially present returning LPR to avoid a doctrine that would otherwise deny her the rights that territorial presence confers. Maria Plasencia's right to procedural due process did not stem from being detained or paroled: she was entitled to due process at the moment that, standing at the border, she presented herself for admission. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982). The exit fiction thus represents a significant exception to the territorial notions of constitutional personhood that have otherwise dominated Supreme Court doctrine on immigration proceedings.

[156] *See id.* ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").

[157] 464 U.S. 183 (1984).

[158] The statutory provision at issue in the case allowed the Attorney General to suspend the deportation of an applicant who could establish that he "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, . . . that during all such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence . . . ." *See* INA § 244(a)(1), 8 U.S.C. § 1254(a)(1) (repealed 1996).

[159] *Phinpathya*, 464 U.S. at 187. For the origin of the "brief, casual, and innocent" standard, *see supra* note 150.

further than the government asked it to. In a decision that has been described as a "bombshell,"[160] the Court held that the statute was to be interpreted literally and that any departure from the United States would preclude continuous physical presence.[161]

Phinpathya suggests a fault line dividing those noncitizens with what the Court has traditionally considered to be the strongest affiliational claims—lawful permanent residents—from others. However, the aftermath of *Phinpathya* tells another story altogether. Congress reacted swiftly to the decision: five months later, the House of Representatives voted 411-4 to amend the statute so that it would bar only those absences that were meaningfully interruptive.[162] Although the Senate did not immediately act, two years later Congress added a provision to the statute codifying the application of the "brief, casual, and innocent" exception for the form of relief at issue in *Phinpathya*.[163] Even at the height of Congress's efforts to restrict relief from removal, when this form of relief was eliminated through the passage of IIRIRA and replaced with a far less generous version, Congress nevertheless codified an exception for brief departures.[164] The reaction to *Phinpathya* suggests that a functional approach to departure has been of interest to Congress as well as to the courts, and that Congress has extended this approach beyond returning permanent residents to encompass even some undocumented immigrants.

B. Departure and Judicial Review

Judicial review presents another arena in which Congress and the courts have engaged in an ongoing dialogue regarding the significance of departure. Between 1961 and 1996, former INA section 106 deprived the federal courts of jurisdiction to review a deportation or exclusion order following a deportee's

---

[160] STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 604 (5th ed. 2009).

[161] *Phinpathya*, 464 U.S. at 195-96.

[162] *See* 130 Cong. Rec. 16348-50 (June 14, 1984) (statement of Rep. Roybal) (purpose of the amendment was "to express the intent of Congress that the requirement [of continuous physical presence] not be literally or strictly construed in light of the recent Supreme Court opinion that did so"). For an account of the case and its aftermath, *see* LEGOMSKY & RODRIGUEZ, *supra* note 160, at 604-605.

[163] Former INA section 244(b)(2) was amended by section 315(b) of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, Title III (repealed 1996).

[164] Suspension of deportation, the form of relief at issue in *Phinpathya*, was replaced in 1996 by cancellation of removal, INA § 240A(b), 8 U.S.C. § 1229b(b) (2006). The new statute provides that continuous physical presence will be destroyed by single absences of more than 90 days, or an aggregate absence of more than 180 days. INA § 240A(d)(2), 8 U.S.C. § 1229b(d)(2) (2006).

departure from the United States.[165] As Peter Spiro has chronicled, Congress enacted section 106 in the wake of several celebrated cases in which noncitizen "subversives" managed to delay their deportations for years on end through skillful use of the appeals process.[166] The departure bar was just one element of the new statute, and was not the subject of extensive debate.[167]

Although the departure bar was perhaps symbolically important, its practical effect on judicial review was limited. A person seeking review of a deportation order during this period rarely found herself in the position of needing to invoke the jurisdiction of the court from abroad because the filing of a petition for review automatically stayed the execution of the deportation order.[168] There were, however, several instances in which deportees did seek review from the courts following departure, and an echo of the exit fiction doctrine can be seen in these cases. In the 1977 case *Mendez v. INS*,[169] the Ninth Circuit held that departure under circumstances that violate due process did not bar the court's jurisdiction to review the legality of the deportation order.[170] The Third Circuit

---

[165] INA § 106(c), 8 U.S.C. § 1105a(c) (repealed 1996) ("An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.").

[166] *See* Spiro, *supra* note 76, at 283-87; Kanstroom, *supra* note 76. The case that inspired the departure bar on judicial review was that of Finnish immigrant and former Communist Party member William Heikkila, who was ordered deported in 1948 but deferred his deportation for many years through appeals. *See* Spiro, *supra*, at 283-87. At one point during this saga, Heikilla was essentially kidnapped by immigration authorities: he was seized in San Francisco, flown to Vancouver, Canada, and then put on a plane to Finland, without being permitted to contact his family, his attorney, or the Finnish consul. See *Immigration: Round Trip to Helsinki*, TIME, May 5, 1958, *available at* http://www.time.com/time/magazine/article/0,9171,863303,00.html. Under order from a Federal District Court, the INS permitted Heikilla to reenter the United States two weeks later to continue pursuing his appeal. *Id.* Upon his death in 1960, Heikilla was still residing in the United States.

[167] *See* Spiro, *supra* note 76, at 285.

[168] 8 U.S.C. § 1105a(a)(3) (repealed 1996) ("The service of the petition for review . . . shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs[.]"). In 1990, Congress excluded those with aggravated felony convictions from the automatic stay provision. *See* Immigration Act of 1990 § 513(a), Pub. L. No. 101-649, 101 Stat. 4978. However, those with such convictions were entitled to a stay if they could establish that they met the traditional standard: "(1) a likelihood of success on the merits; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the movant outweighs the harm to the opposing party if a stay is not granted; and (4) that the granting of the stay would serve the public interest." Ignacio v. INS, 955 F.2d 295, 299 (9th Cir. 1992).

[169] 563 F.2d 956 (9th Cir. 1977).

[170] *Id.* at 958 (noting that "'departure' in the context of [former INA § 106] cannot mean 'departure in contravention of procedural due process'"). *Mendez* concerned a lawful permanent resident who had been ordered deported based on a criminal conviction that fit

agreed, commenting that former section 106 "says only that we lack jurisdiction when the alien has 'departed.' We are reluctant to substitute the word 'deported' when a right so fundamental as due process is at stake."[171] This approach met with mixed reception in other circuits,[172] and has been criticized on the ground that the legislative history of former section 106 evinces Congress's intent to apply the bar without regard to circumstances.[173]

With the passage of IIRIRA in 1996, Congress turned the statutory scheme governing judicial review on its head. Where previously the INA imposed a departure bar but provided an automatic stay while a petition for review was pending, "IIRIRA 'inverted' [these] provisions of the INA, encouraging prompt voluntary departure and speedy government action, while eliminating prior statutory barriers to pursuing relief from abroad."[174] It did so by eliminating the automatic stay of deportation that used to result from the filing of a petition for review,[175] mandating that removal be effected within ninety days,[176] and eliminating the departure bar on judicial review.[177] In short, IIRIRA ensured that most respondents in removal proceedings left the United States soon after

---

within the grounds of deportability. *Id.* at 957-58. Prior to Mendez's departure from the United States, the criminal court vacated his sentence, which altered the immigration consequences of the conviction. *Id.* The INS mailed the petitioner a notice to appear for deportation soon thereafter but provided no notice (as required by relevant regulations) to the petitioner's attorney. *Id.* When the petitioner appeared as instructed, he informed the INS that his sentence had been vacated, but was deported that day without being given the opportunity to contact his attorney. *Id.* His motion for reconsideration, filed post-departure, was denied on the grounds that the departure deprived the BIA of jurisdiction, and his petition for review was opposed by the government on the grounds that the court lacked jurisdiction to review. *Id.*

[171] Marrero v. INS, 990 F.2d 772, 777 (3d Cir. 1993).

[172] The Sixth and Eighth Circuits adopted versions of the *Mendez* holding. *See* Camacho-Bordes v. INS, 33 F.3d 26, 27 (8th Cir. 1994); Juarez v. INS, 732 F.2d 58, 59-60 (6th Cir. 1984). Other circuits have rejected it. *See* Baez v. INS, 41 F.3d 19, 23 (1st Cir. 1994); Roldan v. Racette, 984 F.2d 85, 90 (2d Cir. 1993) (observing that "[t]he pertinent language of § 1105a(c) constitutes a clear jurisdictional bar, and admits of no exceptions"); Quezada v. INS, 898 F.2d 474, 476 (5th Cir. 1990) (quoting Umanzor v. Lambert, 782 F.2d 1299, 1303 (5th Cir. 1986)) ("*Mendez* has become a sinkhole that has swallowed the rule of 1105a(c)."). *See also* Joehar v. INS, 957 F.2d 887, 890 (D.C. Cir. 1992) (declining to consider the *Mendez* exception with respect to noncitizen who had departed voluntarily).

[173] *See* Spiro, *supra* note 76, at 285-87.

[174] Coyt v. Holder, 593 F.3d 902, 906 (9th Cir. 2010) (quoting Nken v. Holder, 129 S. Ct. 1749, 1755 (2009)).

[175] *See* 8 U.S.C. § 1252(b)(3)(B) (2006) ("Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."). This provision was added by IIRIRA section 306(b).

[176] *See* INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A) (2006). This provision was added by IIRIRA section 305(a)(3).

[177] IIRIRA section 306(b) replaced former section 106 with INA § 242, 8 U.S.C. § 1252 (2006). The new section 242 does not include the departure bar.

their removal order became final, but at the same time enabled them to pursue their appeals from outside the United States.

C. Departure and Administrative Appeals

Another area in which the courts have confronted the meaning of departure is within the context of administrative appeals. DOJ regulations provide that a pending appeal to the BIA is deemed withdrawn if the respondent in the removal proceeding departs the United States.[178] However, as in the case of judicial review prior to 1996, execution of a removal order is automatically stayed during the pendency of an administrative appeal,[179] and the practical effect of this regulation has thus been limited.

Like the departure bar on judicial review, the departure bar on administrative appeals has received mixed reactions from the courts.[180] Some circuits have suggested that a departure must be voluntary and intentional in order to withdraw an appeal,[181] while other courts have found that the regulation applies even to inadvertent departures.[182] No court, however, has found that forcible removal by the government could serve to withdraw an appeal.[183]

---

[178] 8 C.F.R. § 1003.4 (2010) ("Departure from the United States of a person who is the subject of deportation or removal proceedings, except for arriving aliens as defined in § 1001.1(q) of this chapter, subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.").

[179] 8 C.F.R. § 1003.6 (2010) (automatic stay pending administrative appeal).

[180] For an analysis of this case law, *see* Marianna C. Mancusi-Ungaro, Comment, *Defining "Departure" in the Context of 8 C.F.R. § 1003.4*, 76 U. CHI. L. REV. 467 (2009).

[181] *See* Mansour v. Gonzales, 470 F.3d 1194 (6th Cir. 2006); Aguilera-Ruiz v. Ashcroft, 348 F.3d 835 (9th Cir. 2003); Mejia-Ruiz v. INS, 51 F.3d 358 (2d Cir. 1995). Courts have been unanimous, however, in rejecting the application of the *Fleuti* doctrine, *supra* note 150. *See Mansour*, 470 F.3d at 1199; *Aguilera-Ruiz*, 348 F.3d at 837; *Mejia-Ruiz*, 51 F.3d at 365.

[182] *See* Long v. Gonzales, 420 F.3d 516 (5th Cir. 2005); Moreno v. Gonzales, 206 F. App'x 815 (10th Cir. 2006). The BIA itself has shown some ambivalence on the matter. It first held that "the lone term 'departure'... as to withdrawals of appeals is not meant to reach involuntary removals from the country[,]" Long, 420 F.3d at 518, and remanded to the immigration judge for a determination as to voluntariness. When the case came back up on review with a finding that the departure had been involuntary, the BIA concluded that the appeal was nevertheless withdrawn. *See id.*

[183] This question was reserved by the Fifth Circuit. *See Long*, 420 F.3d at 520 n.6. It was addressed directly by the Sixth Circuit. *See* Madrigal v. Holder, 572 F.3d 239, 245 (6th Cir. 2009) (expressing agreement with *Long* but distinguishing on the basis of the government's improper removal).

D. Departure and Rescission of In Absentia Orders of Removal

The BIA has arguably adopted an exit fiction of its own within the limited context of in absentia removal orders. In *In re Bulnes-Nolasco*,[184] the BIA carved out an important exception to the departure bar for those seeking to reopen and rescind in absentia orders based on lack of notice.[185]

The crux of the BIA's reasoning in *Bulnes-Nolasco* is that a person ordered removed in an in absentia proceeding without proper notice should not be considered to have been truly removed.[186] The BIA reasoned that an in absentia removal order issued in proceedings of which the respondent had no notice is voidable from its inception and becomes a legal nullity upon its rescission, with the result "that the respondent reverts to the same immigration status that he or she possessed prior to entry of the order."[187] Secondly, the BIA noted that the regulation governing in absentia orders permits rescission "at any time," suggesting that "an alien ordered deported in absentia possesses a robust right to challenge the removal order on improper notice grounds."[188] The BIA concluded that "[a]pplying the jurisdictional bar to reopening in a case involving an inoperative in absentia deportation order would give that order greater force than it is entitled to by law and would, as a practical matter, impose a limitation on motions to rescind that is not compatible with the broad language of [the regulation governing rescission]."[189]

E. Implications for Administrative Reopening and Reconsideration

At a minimum, these comparisons suggest that there is nothing inherently transformative about departure. In a variety of contexts, noncitizens retain legal rights after crossing a territorial border. They retain such rights even, in some cases, after crossing a territorial border while subject to an order of removal.

---

[184] 25 I. & N. Dec. 57 (B.I.A. 2009).

[185] *Id.* at 60.

[186] *Id.* at 59.

[187] *Id.*

[188] *Id.*

[189] *Id.* The regulation governing rescission is 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2) (2010). It could be noted, in this context, that the broad "at any time" language that the BIA finds so significant in *Bulnes-Nolasco* also appears in the regulations regarding the authority of immigration judges and the BIA to reopen or reconsider sua sponte. *See supra* note 81 and accompanying text. The language with regard to in absentia orders also appears in the statute, *see* INA § 240(b)(5)(C)(ii), 8 U.S.C. § 1229a(b)(5)(C)(ii) (2006), which is perhaps an important distinction. However, the BIA cited only to the regulation, not the statute. The BIA did note, however, that the "at any time" language regarding in absentia motions is (in contrast to the language with regard to regular MTRs) both more specific and more recent than the regulations imposing the departure bar. *See Bulnes-Nolasco*, 25 I. & N. Dec. at 60 n.3.

Where courts have imposed departure-based distinctions, they have generally done so pursuant to their interpretation of congressional intent[190]—a factor entirely absent within the realm of the departure bar on administrative reopening or reconsideration. Moreover, courts have often shown an inclination to skirt the effects of departure even in the face of seemingly inflexible statutory language.[191]

If there is nothing inherently transformative about departure, and no congressional mandate to impose departure-based distinctions, courts might fairly ask—as the Fourth, Sixth, Seventh, and Ninth Circuits[192] have—what authority DOJ has to impose the requirement of territorial presence through regulation. By the same token, it is worth asking whether the BIA may impose such a requirement of its own accord without even a regulatory basis, as it has done in the wake of the *William I* decision in the Fourth Circuit.

The difficulty of challenging a BIA decision such as the one at issue in *William II* is that it is cloaked in the mantle of agency discretion. Most post-departure MTRs will be untimely[193] and will thus rely on the adjudicator's exercise of sua sponte authority to reopen or reconsider. Courts have generally deemed the BIA's decision not to exercise sua sponte authority to be unreviewable.[194] However, recent Supreme Court case law on judicial review

---

[190] *See supra* notes 157, 172 and accompanying text.

[191] *Kwong Hai Chew v. Colding* is one of the leading examples of "creative" statutory or regulatory interpretation. *See* Motomura, *supra* note 140, at 571 (referring to the Court's decision in *Chew* as "a highly questionable reading of the regulation's text that Louis Henkin rightly called one of the Court's 'feats of creative interpretation' in immigration law") (quoting Louis Henkin, *The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 861 n.40 (1987)). *See also* Spiro, *supra* note 76, at 285-87 (criticizing statutory interpretation in *Mendez* as being far-fetched).

[192] *See supra* notes 96-99.

[193] As a practical matter, the time limits are so short (thirty days for motions to reconsider and ninety days for motions to reopen) that it is often not possible for the government to effect removal before the time limit has run, meaning that timely motions will tend to be filed pre-departure. There are, in addition, a number of factors that may contribute to the untimely filing of post-departure MTRs. A motion that is based on a subsequent change in law will be possible only when the law has changed, which may be months or years after an order becomes final. A motion based on the vacatur of an underlying conviction can only be filed after the conviction is vacated, which will depend on the pace of the criminal courts. Those who are seeking reopening based on ineffective assistance of counsel may not learn of their counsel's error or fraud until much later. These are all factors that Congress, the BIA, and the courts have accounted for in creating exceptions to the time limits on MTRs (for those who have not left the United States). *See supra* notes 80-84 and accompanying text.

[194] The regulation governing sua sponte reopening and reconsideration by the BIA provides that "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief." 8 C.F.R. § 1003.2(a) (2010). Most circuits have held that they lack jurisdiction to review the BIA's decision not to exercise sua sponte authority to reopen or reconsider because of the unfettered discretion granted to the Board in such matters. *See,*

of motions to reopen may present a new opportunity to challenge such precedent.[195] Unless advocates succeed in piercing this veil of non-

---

e.g., Tamenut v. Mukasey, 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc); Harchenko v. INS, 379 F.3d 405, 410-11 (6th Cir. 2004); Enriquez-Alvarado v. Ashcroft, 371 F.3d 246, 249-50 (5th Cir. 2004); Calle-Vujiles v. Ashcroft, 320 F.3d 472, 475 (3d Cir. 2003); Belay-Gebru v. INS, 327 F.3d 998, 1001 (10th Cir. 2003); Ekimian v. INS, 303 F.3d 1153, 1159 (9th Cir. 2002); Luis v. INS, 196 F.3d 36, 40-41 (1st Cir. 1999); Anin v. Reno, 188 F.3d 1273, 1279 (11th Cir. 1999). *But see* Riley v. INS, 310 F.3d 1253, 1257-58 (10th Cir. 2002) (finding abuse of discretion where BIA failed to consider whether case warranted equitable tolling of deadline for motion to reopen based on ineffective assistance of counsel); Cevilla v. Gonzales, 446 F.3d 658, 660 (7th Cir. 2006) (holding that a BIA decision not to exercise sua sponte authority to reopen was reviewable where the BIA based its decision on its finding that a person seeking reopening had not established eligibility for relief and reserving nonreviewability for denials that are "indeed based on an exercise of uncabined discretion rather than on the application of a legal standard"). *See also* Munoz de Real v. Holder, 595 F.3d 747 (7th Cir. 2010) (reviewing the BIA's affirmance of an immigration judge's decision not to grant sua sponte reopening under an abuse of discretion standard). In *Cruz v. Attorney General of the United States*, the Third Circuit held that even a decision regarding the exercise of sua sponte authority may not deviate, without explanation, from a settled practice of decision-making:

> Where there is a consistent pattern of administrative decisions on a given issue, we would expect the BIA to conform to that pattern or explain its departure from it. Should the Board determine on remand that [the petitioner] is no longer "convicted" under the INA, we would expect it to reopen his proceedings despite the untimeliness of his motion, as it has routinely done in other cases where a conviction was vacated under *Pickering*, or at least explain logically its unwillingness to do so.

452 F.3d 240, 250 (3d Cir. 2006) (citations omitted). *Cruz* is particularly relevant to post-departure cases such as *William* because it involves an untimely motion to reopen based on the vacatur of the underlying conviction.

[195] A recent panel decision in the Sixth Circuit called into question the nonreviewability of sua sponte denials in light of the Supreme Court's recent decision in *Kucana v. Holder* and urged the court to consider the matter en banc. *See* Gor v. Holder, 607 F.3d 180, 186-91 (6th Cir. 2010). In *Kucana*, the Court construed the jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(B)(ii) (2006), added by IIRIRA, which bars judicial review of "any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . ." The Court read the phrase "specified under this subchapter" to mean that "Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute." Kucana v. Holder, 130 S. Ct. 827, 836-37 (2010). Thus, the Court held, "[a]ction on motions to reopen, made discretionary by the Attorney General only, therefore remain subject to judicial review." *Id.* at 840. The Court further commented that

> [t]o read § 1252(a)(2)(B)(ii) to apply to matters where discretion is conferred on the Board by regulation, rather than on the Attorney General by statute, would ignore that congressional design. If the Seventh Circuit's construction of § 1252(a)(2)(B)(ii) were to prevail, the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions "discretionary." Such an extraordinary delegation of authority cannot be extracted from the statute Congress enacted.

reviewability, those who have been wrongly deported have little hope of returning to the United States regardless of the status of the regulatory departure bar.

The various "exit fictions" that emerge from the case law on departure may provide another possible avenue for challenging the application of the departure bar. To the extent that the adjudication of an MTR triggers due process considerations—for example, where a motion to reopen raises questions of ineffective assistance of counsel[196]—the exit fiction cases provide a basis for arguing that a *Mathews v. Eldridge*[197] analysis should apply in deciding whether reopening or reconsideration should be available.[198]

The most compelling argument to emerge from these comparisons may well be the normative one suggested by Congress's 1996 repeal of the departure bar: that there is no need for a departure bar in the context of an overall legislative scheme that now insures the prompt removal of most individuals with final orders of removal. The departure bar on judicial review is in many ways the closest parallel to the departure bar on administrative reopening and reconsideration,[199] and its repeal provides a strong argument for analogous policy changes within the realm of agency adjudication. This parallel, and its implications, have been recently noted by the Supreme Court, which commented in *Dada v. Mukasey*[200] that a "solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen post-departure, much as Congress has permitted with respect to judicial review of a removal order."[201]

Id. at 839-40.

[196] Courts have been extremely deferential in reviewing agency denials of motions to reopen or reconsider. *See, e.g.*, Cevilla v. Gonzales, 446 F.3d 658, 662 (7th Cir. 2006) (noting that though an agency's haphazard analysis of a petitioner's claim might violate due process in other contexts, there is no liberty interest in a discretionary grant of relief). However, there has also been some recognition that the refusal to consider the merits of such a motion may implicate due process. *See* Saakian v. INS, 252 F.3d 21, 26 (1st Cir. 2001) (finding due process violation where the respondent's ineffective assistance of counsel claim "[had] not been examined, despite [his] persistent efforts to have it heard").

[197] 424 U.S. 319 (1976).

[198] *See* Landon v. Plasencia, 459 U.S. 21, 34 (1982) (applying *Mathews v. Eldridge* balancing test of private and government interests to determine the sufficiency of a governmental procedure, and characterizing Plasencia's interest as a "weighty one" that includes the right "to stay and live and work in this land of freedom" and "to rejoin her immediate family, a right that ranks high among the interests of the individual") (citation omitted).

[199] *See* Wiedersperg v. INS, 896 F.2d 1179, 1181 n.2 (9th Cir. 1990) (noting that the departure bar on reopening "operates parallel to 8 U.S.C. § 1105a(c)").

[200] 554 U.S. 1 (2008).

[201] *Id.* at 22. *Dada* concerned the potential conflicts that may arise between the requirement that a person granted voluntary departure leave the United States within sixty days, INA §

It is worth noting in this context that the repeal of the departure bar on judicial review has arguably been a success. In the wake of IIRIRA, some commentators have raised concerns regarding the demise of the automatic stay pending a petition for review,[202] and advocates have criticized DHS and the Department of State for lacking a coordinated policy for providing the necessary documentation to facilitate the reentry of those who prevail on a petition for review from abroad.[203] Notably, however, there has been no criticism from any corner regarding the demise of the departure bar itself. Indeed, it appears to be one of the few aspects of IIRIRA that has been uncontroversial.

If the departure bar on reopening and reconsideration is dismantled through administrative rulemaking or other means, it is crucial that such a change be accompanied by additional action to ensure that existing practices regarding the exercise of sua sponte reopening and reconsideration be applied to post-departure cases.[204] Such a policy could be mandated by the courts or implemented through an administrative rulemaking procedure or certification to the Attorney General of a BIA decision that involves a discretionary decision such as the one at issue in *William II*.[205] Otherwise, as *William II* illustrates, the elimination of the departure bar may have little practical effect.

240B(b)(2), 8 U.S.C. § 1229c(b)(2) (2006), and regulations deeming motions to reopen withdrawn upon the respondent's departure. At oral argument, Chief Justice Roberts went even further, commenting, "[I]f I thought it important to reconcile the two [statutes governing motions to reopen and voluntary departure], I would be much more concerned about that interpretation—that the motion to reopen is automatically withdrawn [upon departure]—than I would suggest we start incorporating equitable tolling rules and all that." Transcript of Oral Argument at 8, Dada v. Mukasey, 554 U.S. 1 (2008) (No. 06-1181).

[202] *See, e.g.*, Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1719 (2010) (arguing for a return to automatic stay).

[203] *See* Trina Realmuto, Practice Advisory: Return to the United States After Prevailing in Federal Court (2009), *available at* http://www.legalactioncenter.org/sites/default/files/lac_pa_11607.pdf (noting that there are "no formal procedures for arranging the return of someone who has been deported" and proposing potential strategies for litigation and administrative advocacy).

[204] Such a change would not entirely solve the problems relating to the Board's broad discretion to decline to exercise sua sponte authority to grant untimely motions to reopen. *See, e.g., In re* Beckford, 22 I. & N. Dec. 1216, 1227-31 (B.I.A. 2000) (Rosenberg, J., dissenting) (criticizing the majority for its narrow interpretation of the exceptions to time limits on filing MTRs). However, it would go a long way to eliminating the phantom departure bar that is evident in *William II*.

[205] *See* 8 C.F.R. § 1003.1(h) (2010) (providing for certification for decision by Attorney General).

V. FINALITY AND THE SIGNIFICANCE OF DEPARTURE

A deportee's departure from the United States serves to execute the removal order,[206] and thus signifies the crossing of a boundary that is not only geographic but also procedural. For this reason, the BIA's claim that departure is a "transformative"[207] act warrants consideration from the perspective of finality as well as territoriality.

A. Finality in Removal Proceedings

The question of when litigation should end arises within every area of the law and has been the subject of particular attention in contexts such as habeas corpus and class actions. "The answer cannot be 'when it is done right,' or nothing would ever be final. . . . Yet equally unsatisfying is the answer 'when it is done once,' as this would relegate us to a world of first drafts, executions based on faulty trials, and binding class action judgments of questionable validity."[208] In crafting an approach to finality, the challenge is to seek a "balance between the sense of injustice and the needs of organized society."[209]

It has long been a mantra of the BIA and the courts that motions to reopen removal proceedings are disfavored due to finality concerns.[210] Statutory changes in 1996[211] and recent Supreme Court precedent affirming the importance of motions to reopen as an "important safeguard" call into question

---

[206] *See supra* note 23.

[207] *In re* Armendarez-Mendez, 24 I. & N. Dec. 646, 656 (B.I.A. 2008).

[208] William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 792-93 (2007).

[209] Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 100 (1965).

[210] *See* INS v. Abudu, 485 U.S. 94, 107 (1988) ("The reasons why motions to reopen are disfavored in deportation proceedings are comparable to those that apply to petitions for rehearing and to motions for new trials on the basis of newly discovered evidence—particularly the strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.") (footnotes omitted); INS v. Doherty, 502 U.S. 314, 323 (1992) ("This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."); *In re* Coelho, 20 I. & N. Dec. 464, 471 (B.I.A. 1992) (citing *Abudu*, 485 U.S. at 110).

[211] Prior to 1996, motions to reopen were "couched solely in negative terms." *Doherty*, 502 U.S. at 322 (citing former motion to reopen regulation that provided that "[m]otions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . ."). Since 1996, the INA has provided an affirmative right to file a motion to reopen. *See* INA § 240(c)(6)(B), 8 U.S.C. § 1229(c)(6)(B) (2006); INA § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i) (2006).

whether this is still an accurate characterization.[212] In any case, though, my aim here is not to challenge the application of finality principles to MTRs. Rather, I ask whether departure from the United States should have any impact on this analysis. That is, are finality concerns *stronger* with regard to a post-departure MTR than with regard to a pre-departure MTR?

B. What Does It Mean to Execute a Removal Order?

Within the context of civil litigation, the execution of a judgment is an event of considerable significance. The principle of res judicata counsels against disturbing such a judgment, even if based on an error of law, due to the reliance of the parties, vested rights, and the societal interest in conserving judicial resources.[213]

In the case of a removal order, however, it is difficult to pinpoint the practical significance of the execution of the order (apart from, of course, triggering the departure bar). In *Armendarez-Mendez*, the BIA seeks to justify the departure bar by noting that "[a]s a rule, once an alien has been [physically] removed, his underlying removal order is deemed executed, the proceedings that led to that order are consummated, and whatever immigration status the removed alien may have possessed before departure is vitiated."[214] Yet it is really only the first of these transformations (the execution of the order) that takes place upon departure. The other effects that the BIA attributes to departure take place well before any borders are crossed. A deportee's immigration status is revoked at the moment that the removal order becomes final.[215] The proceedings are closed as of that moment as well—thus the need

---

[212] *See* Kucana v. Holder, 130 S. Ct. 827, 834 (2010) (quoting Dada v. Mukasey, 554 U.S. 1, 18 (2008)).

[213] *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398-99 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."); Ritter v. Smith, 811 F.2d 1398, 1401 (11th Cir. 1987) (noting that "when a judgment has been executed a concomitantly greater interest in finality exists" and citing as an example a case involving vested property right pertaining to real estate titles).

[214] *In re* Armendarez-Mendez, 24 I. & N. Dec. 646, 656 (B.I.A. 2008). The BIA also cites INA § 101(g) as evidence of the importance placed by the statute on physical departure. *Id.* It provides that "any alien ordered deported or removed . . . who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed." INA § 101(g), 8 U.S.C. § 1101(g) (2006). *See also William II*, 359 F. App'x 370, 372 (2009) (quoting BIA decision under review as referring to physical departure as "consummating" the removal proceeding).

[215] *See* INA § 241(a)(1), 8 U.S.C. § 1231(a)(1) (2006) (mandating removal within 90 days of

to *reopen* if any future relief is sought. It is true, as the BIA points out, that departure from the United States triggers additional consequences—namely, future inadmissibility bars and potential criminal sanctions for reentry.[216] However, these are issues that affect only the deportee and are remote from the concerns that generally animate discussions of finality.

C. Departure: A Distinction without a Difference

Any number of circumstances might keep a person from physically leaving the United States following the entry of a final removal order: statelessness, lack of a repatriation agreement with the country designated for removal, the granting of a stay, or even simply the government's failure to act. A person who remains in the United States because the government has not yet effected removal is subject to a removal proceeding that is every bit as closed as the removal proceeding of a deportee who has left the United States. Yet under the right set of circumstances, such a person can seek reopening even years after an order becomes administratively final.[217] Even in the face of strict time and number limits on such motions, the BIA has recognized that justice requires reopening or reconsideration in a limited set of circumstances.[218] These circumstances include the key issues raised within post-departure motions, such as a change in law and vacatur of an underlying conviction.

Why should the regulations distinguish between individuals whose removals have been delayed and individuals who have departed?[219] The finality concerns that preoccupied Congress from the early 1960s through passage of IIRIRA in 1996 do not apply to those who have departed in the way that they

---

date removal order becomes administratively final). Although INA § 241(a)(7), 8 U.S.C. § 1231(a)(7) (2006), provides employment authorization for those whose removals cannot be carried out, the statute does not provide for any other status for those with final orders of removal.

[216] INA §§ 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2006); INA § 276(a)-(b), 8 U.S.C. § 1326 (2006).

[217] *See supra* notes 80-84 and accompanying text.

[218] *See In re* Vasquez-Muniz, 23 I. & N. Dec. 207, 208 (B.I.A. 2002); *In re* J-J-, 21 I. & N. Dec. 976, 984 (B.I.A. 1997).

[219] This line of inquiry raises the question of an equal protection challenge to the departure bar. A related regulation, 8 C.F.R. § 1003.44 (2010), was challenged unsuccessfully on equal protection grounds for barring those who had illegally reentered from filing special motions for reopening to apply for 212(c) relief in the wake of *INS v. St. Cyr*, 533 U.S. 289 (2001). *See* Avila-Sanchez v. Mukasey, 509 F.3d 1037, 1041 (9th Cir. 2007). It is possible that a deportee who remains outside the United States would have a stronger equal protection claim than one who has illegally reentered. However, equal protection claims are exceedingly difficult to litigate in light of the plenary power doctrine. *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001) (rejecting equal protection challenge to statute providing different citizenship rules for children born abroad and out of wedlock based on gender of citizen parent).

may arguably have applied during that period to those who remained inside the United States. In fact, the entire discussion of finality in the removal context was shaped not by departure but by the specter of its opposite: *failure* to depart. As the Supreme Court repeatedly noted in the days before IIRIRA, the reason that motions to reopen were particularly disfavored in the deportation or removal context was that "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States."[220] For the person who is already outside the United States, there is nothing to be gained by a motion to reopen or reconsider unless it is meritorious. In addition, motions to reopen must be accompanied by applications for all relevant forms of relief,[221] and are unlikely to be granted unless the underlying application itself is likely to succeed.

The various measures that Congress has put in place to ensure finality would apply to post-departure motions even if the departure bar were eliminated. Should post-departure reopening be subject to additional barriers? It would seem that, as in the case of the departure bar on judicial review, the trade-off for speedy removal should be that those who are rushed out of the country retain the same rights as those whose removals happen to drag on. If anything, the departure bar creates a perverse incentive for individuals in removal proceedings to delay and evade efforts to remove them, thus undermining Congress's stated aims in enacting IIRIRA.

Beyond the question of disparities based on nationality and individual circumstance, an even more obvious disparity lies in the differential access that the government has to reopening. There is a powerful asymmetry at work in the jurisdiction-stripping function of the departure bar. With the exception of people who are stateless or are from the small number of countries that have refused to repatriate deportees, most people with final orders of removal leave the United States within a few months after their order becomes final. A deportee who learns of a subsequent change in law is thus foreclosed by the departure bar from seeking reconsideration. If, however, that person prevails in removal proceedings and is granted relief, she may find the relief revoked at a later date if the law changes in the government's favor. Because the person would, in such circumstances, remain in the United States, the decision-maker retains jurisdiction to reopen or reconsider sua sponte.[222] This is true even if

---

[220] INS v. Doherty, 502 U.S. 314, 323 (1992) (citing INS v. Rios-Pineda, 471 U.S. 444, 450 (1985)).

[221] 8 C.F.R. § 1003.23(b)(3) (2010) ("Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents.").

[222] It is not only the fact that the person remains in the United States that creates this disparity. The departure bar arguably does not apply to motions by the government. *See* 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) (2010) (barring only those motions filed "by or on behalf of

the removal proceedings have been terminated–a procedural transformation that is arguably every bit as final as the execution of a final order.

D. Lessons from Civil and Criminal Procedure

In seeking an analogy for motions to reopen or reconsider, both the Supreme Court and the BIA have looked to motions for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure.[223] The Rule 60(b) parallel is an intriguing one in the context of post-departure motions.

Rule 60(b) motions will generally not be granted based on an intervening change in law or circumstances, particularly if the judgment has been executed.[224] However, it is well established that there is an exception to this

---

a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States"). For an example of this disparity, consider the case of Carlos Vasquez-Muniz, who became an LPR at the age of five. *In re* Vasquez-Muniz, 23 I. & N. Dec. 207, 208 (B.I.A. 2002). At age eighteen, he was convicted of robbery, and seven years later he was convicted of being a felon in possession of a firearm. *Id.* The immigration judge held that the firearm conviction was not an aggravated felony and, after considering all of the relevant factors, granted discretionary relief. *Id.* at 208-209. The government appealed the legal determination with regard to the aggravated felony definition, and the BIA affirmed the immigration judge's ruling. *Id.* at 209. Thus, the removal proceedings were terminated and Vasquez-Muniz was allowed to remain a permanent resident. *Id.* Subsequently, however, the Ninth Circuit held that such a conviction *does* constitute an aggravated felony. *Id.* at 207 (citing United States v. Castillo-Rivera, 244 F.3d 1020, 1025 (9th Cir. 2001)). The government then filed a motion with the BIA to reconsider its decision in Vasquez-Muniz's case. *Id.* at 208. The BIA noted the untimeliness of the government's motion but granted it anyway, finding that "[i]n view of the importance of the matter and the inconsistency between our prior decision and that of the Ninth Circuit, and upon a close examination of the statute, [it is] appropriate to reconsider the matter upon our own motion." *Id.* The Board, exercising its authority to reconsider sua sponte, vacated its prior decision, vacated the immigration judge's decision, and ordered Vasquez-Muniz removed. *Id.*

[223] *See* Stone v. INS, 514 U.S. 386, 401 (1995) ("The closest analogy to the INS's discretionary petition for agency reconsideration is the motion for relief from judgment under Rule of Civil Procedure 60(b)."); *In re* J-J-, 21 I. & N. Dec. 976, 983 (B.I.A. 1997) ("'[R]elief from judgment orders,' contained in Rule 60(b), most resemble our motions to reopen or reconsider."). Rule 60(b) provides that the court may relieve a party from a final judgment, order, or proceeding on grounds that, *inter alia,* there is newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial; the judgment is based on an earlier judgment that has been reversed or vacated; applying the judgment prospectively is no longer equitable; or there is any other reason that justifies relief. Fed. R. Civ. P. 60(b).

[224] 11 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2864 n.46 (2d ed. 1995 & Supp. 2010) (collecting cases); Marrero Pichardo v. Ashcroft, 374 F.3d 46, 56 (2d Cir. 2004) (noting that "as a general matter, a mere change in decisional law does not constitute an 'extraordinary circumstance' for the purposes of Rule 60(b)(6)"). Regarding execution of an order, *see* Ritter v. Smith, 811 F.2d 1398, 1401 (11th

rule where the court is modifying or vacating a judgment with prospective effect, such as an injunctive order.[225] It is not merely permissible for a court to amend such a judgment in the face of a change in law or circumstances; the failure to do so is an abuse of discretion.[226]

From the perspective of the deportee, departure from the United States is not the end of the story but rather the beginning. An order of removal imposes an ongoing–potentially lifetime–restriction on a deportee, depriving her of the status she once held and barring her from reentering the United States.[227] In many cases, particularly those involving longtime residents, removal separates deportees from their children and other immediate family members.[228] Courts have long recognized the gravity of deportation for a longtime resident with deep roots in the United States.[229] Many commentators have argued that

---

Cir. 1987) ("When a judgment has been executed a concomitantly greater interest in finality exists.").

[225] *See* Fed. R. Civ. P. 60(b)(5) (providing for relief from final judgment where "applying [judgment] prospectively is no longer equitable"). Although some grounds for relief from final judgment are subject to a one-year filing deadline, there is no time limit for moving for relief from judgment under Rule 60(b)(5). *See* Fed. R. Civ. P. 60(c)(1). *See also* Sys. Fed'n No. 91, Ry. Emp. Dept., AFL-CIO v. Wright, 364 U.S. 642, 647-648 (1961) ("There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. . . . [T]he court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.") (internal quotations omitted); Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 384 (1992) ("A party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law."); WRIGHT & MILLER, *supra* note 224, § 2961 ("The three traditional reasons for ordering the modification or vacation of an injunction are (1) changes in operative facts, (2) changes in the relevant decisional law, and (3) changes in any applicable statutory law.") (footnotes omitted).

[226] *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437-38 (1976) (holding that where intervening clarification of constitutional law reduced obligations of state officials, district court abused its discretion by refusing to modify injunction accordingly); Am. Horse Prot. Ass'n v. Watt, 694 F.2d 1310, 1316 (D.C. Cir. 1982) ("When a change in the law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law.").

[227] *See* INA 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2006) (imposing various terms of inadmissibility depending on circumstances of removal order).

[228] *See* INTERNATIONAL HUMAN RIGHTS LAW CLINIC, IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 4 (2010), *available at* www.law.berkeley.edu/files/Human_Rights_report.pdf (estimating that between April 1997 and August 2007, 103,000 children lost a lawful immigrant family member to deportation and that more than 217,000 other immediate family members were affected by the deportation of LPRs).

[229] *See* Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though

deportation should, for this reason, be considered punishment.[230] Viewed from the perspective of civil procedure, however, deportation could also be compared to a continuing injunctive order. It is perhaps for this reason that the BIA has recognized a change in law as an exceptional circumstance that warrants the granting of an untimely motion to reopen or reconsider.[231] Yet the BIA has cut off this principle at the border. Given the prospective effect of a removal order, the Rule 60(b) parallel suggests that execution of the order is irrelevant. Rather than taking away any rights that have vested in others and thus triggering traditional finality concerns, vacating the removal order would merely halt its prospective effect.[232]

Criminal procedure also provides instructive parallels. Although courts have generally been reluctant to import norms from criminal procedure into the removal context due to the civil nature of immigration law,[233] the Supreme Court has on at least one occasion suggested a parallel between motions to reopen and motions for a new trial in a criminal proceeding.[234] The Court's

---

deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted.").

[230] *See, e.g.*, Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel."). *See also* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 19 (2007) (arguing that "constitutional norms applicable to criminal cases should inform the approach to deportation for crime").

[231] *See supra* notes 84, 218 and accompanying text.

[232] An important question that may arise in post-removal cases is whether vacating a removal order returns a deportee to the status quo ante or merely bars the order from having prospective effect. This question might be significant where a deportee is no longer deportable (under current precedent) but faces a related or separate ground of inadmissibility. This inadmissibility ground might relate to pre-removal conduct (for example, an old conviction for minor marijuana possession that would render a person inadmissible, *see* INA § 212(a)(2)(A)(II), 8 U.S.C. § 1182(a)(2)(A)(II) (2006) but not deportable, *see* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)B)(i) (2006)). Or it may be a new ground stemming from post-removal conduct. In the former case, there would seem to be strong arguments in favor of not subjecting a person to inadmissibility based on an involuntary departure from the United States. *See Delgadillo*, 332 U.S. at 391 ("Respect for law does not thrive on captious interpretations."). However, such an argument would be difficult to make with regard to new grounds of inadmissibility that have arisen while a deportee is outside the United States.

[233] *See* Steven H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 511-515 (2007) (discussing reluctance of courts to apply norms of criminal adjudication within the context of deportation).

[234] INS v. Abudu, 485 U.S. 94, 110 (1988) ("The appropriate analogy [to a motion to reopen

intention was to invoke the disfavored status of such motions,[235] and it may be a stretch to pursue the implications any further. But if such a parallel is to be invoked, it bears noting that an analogy to the common law writ of coram nobis suggests that reopening may be warranted even after a removal order has been executed.[236] In addition, there is doctrine within the context of both coram nobis and habeas corpus to suggest that new precedent, rather than the law in effect at the time the order was entered, should govern upon reopening.[237]

E. The "Gross Miscarriage of Justice" Standard

With regard to the question of the application of old law versus new law, one particular aspect of the phantom departure bar on display in *William II* merits particular attention: the BIA's application of the "gross miscarriage of justice" standard. On remand from the Fourth Circuit, the BIA invoked the standard to explain that post-departure reopening would be granted "only if the order clearly could not have withstood judicial scrutiny under the law in effect at the

---

deportation proceedings] is a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden.").

[235] *Id.*

[236] *See* Morgan v. United States, 346 U.S. 502, 512 (1954) (affirming continuing vitality of common law writ of coram nobis to challenge validity of federal convictions by individual who is no longer in custody for purposes of habeas corpus); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

[237] *See* Davis v. United States, 417 U.S. 333, 346-47 (1974) (in ruling on writ of coram nobis, interpretation of criminal law at the time of review, not at the time of conviction, governs). The Supreme Court has imposed considerable limits on retroactivity in the context of habeas. *See* Teague v. Lane, 489 U.S. 288, 310 (1989) (establishing a general rule of non-retroactivity on collateral rule for new procedural rules). However, the Court has nevertheless held that a decision interpreting the substantive scope of a criminal statute is to be applied retroactively on collateral review. *See* Bousley v. United States, 523 U.S. 614, 620 (1998). Summarizing *Bousley* in a later case, the Court explained:

> When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review . . . . As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish . . . . Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.

Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004). In a removal proceeding in which the respondent was wrongly deemed an aggravated felon, or in which the scope of a substantive ground of deportability or eligibility for relief was otherwise misapplied, it would appear that *Bousley*, rather than *Teague*, provides the relevant analogy.

time of its issuance or execution."[238] The BIA's decision is unpublished and its weight should therefore not be overstated. This rationale, however, has also cropped up in two other recent unpublished cases regarding post-departure motions,[239] which may indicate that it will play an ongoing role in facilitating departure-based distinctions if the regulatory departure bar is eliminated.

Although presented by the BIA as a matter of well-established doctrine, the application of the gross miscarriage of justice standard in the context of administrative reopening is in fact a radical departure from decades of BIA and federal court doctrine. The standard derives from another context entirely, namely collateral attacks on prior removal orders brought within a *new* proceeding after a deportee has *reentered* the United States. For decades, the BIA and the courts have imposed strict limits on such attacks, reserving them only for rare cases in which the deportation or removal order was clearly erroneous at the time it was executed.[240] A contemporary expression of this impulse can be found in INA section 241(a)(5), which prohibits the reopening of proceedings following illegal reentry.[241]

To import this standard into the adjudication of a regular motion to reopen is highly unusual. On remand in *William I*, the only support the BIA cited for its application of this standard was *In re Roman*, a case standing for the proposition that "an alien may *collaterally* attack a final order of exclusion or deportation *in a subsequent deportation proceeding* only if she can show that the prior order resulted in a gross miscarriage of justice."[242]

---

[238] *William II*, 359 F. App'x 370, 372-73 (4th Cir. 2009) (quoting BIA opinion under review).

[239] *See* Munoz de Real v. Holder, 595 F.3d 747 (7th Cir. 2010) (upholding BIA affirmance of the immigration judge's denial of a post-departure MTR on the basis of the "gross miscarriage of justice" standard); *In re* Sandoval-Ortiz, No. A092 538 275, 2010 WL 1251016 (B.I.A. Feb. 23, 2010) (denying MTR on the basis of "gross miscarriage of justice" standard where removal order was based on erroneous classification of DUI conviction as an aggravated felony).

[240] *See, e.g.*, Debeato vs. Attorney Gen., 505 F.3d 231 (3d Cir. 2007); Lara v. Trominski, 216 F.3d 487 (5th Cir. 2000); United States *ex rel.* Steffner v. Carmichael, 183 F.2d 19, 20 (5th Cir. 1950); *In re* Farinas, 12 I. & N. Dec. 467 (B.I.A. 1967); *In re* Malone, 11 I. & N. Dec. 730 (B.I.A. 1966).

[241] INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2006) ("If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.").

[242] *In re* William, No. A073 561 811, 2008 WL 5537807 (B.I.A. Dec. 23, 2008) (citing *In re* Roman, 19 I. & N. Dec. 855, 856-57 (B.I.A. 1988)) (emphasis added).

F. Implications for Administrative Reopening and Reconsideration

An examination of the role that the execution of an order plays within the removal context, and a comparison to relevant law within the fields of civil and criminal procedure, suggest that finality concerns do not warrant distinguishing between pre- and post-departure motions to reopen or reconsider.

If we are to take seriously the parallels that the courts and the BIA have drawn between MTRs and analogous motions in civil and criminal procedure, we should look beyond cursory descriptions of the "disfavored nature" of such motions and consider the full implications of these analogies. Viewing deportation through this lens suggests three key principles: (1) the decision-maker who ordered the removal should continue to have jurisdiction to take into account relevant changes in law or fact,[243] (2) decisions not to take such changes into account should be subject to judicial review, and (3) "new law" rather than "old law" should govern the outcome.

VI. PRUDENTIAL CONCERNS

Having considered the departure bar from the perspectives of territoriality and finality, I turn here to the prudential concerns raised by the BIA as justification for the bar.

A. The Limited Authority of Immigration Judges and the BIA

In *Armendarez-Mendez*, the BIA states that the departure bar is "an expression of the limits of our authority within the larger immigration bureaucracy. Removed aliens have, by virtue of their departure, literally passed beyond our aid."[244] In support of this conclusion, the Board points to the fact that it lacks the power to admit or parole a noncitizen into the United States for the purposes of pursuing a reopened proceeding.[245] This trope is also evident in the BIA's decision on remand in *William I*.[246]

---

[243] No court has yet considered these arguments in the context of MTRs. However, Justice Brennan, joined by Justices Douglas and Black and Chief Justice Warren, once took this position in dissent with regard to modification by a District Court of a denaturalization decree. *See* Polites v. United States, 364 U.S. 426, 438 (1960) (Brennan, J., dissenting) (observing that a denaturalization decree "is a determination of status which has prospective effect, and there is no reason why in modern times it should not be governed by equitable principles").

[244] *In re* Armendarez-Mendez, 24 I. & N. Dec. 646, 656 (B.I.A. 2008).

[245] *Id.* at 656 n.8.

[246] *See William II*, 359 F. App'x 370, 373 (4th Cir. 2009) (per curiam) (quoting BIA's statement that respondent's return to the United States is "wholly out of our control").

Post-departure challenges to removal orders do present logistical challenges regarding reentry. Some deportees who have prevailed on petitions for review from outside the United States have faced significant bureaucratic roadblocks in obtaining the documents necessary to return to the United States.[247] The obstacles are likely to be even greater for those seeking to return to pursue an application for relief. Such obstacles, however, could be addressed through guidelines on inter-agency cooperation.[248]

Moreover, it is simply untrue that deportees have "literally passed beyond [the] aid" of the BIA. The BIA's jurisdiction is not confined to individuals who are within the territorial limits of the United States.[249] Immigration judges and the BIA have reopened proceedings in a number of cases involving deportees, including cases on remand from the federal courts[250] and a handful of cases in which the government has not contested jurisdiction.[251] The BIA itself concedes in *Armendarez-Mendez* that some deportees may be able to obtain permission from DHS to reenter to pursue reopening,[252] and that a deportee whose removal order is vacated by a federal court might also be permitted to lawfully reenter for this purpose.[253]

---

[247] *See* Realmuto, *supra* note 203 (advising attorneys on how to address such obstacles). In my capacity as Supervising Attorney at the Post-Deportation Human Rights Project, I communicated with several attorneys whose clients had prevailed from abroad on petitions for review but were unable to obtain the documentation required to facilitate their return to the United States.

[248] *Id.* It is notable that the Board expressed no concerns in *In re Bulnes-Nolasco*, 25 I. & N. Dec. 57 (B.I.A. 2009), regarding the logistical questions likely to arise from post-departure reopening of an in absentia proceeding, even though the respondent was an undocumented immigrant who had originally entered without inspection—a more difficult scenario regarding reentry, it might seem, than a deportee who has been restored to LPR status.

[249] For examples of the BIA's jurisdiction to determine matters affecting the status of individuals who are not within the United States, *see* 8 C.F.R. § 1003.1(b)(5) (2010) (jurisdiction to review denials of immigrant visa petitions); 8 C.F.R. § 1003.1(b)(6) (2010) (jurisdiction to review denials of waivers of inadmissibility for applicants for non-immigrant visas).

[250] *See supra* note 138.

[251] *See, e.g., In re* Campos-Mendez, No. A34 065 088, 2006 WL 3485570 (B.I.A. Oct. 27, 2006). *See also* Guevara v. Gonzales, 450 F.3d 173 (5th Cir. 2006) (granting respondent's petition for review where government failed to raise jurisdictional challenge to post-departure motion to reopening, BIA granted reopening, and then BIA subsequently rescinded decision granting reopening upon government's motion to reconsider in light of departure bar).

[252] *See In re* Armendarez-Mendez, 24 I. & N. Dec. 646, 656 n.8 (B.I.A. 2008) (conceding that "[i]t may be that some removed aliens could obtain permission from the DHS to lawfully reenter the United States for the purpose of pursuing reopening").

[253] *See id.* at 649 n.2 (citing the Supreme Court's statement in *Lopez v. Gonzales*, 549 U.S. 47, 52 n.2 (2006), that "[a]lthough the Government has deported Lopez, we agree with the parties that the case is not moot. Lopez can benefit from relief in this Court by pursuing his application for cancellation of removal . . . ."). The BIA further notes that the government's

B. Administrative Efficiency

The BIA notes in *Armendarez-Mendez* that in the wake of the passage of IIRIRA, the Attorney General rejected the suggestions of commentators who urged the deletion of the departure bar from the regulations, stating that "[t]he Department [of Justice] believes that the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages this system might render."[254] Although neither DOJ nor the BIA has clarified what these burdens are, the main concerns would appear to be the burden of relitigating settled matters and the logistics of holding evidentiary hearings on applications for relief from removal without the physical presence of the respondent.[255]

There would inevitably be costs associated with the elimination of the departure bar. Immigration judges and the BIA are overwhelmed by their caseloads[256] and are no doubt reluctant to invite an increase in MTRs. However, it is questionable how extensive such costs would be. The concerns that have arisen within the habeas context with regard to the retroactivity of new rules of criminal procedure—concerns of opening the prison doors and necessitating thousands of new trials[257]—bear little relevance in this context. Motions to reopen and reconsider are virtually always adjudicated on the briefs with no oral argument or evidentiary hearing. In the case of someone removed

---

brief acquiescing in the grant of the petition for a writ of certiorari in *Lopez* stated that "were this Court to decide that [Lopez's] cocaine conviction is not an aggravated felony, the Board would address petitioner's request for cancellation of removal, which is a form of relief that petitioner can continue to pursue in administrative proceedings even while he is in Mexico." *Id.*

[254] *Armendarez-Mendez*, 24 I. & N. Dec. at 657 (quoting Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10321 (Mar. 6, 1997) (Supplementary Information)).

[255] *See* INS v. Abudu, 485 U.S. 94, 108 (1988) (noting that reopened cases "waste time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations") (quoting INS v. Jong Ha Wang, 450 U.S. 139, 144 n.5 (1981)) (internal citations omitted).

[256] See Julia Preston, *Immigration Agency Ends Some Deportations*, N.Y. TIMES, Aug. 26, 2010, at A1 (noting that the immigration courts "are swamped under a backlog that reached a record in June [2010] of 247,922 cases").

[257] *See, e.g.*, Linkletter v. Walker, 381 U.S. 618 (1965).

> To make the [Fourth Amendment exclusionary] rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

Id. at 637-38.

for a DUI conviction, for example, an adjudicator considering an MTR would simply seek to establish that the sole ground for the removal order was a DUI conviction and that the conviction falls squarely within the Supreme Court's holding in *Leocal*. If such a motion had merit, the adjudicator could reopen the proceeding, vacate the prior order, and terminate the removal proceeding, thereby restoring the individual to permanent resident status, without ever holding a hearing. It is not an exaggeration to say that in many cases, the same amount of agency resources are expended in *denying* post-departure motions as would be expended in *granting* them.[258]

Cases that concern eligibility for discretionary relief present greater complexity because a reopened proceeding may entail a hearing on whether relief should be granted, with testimony by the respondent and others. In some cases, immigration judges may be willing to grant relief without testimony from the respondent–for instance, if a person with significant ties to the United States has only a very minor criminal record. Moreover, it is important to note that any hearing that might take place would not be duplicative in the way that a second criminal trial would be, because a hearing on the merits never took place the first time around. Nor would such hearings put a burden on the government to resurrect old fact-finding in the way that a criminal trial would. Whatever the costs of a new hearing, they are costs that would have been borne by the system had the law been properly applied in the first instance.[259]

In an era in which videoconferencing has become routine in removal proceedings (with an immigration judge in Virginia, for example, presiding over a respondent in Ohio),[260] it seems disingenuous for the BIA to raise concerns regarding the physical location of a person seeking relief. The government's own system of transferring immigrant detainees across the country within a vast network of detention facilities can present logistical

---

[258] A case such as *Navarro-Miranda* is a perfect example. *See supra* notes 41-44 and accompanying text. In denying Navarro-Miranda's motion, the Board cited all of the information necessary to grant it. If anything, applying a departure bar may in fact create *extra* work for the adjudicator; although the administrative record will include all relevant information about the criminal conviction(s) at issue in the case and the grounds of removal, it may not provide the necessary information regarding if or when physical removal from the United States occurred.

[259] Moreover, where such a hearing has already been held, there would be no need to hold it again. For example, Ruben Ovalles was granted relief by an immigration judge, only to find it taken away under an erroneous interpretation of the law by the BIA. *See supra* note 68. In such a case, the BIA could vacate its order and reinstate the immigration judge's grant of relief.

[260] See Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 59 (2006) (describing advent of videoconferencing in removal proceedings in 1996 and steady increase in its use).

problems in the reopening context that rival any problems presented by deportees who are outside the United States.[261]

With the lone exception of the regulations that set forth the departure bar, the current adjudication system is equipped to remedy wrongful removals. Established BIA doctrine and practices are already in place to handle a variety of claims that may arise post-departure; indeed, immigration judges and the BIA routinely encounter these same claims from those who are still in the United States and have had no problem adjudicating such motions on the merits, in most cases without the need for a hearing. The personal interests at stake for deportees and their family members in the United States far outweigh the relatively limited administrative costs of permitting post-departure motions.

C. The Government Interest in Expeditious Removal

One final aspect of *Armendarez-Mendez* warrants scrutiny. The BIA states that "the ultimate purpose of a removal proceeding is, with respect to removable aliens, precisely to bring about . . . physical departure."[262] With this statement, the BIA invokes a key aspect of the 1996 changes embodied in IIRIRA: Congress's desire to speed up the pace of removals.

Although the BIA offers this statement as a defense of the departure bar, the opposite inference could also be drawn. In enacting changes to the INA designed to speed up removals in 1996, Congress simultaneously repealed the departure bar on judicial review. It is not clear why a system focused on ensuring physical departure from the United States would require a departure bar on motions to reopen. In fact, it would seem that, as in the case of judicial review, a system of speedy removals would weigh in favor of *eliminating* the departure bar.

It also bears asking whether the government has a legitimate interest in deporting those who are not deportable, or in barring from discretionary relief those who are eligible. As Justice Marshall stated in his concurrence in *Landon v. Plasencia*:

> Although the various other government interests identified by the Court may be served by the exclusion of those who fail to meet the eligibility requirements set out in the Immigration and Nationality Act, they are not served by procedures that deny a permanent resident alien a fair opportunity to demonstrate that she meets those eligibility requirements.[263]

The BIA itself has acknowledged that "immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to

---

[261] *See* LOCKED UP FAR AWAY, *supra* note 62.

[262] *In re* Armendarez-Mendez, 24 I. & N. Dec. 646, 656 (B.I.A. 2008).

[263] Landon v. Plasencia, 459 U.S. 21, 41 (1982) (Marshall, J., concurring).

removals at any cost. Rather, as has been said, the government wins when justice is done."[264]

VII. CONCLUSION

Whether or not the regulatory departure bar conflicts with the plain language of the statutory provisions governing reopening and reconsideration, it is beyond question that Congress has never mandated a departure bar on such motions. I have endeavored to show here that neither territoriality nor finality concerns justify cutting off deportees who are outside the United States from existing procedures for rectifying erroneous removal orders, and that the benefits of allowing those who have been wrongly deported to seek reopening or reconsideration far outweigh the potential costs.

The departure bar on motions to reopen and reconsider is a vestige of an earlier era. It makes little sense in light of the fundamental shift that has occurred over the past two decades toward a system of speedy removals and extraterritorial rights. Just as the departure bar on judicial review was eliminated in 1996, the regulatory departure bar on reopening and reconsideration should be eliminated as well.[265]

As the courts and the Department of Justice consider the future of the regulatory departure bar, however, they must also consider the implications of the phantom departure bar that promises to take its place upon its demise. Without attention to the new rationales that the BIA has begun to employ, such as the use of the "gross miscarriage of justice" standard and the invocation of unfettered discretion, meaningful relief will not come to those who have been wrongly deported and the many family members who wait for their return. It is crucial that the elimination of the departure bar be accompanied by clear judicial interpretation or policy changes establishing that the same substantive standard should be applied to all those seeking reopening or reconsideration, regardless of the physical ground on which they stand.

---

[264] *In re* S-M-J-, 21 I. & N. Dec. 722, 727 (B.I.A. 1997); *see also* Reid v. INS, 949 F.2d 287, 288 (9th Cir. 1991) ("Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation.").

[265] My aim here has been to argue for the elimination of the departure bar. It bears mentioning, however, that even in the absence of such reforms, DHS can begin to seek reopening or reconsideration in cases where individuals have been removed based on erroneous interpretations of the law, convictions that have since been vacated, or other grounds upon which reopening or reconsideration is clearly indicated. Even broadly interpreted, the regulations appear to contemplate that an MTR filed by *the government* may be granted post-departure. *See supra* note 222.

Regression by Progression: Unleveling the Classroom Playing Field Through Cosmetic Neurology

Helia Garrido Hull*

"[H]ow much happier that man is who believes his native town to be the world, than he who aspires to become greater than his nature will allow."[1]

I. INTRODUCTION

In the novel *Frankenstein*, Victor Frankenstein exceeds the natural order of reality by creating life and learns to regret his desire to become something greater than his own nature allowed. Although the story is fiction, for many, the desire to exceed their own physical, emotional, or intellectual limitations is very real. Today, medical advances intended to improve the quality of life for those suffering from disease, disorders, or disabilities are routinely employed by healthy individuals to enhance their natural abilities. The illicit use of prescription drugs for non-therapeutic purposes has sparked an ethical debate within the academic and medical communities regarding the propriety of enhancing performance through cosmetic neurology.[2] For some, using prescription drugs for non-therapeutic use is both morally wrong and socially unjustified. As one author opined, "the original purpose of medicine is to heal the sick, not turn healthy people into gods."[3] For others, using prescription drugs to increase attention span, improve learning, or to augment productivity is both morally acceptable and culturally desirable.[4] Nowhere is this more

---

* Associate Dean for Academic Affairs and Associate Professor of Law, Barry University Dwayne O. Andreas School of Law; B.A. Providence College, J.D. Stetson University College of Law. I would like to thank my research assistant, Cameron Parks, for her diligence and enthusiasm. I would also like to thank my husband, Eric V. Hull, for his constant support and patience. Without his love and encouragement I would not be where I am today.

[1] MARY SHELLY, FRANKENSTEIN; OR, THE MODERN PROMETHEUS 47 (Barnes and Noble Books 2003) (rev. ed. 1831).

[2] *See generally* Anjan Chatterjee, *Cosmetic Neurology: The Controversy Over Enhancing Movement, Mentation, and Mood*, 63 NEUROLOGY 968, 968 (2004) (defining cosmetic neurology as the use of medicine to artificially improve brain function by modulating motor, cognitive, and affective systems to enhance performance and improve quality of life).

[3] Chatterjee, *supra* note 2, at 969 (citing FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION 208 (2002)).

[4] Henry Greely et al., *Towards Responsible Use of Cognitive-Enhancing Drugs by the Healthy*, 456 NATURE 702 (2008), *available at* http://www.nature.com/nature/journal/

evident than on high school and college campuses throughout the United States, where healthy, intelligent students are increasingly using controlled drugs without prescriptions to enhance academic performance. Lost in this debate, however, is the significant negative impact that illicit use of certain prescription drugs by healthy individuals has on those individuals for whom the drugs were originally intended.

High school and college students across the country are increasingly using methylphenidate and amphetamines to increase cognition, improve grades, and gain a competitive edge over their classmates; they also use these substances recreationally. Both stimulant drugs are prescribed to treat individuals suffering from Attention Deficit Hyperactivity Disorder (ADHD), a psychological disorder that places millions of students at a competitive disadvantage within the learning environment.[5] Due to their high potential for abuse, methylphenidate and amphetamines are listed as controlled substances under U.S. law; therefore, they can only be used legally with a prescription.[6] The non-medical use of either stimulant is a crime punishable by imprisonment and the imposition of substantial monetary fines, but the lack of enforcement coupled with moral acceptance of such use among students has led to an increase in illicit use of each stimulant.[7]

The use of methylphenidate and amphetamines by students without ADHD is both dangerous to the user and unfair to those individuals who require the stimulants to compete with other students in the classroom. When healthy individuals utilize stimulants to enhance their natural cognitive abilities, the gap that use of the medicine was intended to close between students with and without ADHD reemerges. As a result, the classroom playing field once again becomes unlevel, placing certain individuals at a competitive disadvantage while destroying decades of legal precedent intended to protect those individuals from such an imbalance.

This article addresses the increasing use of methylphenidate and amphetamines by high school and college students and argues that states have a responsibility to prevent the uncontrolled, non-therapeutic, and injury-causing use of stimulants by students under their supervision and to protect the rights of

---

v456/n7223/full/456702a.html.

[5] *Attention Deficit Hyperactivity Disorder (ADHD)*, NAT'L INST. OF MENTAL HEALTH, http://www.nimh.nih.gov/health/publications/attention-deficit-hyperactivity-disorder/complete-index.shtml (last visited Sept. 5, 2010) [hereinafter NIMH].

[6] 21 C.F.R. §1308.12 (2010).

[7] *See* 21 U.S.C. § 841(a)(1) (2006) (imposing penalties for the unauthorized distribution of a controlled substance); *see also* Sean Esteban et al., *Non-medical Use of Prescription Stimulants Among US College Students: Prevalence and Correlates from a National Survey*, 99 ADDICTION 96 (2005), *available at* http://www.wellcorps.com/files/NonMedicalUseOfPrescriptionStimulants.pdf.

individuals with ADHD. Part II provides a brief overview of ADHD, the dangers associated with the use of methylphenidate and amphetamines to treat the disorder, and the Food and Drug Administration's response to risks posed by the use of each drug. Part III explores the increasing non-medical use of methylphenidate and amphetamines by students across the United States and considers the short-term and long-term implications of such use. Part IV argues that the current regulatory structure is inadequate and negatively impacts students with legitimate medical needs by un-leveling the playing field created by existing laws. Part V presents recommendations to level the academic playing field.

II. ADHD: DIAGNOSIS, REGULATION, AND RISK

Student misconduct in the classroom severely constrains the ability of schools to effectively educate students and has become a common reason for referring students to mental health services.[8] Often, student misconduct is linked to inattention, hyperactivity, or impulsivity that are the hallmarks of ADHD.[9] Once a student is diagnosed with ADHD, teaching strategies, unique learning environments, and adaptive or assistive technologies can be employed to prevent classroom disruptions and assist students with ADHD to compete on a level playing field with their fellow students.[10]

A. ADHD

ADHD is the current diagnostic label for a developmental disorder that has been known over the last century as "brain-damaged syndrome," "minimal brain dysfunction (MBD)," "hyperkinetic impulsive disorder," or "attention deficit disorder (ADD)."[11] ADHD affects between five to eight percent of school-age children and is the most common reason for referral of children to mental health services.[12] Individuals with ADHD often experience substantial impairment in family, social, and educational functioning.[13] In a classroom environment, individuals with ADHD may have difficulty controlling their

---

[8] *Strategies for Teaching Students With Attention Deficit Disorder*, W. VA. UNIV., http://www.as.wvu.edu/~scidis/add.html (last updated Apr. 10, 2007).

[9] *See* NIMH, *supra* note 5.

[10] *Strategies for Teaching Students With Attention Deficit Disorder*, *supra* note 8.

[11] *What is ADHD or ADD?*, NAT'L RES. CTR. ON AD/HD, http://www.help4adhd.org/en/about/what (last visited Sept. 5, 2010).

[12] *Id.*

[13] Am. Med. Ass'n, *Attention Deficit Hyperactivity Disorder*, http://www.ama-assn.org/ama1/pub/upload/mm/443/csaph10a07-fulltext.pdf (last visited Sept. 5, 2010).

behavior and staying focused and may experience periods of hyperactivity.[14] As a result, otherwise simple classroom tasks can become extremely challenging.[15] ADHD symptoms first appear between the ages of three and six, but no single test has proven effective at identifying the disorder.[16] Typically, individuals undergo a battery of tests by physicians and mental health specialists to rule out other possibilities for the symptoms exhibited.[17] Although it is normal for young children to experience periods of inattention, hyperactivity, or impulsivity, children with ADHD exhibit these behaviors more frequently and with greater severity.[18] Thus, ADHD is typically determined upon proof that the child has exhibited such symptoms for at least six months at a degree greater than that expected from children of similar age.[19] Although treatment may temporarily relieve many of the disorder's symptoms to help individuals lead productive lives, no cure exists.[20] ADHD can continue into adulthood.[21] Approximately two to four percent of adults have ADHD.[22] Although diagnostic criteria exist for children, there are currently no age-appropriate diagnostic criteria for adults.[23] Many adult patients are self-referred.[24] Because it is difficult for doctors to accurately diagnose ADHD even in adults, students who understand the testing protocol can easily manipulate the process to obtain a prescription.[25]

Once diagnosed, individuals with ADHD may be treated with one of a number of psychoactive stimulants. However, only two substances are widely utilized by American physicians to treat children: methylphenidate and amphetamines.[26] Stimulants work by increasing dopamine levels in the brain, a

---

[14] NIMH, *supra* note 5.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] American Acad. of Pediatrics, *ADHD and Your School-Aged Child* (Oct. 2001), http://pediatrics.aappublications.org/cgi/data/108/4/1033/DC1/1.

[19] *Id.*

[20] NIMH, *supra* note 5.

[21] *Id.*

[22] NAT'L RESOURCE CTR. ON AD/HD, *supra* note 11.

[23] ADHD diagnosis in children is based on meeting the criteria of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR). These criteria require evidence of inattention, or hyperactivity and impulsivity, or both.

[24] *Adult ADHD: Issues and Answers*, NYU SCHOOL OF MEDICINE ADULT ADHD NEWSLETTER (N.Y.U. Sch. of Med., New York, N.Y.), Spring 2005, *available at* http://webdoc.nyumc.org/nyumc/files/psych/attachments/adult_adhd_1_1.pdf.

[25] *Id.* (noting that ADHD can be diagnosed in adults who exhibit criteria used to diagnose children as long as the adult can recollect such symptoms in childhood).

[26] *Ritalin Use Among Youth: Examining the Issues and Concerns: Hearing Before the Subcomm. on Early Childhood, Youth and Families of the H. Comm. on Education and the Workforce*, 106th Cong. 12-14, 79-98 (2008) (statement of Terrance W. Woodworth, Deputy

chemical associated with pleasure, movement, and attention.[27] These stimulants pass through the blood-brain barrier to affect brain function that manifests in changes in perception, mood, consciousness cognition, and behavior.[28] For individuals with ADHD, the stimulants act to reduce hyperactivity and impulsivity and to improve the individual's ability to focus, work, and learn.[29] Because these medications may pose significant dangers to individuals with cardiovascular (heart and blood) or psychiatric problems, however, physicians should examine individuals diagnosed with ADHD to assess their cardiovascular and psychiatric health and warn them of the dangers associated with using the particular drug.[30]

The use of stimulants has been shown to improve attention span, concentration, compliance, handwriting, fine motor skills, and interactions with other students.[31] Although methylphenidate and amphetamines are effective at treating the symptoms of ADHD, their ability to bring about short-term beneficial changes in consciousness and mood creates a high potential for abuse that can lead to addiction.[32] Congress has addressed this problem by placing strict controls on these and other psychoactive drugs.[33]

B. Regulation of Psychoactive Drugs

The United Nations Convention on Psychotropic Substances (UNCPS) was signed by the United States on February 21, 1971 and ratified on April 16, 1980. The goal of the Convention is to encourage stricter regulation over the illegal importation, manufacture, distribution, possession, and improper use of controlled substances.[34] The U.S. Drug Enforcement Agency (DEA) was

---

Dir., Office of Diversion Control, Drug Enforcement Admin., U.S. Dep't of Justice), *available at* http://www.justice.gov/dea/pubs/cngrtest/ct051600.htm [hereinafter Woodworth Statement].

[27] Nat'l Inst. on Drug Abuse, Nat'l Insts. of Health, U.S. Dep't of Health & Human Servs., *NIDA InfoFacts: Stimulant ADHD Medications: Methylphenidate and Amphetamines* (June 2009), *available at* http://drugabuse.gov/pdf/Infofacts/ADHD09.pdf.

[28] *Id.*

[29] NIMH, *supra* note 5.

[30] Victoria L. Vetter et al., *Cardiovascular Monitoring of Children and Adolescents with Heart Disease Receiving Medications for Attention Deficit/Hyperactivity Disorder*, 117 CIRCULATION 2407, 2418 (2008), http://circ.ahajournals.org/cgi/content/full/117/18/2407 ("The consensus of the committee is that it is reasonable to obtain ECGs as part of the evaluation of children being considered for stimulant drug therapy.").

[31] Jay D. Tarnow, *Pharmacological Treatment of Attention Deficit Disorders*, ADHD SELF-MGMT. CTR. ONLINE, http://www.adhdselfmanagement.com/pharmacological_treatment_add.html (last visited May 24, 2010).

[32] *Id.*

[33] *See infra* Part II.B.

[34] Convention on Psychotropic Substances, E.S.C. Res. 1474 (XLVIII), U.N.Doc. A/RES/1474 (XLVIII) (Mar. 24, 1970).

designated as the authority responsible for meeting the United States' obligations under the treaty.[35] However, because the Convention is not self-executing, implementation of its terms required additional action by Congress. Recognizing the "substantial and detrimental effect on the health and general welfare of the American people" caused by such activities, Congress enacted the Controlled Substances Act (CSA) to implement the UNCPS.[36] The Act created five Schedules (classifications) that categorize drugs based on multiple factors including the drug's medical utility and its risk of harm. Schedule I drugs include drugs that have the highest potential for abuse, offer no recognized medical utility, and cannot be used safely.[37] Examples include LSD, PCP, heroin, marijuana, and crack cocaine. Schedule II includes drugs that have a high potential for abuse, the use of which may lead to severe psychological or physical dependence.[38] However, Schedule II drugs do have currently accepted medical use as part of treatment plans.[39] Examples include morphine, cocaine, oxycodone, methylphenidate, and amphetamine mixtures.[40] Drugs listed on Schedules III, IV, and V have decreasing potential for abuse, medical utility, and risk of physical dependence or psychological dependence relative to the drugs and other substances in higher Schedules.[41] The DEA is charged with enforcing the CSA, but the Food and Drug Administration (FDA) also plays a critical role as the primary authority for regulating controlled drugs that are prescribed for therapeutic use.[42]

The CSA created penalties for the unlawful manufacturing, distribution, and dispensing of controlled substances, with penalties that vary based on several factors, including the Schedule of the substance. In 1988, Congress passed the Anti-Drug Abuse Act (ADAA), which imposes penalties on both the seller and the purchaser of the drug.[43] Unless otherwise authorized by law, it is unlawful to knowingly or intentionally distribute a controlled substance.[44] The penalty for such action is imprisonment for up to one year, a minimum fine of $1000,

---

[35] *Continuing Concerns Over Imported Pharmaceuticals: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 107th Cong. 37-40 (2001) (statement of Laura M. Nagel, Deputy Assistant Adm'r, Office of Diversion Control, Drug Enforcement Admin.), *available at* http://ftp.resource.org/gpo.gov/hearings/107h/73737.pdf.

[36] Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1236, 1242 (1970) (codified at 21 U.S.C. §§ 801-904 (2006)).

[37] 21 U.S.C. § 812(b)(1) (2006).

[38] *Id.* § 812(b)(2).

[39] *Id.*

[40] *Id.*

[41] *Id.* § 812(b)(3)-(5).

[42] 21 C.F.R. § 290.1 (2010).

[43] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

[44] 21 U.S.C. § 841(a)(1) (2006).

or both.[45] If the distribution is to someone under twenty-one years of age, or occurs within 1000 feet of a private or public school, college, or university, the penalty is twice the maximum punishment normally authorized.[46] It is also unlawful for any person to knowingly or intentionally possess a controlled substance without a valid prescription for the substance.[47] Any individual found to illegally possess such drugs may be imprisoned for up to one year and shall be fined a minimum of $1000.[48] The penalty for such distribution or possession is particularly harsh for students. In addition to the criminal penalties that may be imposed, distributors of controlled substances are ineligible to receive federal benefits for up to five years and possessors are ineligible to receive these benefits for up to one year.[49] This includes student loans and grants.[50] Despite these substantial penalties, students across the country continue to illegally use or distribute methylphenidate and amphetamines. In many cases, individuals who use the drugs illegally are unaware of the risks posed by such use.

1. Methylphenidate

Methylphenidate shares many of the pharmacological effects of amphetamine, methamphetamine, and cocaine.[51] It is commonly known by a variety of names, including "Diet Coke," "Kiddie Cocaine," "Vitamin R," "Poor Man's Cocaine," "Skittles," and "Smarties"[52] The names reflect the effects that users experience. Both animal and human studies comparing the effects of cocaine with that of methylphenidate showed that subjects could not tell the difference because each produced the same physiologic effects.[53] Methylphenidate acts on the central nervous system (CNS) to reduce symptoms of ADHD by "blocking the neuronal dopamine transporter, and to a lesser extent, norepinephrine."[54] Use of methylphenidate produces "dose-related increases in blood pressure, heart rate, respiration and body temperature, appetite suppression and increased alertness."[55] Chronic use can inhibit growth

---

[45] *Id.* § 844(a).

[46] *Id.* §§ 859(a), 860(a).

[47] *Id.* § 844(a).

[48] *Id.*

[49] *Id.* § 862(a)(1)(A), (b)(1)(A).

[50] *Id.* § 862(d)(1)(A).

[51] Drug Enforcement Agency, U.S. Dep't of Justice, Methylphenidate (A Background Paper) (Oct. 1995), *available at* http://www.methylphenidate.net/.

[52] DRUG FREE WORLD, THE TRUTH ABOUT RITALIN ABUSE (2009), http://www.drugsalvage.com.au/downloads/kiddie_cocaine.pdf.

[53] *Id.*

[54] Am. Med. Ass'n, *supra* note 13, at 8.

[55] Drug Enforcement Agency, *supra* note 51.

and result in weight loss.[56] If abused, methylphenidate may cause "excessive CNS stimulation, euphoria, nervousness, irritability," agitation, psychotic episodes, violent behavior, and severe psychological dependence.[57]

Methylphenidate is most commonly marketed under the brand name Ritalin, and its beneficial effects on individuals with ADHD are well documented.[58] The drug's success led to its widespread administration beginning in the 1990s. Between 1990 and 2000, the production of Ritalin increased nearly 500 percent.[59] Today, Ritalin is the most widely prescribed Schedule II stimulant to treat ADHD.[60] According to the United Nations, the United States produces and consumes approximately 75 percent of the world's Ritalin.[61] Although these drugs have helped many individuals with ADHD, their use has become so widespread that questions exist as to whether the drug has been over-prescribed and over-used.[62]

2. Amphetamines

Amphetamines are potent stimulants that affect the CNS by increasing levels of dopamine and norepinephrine in the brain to produce increased alertness and focus, while decreasing fatigue and hunger.[63] Its actions resemble those of adrenaline, the body's fight or flight hormone.[64] The drug was widely used by soldiers in World War II to combat fatigue and increase alertness on the battlefield. After the war, easy access for the general public led to increased use that culminated in widespread abuse of the drug in the 1960s.[65] In 1971, Congress listed the drug as a Schedule II drug based on its potential for abuse,

---

[56] *Id.*

[57] *Id.*

[58] *See, e.g., id*; *see also* Howard Abikoff et al., *Symptomatic Improvement in Children With ADHD Treated With Long-Term Methylphenidate and Multimodal Psychosocial Treatment*, 43 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 802 (2004) (reporting significant benefits from methylphenidate use in children with ADHD).

[59] Woodworth Statement, *supra* note 26, at fig.1.

[60] U.N. INT'L NARCOTICS CONTROL BD., REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2009, at 13 (Feb. 24, 2010), *available at* http://www.incb.org/pdf/annual-report/2009/en/AR_09_English.pdf.

[61] *Id.* at 26.

[62] Gene R. Haislip, Deputy Assistant Adm'r, Drug Enforcement Admin., ADD/ADHD Statement of Drug Enforcement Administration, Address at the Conference on Stimulant Use in the Treatment of ADHD (Dec. 10-12, 1996), *available at* http://www.add-adhd.org/ritalin.html.

[63] Susan Jones et al., *Amphetamine Blocks Long-Term Synaptic Depression in the Ventral Tegmental Area*, 20 J. NEUROSCI. 5575, 5575–80 (2000).

[64] Alcoholism & Drug Addiction Research Found., *Amphetamines* (1991), http://www.xs4all.nl/~4david/amphetam.html.

[65] Everett H. Ellinwood et al., *Chronic Amphetamine Use and Abuse* (2000), http://www.acnp.org/g4/GN401000166/CH162.htm.

but it has reemerged as the drug of choice for many students.[66] One of the most common amphetamines used to treat ADHD is marketed under the trade name of Adderall.[67]

Amphetamines act on the brain to "increase alertness, reduce fatigue, heighten concentration, decrease appetite, and enhance physical performance."[68] They may produce a feeling of well-being, euphoria, and loss of inhibitions.[69] Misuse may result in "seizures, hypertension, tachycardia, hyperthermia, psychosis, hallucinosis, stroke, and fatality."[70]

For individuals with cardiovascular risk factors, amphetamine use is particularly dangerous.[71] Blood pressure may elevate to a point where blood vessels in the brain rupture and cause a stroke.[72] Some individuals, even young athletes, have suffered heart attacks as a result of amphetamine use.[73] In other cases, users may become "extremely paranoid, violent, and out of control."[74] In the United States, Adderall use continues to climb. Between 1990 and 2000, the production for Adderall increased by 2000 percent.[75]

C. FDA Response to Risk of Methylphenidate and Amphetamine Misuse

In 2005, Canada pulled Adderall off the market, citing reports linking it to twenty deaths between 1999 and 2003.[76] In that same period, twenty-five people died suddenly in the United States and fifty-four others suffered serious, unexplained heart problems while taking ADHD stimulants.[77] The FDA responded by announcing that it found no need to make immediate changes to the marketing or labeling of drugs used to treat ADHD.[78] The FDA noted that most of the victims had existing heart defects that increased the risk for sudden

---

[66] Woodworth Statement, *supra* note 26, at fig.1.

[67] Nat'l Inst. on Drug Abuse, *supra* note 27.

[68] Patrick G. O'Connor, *Amphetamines, in* THE MERCK MANUAL HOME EDITION (ONLINE VERSION) (last updated Jan. 2009), *available at* http://www.merckmanuals.com/home/sec25/ch312/ch312c.html.

[69] *Id.*

[70] Neal Handly, *Toxicity, Amphetamine* (last updated Oct. 21, 2009), *available at* http://emedicine.medscape.com/article/812518-overview.

[71] O'Connor, *supra* note 68.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] Woodworth Statement, *supra* note 26, at fig.1.

[76] Matt McMillen, *Adderall: A Stroke of Bad News*, WASH. POST, Feb. 15, 2005, at HE02.

[77] Gardiner Harris, *Deaths Cited in Reports on Stimulant Drugs, But Their Cause is Uncertain*, N.Y. TIMES, Feb. 9, 2006, at A19.

[78] U.S. Food & Drug Admin., *Statement on Adderall* (Feb. 9, 2005), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2005/ucm108411.htm.

death.[79] It also noted that the overall risk associated with Adderall was only slightly higher than that associated with methylphenidate products used to treat ADHD.[80]

The FDA did acknowledge, however, that use of stimulants presents the potential for rare fatal and nonfatal cardiovascular events.[81] In 2006, the FDA's Drug Safety and Risk Management Advisory Committee voted unanimously to recommend the distribution of Medical Guides to warn of potential cardiovascular risks associated with using ADHD stimulants.[82] The Committee also recommended requiring black box warnings—the strongest warning required by the FDA—to alert users of the significant cardiovascular risks associated with such use.[83] The Committee's decision was based on the proven relationship between elevated blood pressure and cardiovascular risk in adults, and the fact that the number of prescriptions for ADHD increased significantly over the previous fifteen years, including in the adult population.[84] Even those who disagreed with the recommendation noted the need for a broader, more effective means of communicating these risks to patients.[85]

Later that year, the FDA's Pediatric Advisory Committee recommended the implementation of stronger warnings regarding the use of the stimulants in patients with underlying structural cardiovascular defects or cardiomyopathies;[86] however, the Pediatric Advisory Committee opposed requiring a black box warning to the labeling of stimulants.[87] They recommended that the FDA modify information in other sections of the product labeling to address the potential harms.[88] The FDA adopted that recommendation.[89] Product labeling on ADHD stimulants now caution on:

---

[79] U.S. Food & Drug Admin., *Public Health Advisory for Adderall and Adderall XR* (Feb. 9, 2005), *available at* http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/DrugSafetyInformationforHeathcareProfessionals/PublicHealthAdvisories/ucm051672.htm.

[80] *Id.*

[81] U.S. Food & Drug Admin., *Drug Safety and Risk Management Advisory Committee Minutes* (Feb. 9, 2006), www.fda.gov/ohrms/dockets/ac/06/minutes/2006-4202M1_FINAL-Minutes.pdf.

[82] *Id.* at 4.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] U.S. Food & Drug Admin., *Minutes of the Pediatric Advisory Committee* 6 (Mar. 22, 2006), http://www.fda.gov/ohrms/dockets/ac/06/minutes/2006-4210m_Minutes%20PAC%20March%2022%202006.pdf.

[87] *Id.*

[88] *Id.*

[89] U.S. Food & Drug Admin., *FDA Directs ADHD Drug Manufacturers to Notify Patients about Cardiovascular Adverse Events and Psychiatric Adverse Events* (Feb. 21, 2007), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2007/ucm108849.htm.

> (1) use in patients with structural cardiac abnormalities or other serious heart problems; (2) the potential for increasing blood pressure and exacerbating pre-existing conditions such as hypertension, heart failure, recent myocardial infarction, or ventricular arrhythmia; (3) the need to conduct a careful history (including assessment for a family history of sudden death or ventricular arrhythmia); (4) a physical examination to assess for the presence of cardiac disease, and further cardiac evaluation if warranted; (5) the potential for causing or exacerbating psychotic, manic, or "aggressive" symptoms or seizures; (6) the potential for growth suppression in continuously medicated youth; and (7) the potential for visual disturbances.[90]

The FDA also directed manufacturers of all drug products approved for the treatment of ADHD to develop Patient Medication Guides to alert patients to potential cardiovascular risks and risks of adverse psychiatric symptoms associated with the use of stimulants.[91] The FDA, however, refused to require pharmaceutical companies to place black box warnings on these drugs as it had done for other dangerous drugs used to treat children and adolescents for depression.[92] Patients, families, and caregivers receive the guides when a medicine is dispensed.[93] The problem with this approach is that its efficacy is based on the assumption that information about the drug's risks is effectively conveyed to the user.

A black box warning is the strongest warning required by the FDA, and it is typically required when (1) "[t]here is an adverse reaction so serious in proportion to the potential benefit from the drug that it is essential that it be considered in assessing the risks and benefits of using a drug," (2) "[t]here is a serious adverse reaction that can be prevented or reduced in frequency or severity by appropriate use of the drug," or (3) where the FDA has approved the drug with restrictions to assure safe use.[94] Although black box warnings are typically mandated based on observed adverse reactions, the FDA has acknowledged that "there are instances when a boxed warning based on an expected adverse reaction would be appropriate."[95]

---

[90] American Med. Ass'n, *supra* note 13, at 12.

[91] U.S. Food & Drug Admin., *supra* note 89.

[92] *Antidepressant Medications for Children and Adolescents: Information for Parents and Caregivers*, NAT'L INST. ON MENTAL HEALTH (Dec. 3, 2010), http://www.nimh.nih.gov/health/topics/child-and-adolescent-mental-health/antidepressant-medications-for-children-and-adolescents-information-for-parents-and-caregivers.shtml.

[93] U.S. Food & Drug Admin., *supra* note 81.

[94] *See* U.S. Food & Drug Admin., *Guidance for Industry: Warnings and Precautions, Contraindications, and Boxed Warning Sections of Labeling for Human Prescription Drug and Biological Products—Content and Format* 9 (Jan. 2006), http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm075096.pdf; *see also* 21 C.F.R. § 314.520 (2010).

[95] U.S. Food & Drug Admin., *supra* note 94, at 9.

The FDA's failure to require black box warnings on ADHD stimulants is problematic for several reasons. First, stimulant misuse has increased among school-aged children, and studies show that an increasing number of students obtain the drugs illegally from a friend or acquaintance with a legal prescription.[96] Many students who use the drugs illegally are unaware of the risks associated with taking the drugs.[97] This strongly suggests that the dangers associated with sharing these drugs with others is not being effectively conveyed to those who have a prescription for the drug. Having a black box warning posted on the prescription vial could increase the likelihood that legal users will warn the illegal user of potential serious side effects of non-therapeutic use.

Second, statistically significant increases in heart rate and blood pressure occur in adults treated with stimulant use, and blood pressure is strongly and directly correlated with vascular and overall mortality in adults.[98] Placing a black box warning on the prescription vial could increase awareness of the risks associated with use by individuals with heart conditions and increase the chance that those at serious risk are informed of the dangers. Given the increased distribution of stimulants and the resultant excess supply of the drugs that can be diverted to illegal use, it would be prudent to place additional warnings on stimulants. As the United States becomes more interested in the potential for cognitive enhancement, there is a growing urgency to increase awareness of the harms of illicit stimulant use.

III. THE DECADE OF THE BRAIN: BETTER LEARNING THROUGH CHEMISTRY

Congress declared the 1990s as the "Decade of the Brain" in an effort to increase the scientific study of debilitating neural diseases and conditions that plagued society.[99] The declaration stimulated research that led to breakthroughs in fundamental knowledge on how to treat debilitating

---

[96] *Id.*

[97] Margaret Marrer, *Adderall Use and Abuse: Is Georgetown Part of a Growing Trend?*, GEORGETOWN INDEP. (Jan. 2, 2010), http://www.thegeorgetownindependent.com/2.14589/adderall-use-and-abuse-1.2081595.

[98] Joseph Biederman et al., *A Randomized, Placebo-Controlled Trial of OROS Methylphenidate in Adults With Attention-Deficit/Hyperactivity Disorder*, 59 BIOLOGICAL PSYCHIATRY 829 (2006). *See also* Richard H. Weisler et al., *Long-Term Cardiovascular Effects of Mixed Amphetamine Salts Extended Release in Adults With ADHD*, 10 CNS SPECTRUMS 35 (2005), *available at* http://www.cnsspectrums.com/aspx/articledetail.aspx?articleid=492 (finding statistically significant increases in blood pressure and heart rate after use of stimulants).

[99] *See* Edward G. Jones & Lorne M. Mendell, *Assessing the Decade of the Brain*, 284 SCIENCE 739 (1999).

neurological disorders and neuropsychiatric diseases.[100] For some, such breakthroughs encouraged the increased acceptance of science as a means to improve the human condition and the expectation that treatments for currently incurable diseases would become available. [101] Moreover, once those cures become available, some individuals with those disorders will seek to do what they wish with their body free from government interference.[102] For others, however, artificial enhancement of humanity through application of human invention is both morally wrong and spiritually corrupt.[103] The argument cuts across science, religion and law with no clear answers, and the classroom has emerged as the epicenter of the debate. As the next section reveals, an increasing number of students are turning to stimulants to gain a competitive edge on peers in the classroom.

A. Illicit Stimulant Use By Students

The United States continues to be the world's largest market for illicit drugs and a major destination of illicit drug consignments.[104] In 2008, an estimated 35.5 million persons in the United States, or 14.2 percent of the population aged twelve or older, reported the use of illicit drugs at one point in their lives.[105] Of these, an estimated 22.2 million persons were classified with substance dependence or abuse.[106] That number is likely to increase, as more than 20 million Americans acknowledged being drug users in 2008.[107] Perhaps more troubling is the increase in abuse of prescription drugs.

In 2008, the number of individuals who abused prescription drugs in the United States exceeded the total number of individuals who abused cocaine, heroin, hallucinogens, and inhalants.[108] Prescription drug abuse now ranks second only to cannabis abuse.[109] Young adults aged eighteen to twenty-five

---

[100] *Id.*

[101] *Id.*

[102] Personal autonomy and the right to privacy is viewed by some as a liberty, protected by the Due Process Clause of the Fourteenth Amendment, that allows the individual to choose what to do with his or her own body free from government restrictions that prevent such action.

[103] *See, e.g.*, Benedict Carey, *Smartening Up: Brain Enhancement Is Wrong, Right?*, N.Y. TIMES, Mar. 9, 2008, at WK1.

[104] U.N. INT'L NARCOTICS CONTROL BD., *supra* note 60, at 66.

[105] *Id.* at 72.

[106] OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2008 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS (2009), *available at* http://www.oas.samhsa.gov/nsduh/2k8nsduh/2k8Results.pdf.

[107] *Id.*

[108] U.N. INT'L NARCOTICS CONTROL BD., *supra* note 60, at 72.

[109] *Id.* at 72-73.

years exhibited twice the level of prescription drug abuse than youth aged twelve to seventeen years, and more than triple the level of abuse among adults aged twenty-six years and older.[110] This trend is likely to continue in the United States because individuals are increasingly turning to prescription drugs to fulfill a need. In 2008, 2.5 million individuals abused prescription drugs for the first time.[111] This is 300,000 more than the number of first-time cannabis users.[112] Of those individuals who used illicit drugs for the first time in 2008, nearly one third (29.6 percent) initiated their use with psychotherapeutics, including pain relievers, tranquilizers, stimulants, and sedatives.[113] Of these, approximately 600,000 individuals initiated their illicit drug use through use of prescription stimulants.[114] More than half of these individuals acknowledged that they received the prescription drugs from friends or relatives for free.[115] Illicit stimulant use begins as early as middle school, extends through high school and college, and continues into the workforce.

1. Illicit stimulant use in middle school and high school

The misuse and abuse of stimulants used to treat ADHD is common among youth. For example, one study reported that 23.3 percent of middle and high school students taking prescribed stimulants had been solicited to give, sell, or trade their medication to friends.[116] The rate increased as the student moved from middle school to high school.[117] A Wisconsin study reported that of 161 elementary and high school students prescribed the stimulant methylphenidate, 16 percent had been asked to give or sell their medications to others.[118] Another study from Canada reported that of a random sample of middle and high school students who were using legally prescribed stimulants, 14.7 percent gave their medications to others, 7.3 percent sold their medication to others, and 4.3 percent had their medications stolen by others.[119] This early use continues in college.

---

[110] *Id.* at 73.

[111] *Id.*

[112] *Id.* at 73, 74.

[113] OFFICE OF APPLIED STUDIES, *supra* note 106, at 52.

[114] *Id.*

[115] *Id.* at 30.

[116] Sean Esteban McCabe et al., *The Use, Misuse and Diversion of Prescription Stimulants Among Middle and High School Students*, 39 SUBSTANCE USE & MISUSE 1095, 1103 (2004).

[117] *Id.*

[118] C.J. Musser et al., *Stimulant Use and the Potential for Abuse in Wisconsin as Reported by School Administrators and Longitudinally Followed Children*, J. DEVELOPMENTAL & BEHAVIORAL PEDIATRICS 187, 192 (1998).

[119] Christine Poulin, *Medical and Nonmedical Stimulant Use Among Adolescents: From Sanctioned to Unsanctioned Use*, 165 CAN. MED. ASS'N J. 1039, 1039 (2001).

2. Illicit stimulant use in post-secondary education

In 2008, college-aged students (eighteen to twenty-five years old) had the highest rate (19.6 percent) of illicit drug use among all age groups.[120] In this age group, the use of psychotherapeutics (5.9 percent) was almost four times greater than the use of cocaine (1.5 percent).[121] This data shows that illicit use of prescription stimulants has become a major problem in post-secondary education.[122] In a recent study of 1811 undergraduate students at a large public university, thirty-four of the students questioned admitted to the illegal use of ADHD stimulants.[123] Most of the students questioned acknowledged that they used the drugs during periods of high academic stress because the stimulants increased reading comprehension, interest, cognition, and memory.[124] Furthermore, most students acknowledged that they possessed little knowledge of the drug or its potential to cause harm.[125] In another study of 1550 college students, of those responding who were not diagnosed with ADHD, almost half (43 percent) reported illegally using prescription stimulants.[126] Approximately 16 percent to 29 percent of students with ADHD stimulant prescriptions were asked to give, sell, or trade their medications.[127] Perhaps more troubling, students have acknowledged they find it easy to obtain prescription drugs on campus and that they do not perceive any stigma attached to their use.[128] Rather, many students believe such use is physically harmless, morally acceptable, and even a necessary predicate to success.[129] This perspective has led to an increased illicit use of stimulants in the workforce.

---

[120] OFFICE OF APPLIED STUDIES, *supra* note 106, at 2.

[121] *Id.*

[122] Sean E. McCabe, *Medical Use, Illicit Use and Diversion of Prescription Stimulant Medication*, 38 J. PSYCHOACTIVE DRUGS 45, 45-46 (2006).

[123] Alan D. DeSantis et al., *Illicit Use of Prescription ADHD Medications on a College Campus: A Multimethodological Approach*, 57 J. AM. COLL. HEALTH 315, 316 (2008).

[124] *Id.*

[125] *Id.* at 317.

[126] Claire D. Advokat et al., *Licit and Illicit Use of Medications for Attention-Deficit Hyperactivity Disorder in Undergraduate College Students*, 56 J. AM. COLL. HEALTH 601, 602 (2008).

[127] Timothy E. Wilens et al., *Misuse and Diversion of Stimulants Prescribed for ADHD: A Systematic Review of the Literature*, 47 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 21 (2008).

[128] DeSantis, *supra* note 123, at 322.

[129] *Id.*

3. *Illicit stimulant use in the workplace*

The abuse of drugs has also filtered over into the workforce. In 2008, of the 17.8 million illicit drug users aged eighteen or older, 12.9 million (72.7 percent) were employed either full- or part-time.[130] Today, doctors, lawyers, and other professionals use stimulants such as Ritalin and Adderall to compete in increasingly stressful, competitive work environments.[131] Recent reports suggest the declining economy may be a key factor behind the increasing number of individuals using these inexpensive stimulants.[132]

While stimulants like Ritalin and Adderall increase the user's attention and productivity, they may have the unwelcome effect of sapping the person's creativity. Memory, attention, and creativity represent three different cognitive domains that are interconnected and contribute to the "mental performance" of an individual.[133] As one psychologist noted, individuals taking Ritalin act "like a horse with blinders, plodding along . . . moving forward, getting things done, but . . . less open to inspiration."[134] Many entrepreneurs, performers, politicians, and communicators alike attribute their success to untreated ADHD.[135] Some argue that living with untreated ADHD allows them to think unconventionally and believe that ADHD medications dampen inspiration, leaving them to think like everyone else.[136] This view may have some merit, given that some of the greatest figures in history—including Albert Einstein, Thomas Edison, Salvador Dali, and Winston Churchill—exhibited classic ADHD traits, but were never treated for the disorder.[137]

Although no long-term career studies exist to determine whether stimulants actually dampen creativity and imagination, at least one study has found anecdotal evidence that taking Ritalin renders some children less interested in pursuing creative opportunities.[138] Psychologists have acknowledged that there may be a trade-off between the ability to focus and creativity for individuals

---

[130] OFFICE OF APPLIED STUDIES, *supra* note 106, at 2.

[131] *Popping Pills a Popular Way to Boost Brain Power*, CBS NEWS (Apr. 25, 2010), http://www.cbsnews.com/stories/2010/04/22/60minutes/main6422159.shtml.

[132] Matt Manning, *Sandusky County Officials: No Decline Seen in Drug Use*, NEWS-MESSENGER (Fremont, Ohio), Aug. 6, 2009 (on file with author) (noting that many new cases of illicit drug use involve the use of less expensive prescription medicines like Adderall and Ritalin).

[133] Christina Lanni et al., *Cognition Enhancers Between Treating and Doping the Mind*, 57 PHARMACOLOGICAL RESEARCH 196 (2008).

[134] Jeffrey Zaslow, *What if Einstein had Taken Ritalin? ADHD's Impact on Creativity*, WALL ST. J., Feb. 3, 2005, at D1.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

using ADHD drugs, where individuals capable of focusing on a single thing while filtering out distractions may be less creative.[139] As Martha Farah, a psychologist and director of the University of Pennsylvania's Center for Cognitive Neuroscience opined, "I'm a little concerned that we could be raising a generation of very focused accountants."[140] Farah, however, also believes cosmetic neurology will be as commonplace as cosmetic surgery, as it may lead to improvements in the world.[141] As another author indicates, despite increased use of stimulants by academics, "so far no one is demanding that asterisks be attached to Nobels, Pulitzers or Lasker awards" like those associated with the possible enhanced performances of professional athletes.[142] The apparent acceptance of cognitive enhancement by professionals in the workplace has raised a number of ethical dilemmas, the answers to which have the potential to change what it means to be successful in or out of the classroom.

B. The Ethics of Brain Enhancement

The use of ADHD stimulants is just the beginning. Today, scientists are actively investigating memory enhancement drugs to help millions of baby boomers suffering from age-related memory loss. If such a "Viagra for the brain" is discovered, how should it be used?[143] Should it be administered, for example, to the elderly population if it improves their quality of life? No consensus likely exists on this question, given the divergent views on the use of brain enhancers. An affirmative answer would generate important questions and challenge notions about human meaning and its limitations. A negative answer would generate equally important questions about the role of medicine to humanity and challenge notions about the purpose of human intellect. From a purely scientific viewpoint, it makes little sense to wait patiently for evolution to improve brain function. Human intellect has evolved to the point at which it is now capable of creating technology that increases brain capacity.[144] Arguably, using brain enhancement technology to improve the quality of life of modern-day man is no different than the use of rudimentary stone tools by early

---

[139] Margaret Talbot, *Brain Gain: The Underground World of "Neuroenhancing" Drugs*, NEW YORKER, Apr. 27, 2009, *available at* http://www.newyorker.com/reporting/2009/04/27/090427fa_fact_talbot?currentPage=all.

[140] *Id.*

[141] *Popping Pills a Popular Way to Boost Brain Power*, *supra* note 131.

[142] Carey, *supra* note 103.

[143] *See* Pew Forum on Religion & Pub. Life, *The Pursuit of Perfection: A Conversation on the Ethics of Genetic Engineering* (Mar. 31, 2004), *available at* http://pewforum.org/Science-and-Bioethics/The-Pursuit-of-Perfection-A-Conversation-on-the-Ethics-of-Genetic-Engineering.aspx [hereinafter Pew Forum].

[144] Michael S. Gazzaniga, *Smarter on Drugs*, SCI. AM. MIND, Oct. 2005.

humans 2.6 million years ago.[145] Such tools were the product of human intellect and dramatically improved early man's quality of life, allowing individuals to perform activities the human body was not equipped to perform.[146] For some, the development of simple tools parallels the development of brain enhancing drugs and represents another step in the evolutionary process that should be embraced. For others, however, the use of technology to enhance natural abilities raises profound questions about the moral status of nature and the proper stance of human beings toward the natural world.[147] Thus, the fundamental question is not whether improvement is possible, but whether humans should aspire to improve their natural state at all.[148]

Much of the debate has focused on the equality of access to enhancers. In 2007, for example, the British Medical Association argued for the equal access to brain enhancement drugs.[149] The authors of that paper acknowledged that equality of opportunity is an explicit goal of the educational system, and requires that individuals are given "the best chance of achieving their full potential and of competing on equal terms with their peers."[150] The best way to achieve this goal, according to the authors, is through selective use of neuroenhancers among individuals with lower intellectual capacity or those who have deprived backgrounds.[151] However, this argument misses the larger problem. From a legal and societal perspective, the question should be whether the use of such brain enhancement drugs by healthy individuals to increase normal abilities is consistent with the goal of leveling the playing field so that *all* students, including those suffering from ADHD, have an equal opportunity to receive an appropriate education.

IV. UNLEVELING THE PLAYING FIELD THROUGH COGNITIVE ENHANCEMENT

In 1970, U.S. public schools educated only one in five children with disabilities.[152] In many states, it was illegal for any deaf, blind, emotionally

---

[145] Sileshi Semaw et al., *2.6-Million-year-old Stone Tools and Associated Bones from OGS-6 and OGS-7, Gona, Afar, Ethiopia*, 45 J. HUM. EVOLUTION 169 (2003).

[146] *Id.*

[147] Michael J. Sandel, *The Case Against Perfection*, ATL. MONTHLY, Apr. 2004, at 50.

[148] *Id.*

[149] Med. Ethics Dep't, British Med. Ass'n, *Boosting Your Brainpower: Ethical Aspects of Cognitive Enhancements* 19 (2007), *available at* http://www.bma.org.uk/images/Boosting_brainpower_tcm41-147266.pdf.

[150] *Id.*

[151] *Id.*

[152] OFFICE OF SPECIAL EDUC. PROGRAMS, OFFICE OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH

disturbed, or mentally retarded individual to attend public school.[153] That changed after two landmark decisions. In *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (PARC)*,[154] plaintiffs challenged the constitutionality of state laws that denied mentally retarded children access to a free public education because of their disabilities. PARC ended in a consent decree that enjoined the state from denying disabled individuals "access to a free public program of public education and training."[155] In *Mills v. Board of Education of the District of Columbia*,[156] seven children labeled by school personnel as having behavioral problems or mental retardation, or as emotionally disturbed or hyperactive, were denied admission to public school or excluded after admission with no provision for an alternative educational placement or review.[157] The court, relying on a Supreme Court mandate that states provide public education on equal terms, held that the state must provide a free public education to the students.[158]

PARC and *Mills* established that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees every child with a disability the right to appropriate public education. In 1975, Congress enacted the Education for All Handicapped Children Act (EHA), to help states protect the educational rights and meet the needs of students with disabilities.[159] The EHA is now codified as the Individuals with Disabilities Education Act (IDEA).[160]

In promulgating the EHA, Congress found that state and local agencies have a responsibility to provide education for all disabled students.[161] Congress also found it in the country's interest for the federal government to assist state and local efforts to provide education for all disabled individuals.[162] The EHA codified existing law by requiring states to provide access for every disabled individual to a Free Appropriate Public Education (FAPE).[163] To be eligible for federal financial assistance under the EHA, states must develop and implement policies assuring access to a FAPE for all children with

---

DISABILITIES THROUGH IDEA (2005), *available at* http://www2.ed.gov/policy/speced/leg/idea/history.pdf.

[153] *Id.*

[154] 334 F. Supp. 1257 (E.D. Pa. 1971).

[155] *Id.* at 1258.

[156] 348 F. Supp. 866 (D.D.C. 1972).

[157] *Id* at 868.

[158] *Id.* at 874 (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

[159] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

[160] 20 U.S.C. §§ 1400-1482 (2006).

[161] *Id.* § 1400(3).

[162] *Id.* § 1400(6).

[163] *Id.* § 1400(3).

disabilities.[164] Congress expressly intended that states provide a *full* educational opportunity to ensure that disabled individuals between the ages of three and twenty-one have equal opportunities in the learning environment.[165] Today, challenges to these mandates are brought under the IDEA.

Under the IDEA, a child is considered disabled if that child suffers from "other health impairments . . .[and] by reason thereof, needs special education and related services."[166] Implementing regulations promulgated by the U.S. Department of Education provide:

> *Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—
>
> (i) [i]s due to chronic or acute health problems such as . . . attention deficit disorder or attention deficit hyperactivity disorder . . . and
>
> (ii) [a]dversely affects a child's educational performance.[167]

Once a child is evaluated and determined to be learning disabled under the IDEA, states are required to ensure that an individualized education program (IEP) is developed for the student.[168] Academic success is an important factor in determining whether an IEP is reasonably calculated to provide educational benefits.[169] The IEP considers, for example, accommodations provided to the student to help him attain identified academic goals in a regular classroom.[170] Those goals are measured through classroom performance and by state administered standardized test results.[171] Congress added procedural safeguards that permit re-evaluation of state plans to measure their effectiveness in providing a free and appropriate education to all disabled individuals.[172] The Act requires the state or Secretary of Interior to conduct studies, investigations, and evaluations that are necessary to ensure the effective implementation of the Act.[173] Collectively, these provisions were intended to ensure that disabled individuals have a fair chance to compete academically with individuals who do not suffer from a disability.

Studies have demonstrated that the Intelligent Quotients (IQ) of individuals with ADHD are normally distributed and that the academic deficits of ADHD

---

[164] *Id.*
[165] *Id.* § 1412(a)(1)(A).
[166] *Id.* § 1401(3)(A)(i)-(ii).
[167] 34 C.F.R. § 300.8(c)(9) (2010).
[168] 20 U.S.C. §§ 1412(a)(4), 1414(d)(1)(a) (2006); 34 C.F.R. § 300.347 (2010).
[169] 20 U.S.C. §§ 1401(14), 1412(a)(4), 1414(d) (2006).
[170] *Id.* § 1414(c)(1)(A)(ii), (d)(1)(A)(i)(II)-(IV).
[171] *Id.* § 1412(a)(16)(A).
[172] *Id.* § 1418(a).
[173] *Id.* § 1418(b).

may be a consequence of it rather than a core feature.[174] This suggests that students with ADHD are just as smart and capable as their peers but are hindered by their disorder. Prescription stimulants, therefore, play a critical role in maintaining equality of opportunity. Advances in cognitive neurology, however, threaten to turn back the hands of time and once again place disabled students at a competitive disadvantage in the classroom. The non-therapeutic use of stimulant drugs designed to help disabled individuals compete in the classroom is inconsistent with United States disability policy and must be prevented. Efforts to prevent illicit use in post-secondary education have largely failed; the legal and financial obligations imposed on states related to primary and secondary education, however, offer an effective means to address the problem.

V. ANALYSIS AND RECOMMENDATIONS

The misuse of stimulant drugs is frequently a prelude to chronic abuse or drug dependence.[175] The diversion of prescription drugs for non-therapeutic use begins as early as middle school and continues into high school, college, and the workplace.[176] States have diminishing levels of responsibility and control over students as they progress from primary and secondary education to post-secondary education and into the workforce.[177] As such, states should act early to prevent the illicit drug abuse.

A. Re-evaluate Success in the Classroom Under IDEA

Congress exercised its authority under the Spending Clause of the Constitution to enact the IDEA with the express goal of providing a free and appropriate public education to students who are disadvantaged because of a disability.[178] In 2010, the federal government authorized almost $24 billion in

---

[174] Bonnie J. Kaplan et al., *The IQs of Children with ADHD are Normally Distributed*, 33 J. LEARNING DISABILITIES 410, 425-32 (2000); *see also* T.P. Ho et al., *Situational Versus Pervasive Hyperactivity in a Community Sample*, 26 PSYCHOL. MED. 309 (1996).

[175] Donald E. Greydanus, *Stimulant Misuse: Strategies to Manage a Growing Problem* (June 2007), http://www.acha.org/prof_dev/ADHD_docs/ADHD_PDprogram_Article2.pdf.

[176] *See generally* NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, COLUM. UNIV., NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE XV: TEENS AND PARENTS (Aug. 2010), http://www.casacolumbia.org/upload/2010/20100819teensurvey.pdf (discussing the use of prescription drugs for non-therapeutic use by middle and high school students).

[177] *See, e.g.*, Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997) (citing Se. Cmty. Coll. v. Davis, 442 U.S. 397, 401 (1979)) (noting that federal disability laws do not compel educational institutions to make substantial modifications in their program to allow disabled persons to participate).

[178] *See* 20 U.S.C. § 1400(d)(1)(A) (2006); *see also* Arlington Cent. Sch. Dist. Bd. of Educ.

funding for the IDEA.[179] To receive federal funds under the IDEA, a state must comply with the extensive goals and procedures set forth in the Act as they apply to state and local educational agencies that accept funds for K-12 programs.[180] Because the IDEA is an entitlement statute, school districts must identify children with disabilities and provide a free and appropriate public education.[181] Unlike other federal disability laws that are designed to ensure equality of access for disabled individuals at all levels, the IDEA was intended to ensure that students are successful in the K-12 system.[182] That success is evaluated in large part on student performance in the classroom and on state-administered standardized tests, where a student's achievement is reflected in relation to how well that student performs relative to other students taking the same test.[183] When healthy individuals use performance enhancing stimulant drugs to perform well on tests, the value of the testing protocol is significantly diminished and test scores may not accurately reflect student achievement.

For many students with debilitating mental or physical disabilities, the IDEA provides help through the provision of educational plans that help modify personal behavior and other aspects of the classroom environment. For students with ADHD, however, the IDEA can do more. Individuals with ADHD are as intelligent as individuals without ADHD, but they require assistance to be successful in the classroom. Like many of their non-disabled peers, students with ADHD are fully capable of performing well in post-secondary education. In fact, individuals with ADHD often move well beyond the basic goals of the IDEA to lead very productive lives. In many ways, the success of students with ADHD reflects the underlying goal of United States disability policy—equality of opportunity through accommodation. Yet, absent change, existing law will act to set back decades of progress in the field of disability law. States must be required to take action to prevent healthy students from using performance enhancing drugs that provide a competitive advantage over individuals with ADHD on standardized tests.

While the IDEA currently does not require states to provide services that maximize each child's potential, it does require states to level the playing field by providing services that are appropriate to ensure the success of the student.

---

v. Murphy, 548 U.S. 291 (2006).

[179] Office of Special Educ. Programs, U.S. Dep't of Educ., IDEA Regulations: State Funding (2006), http://idea.ed.gov/object/fileDownload/model/TopicalBrief/field/PdfFile/primary_key/18.

[180] *See* 20 U.S.C. §§ 1412-1414 (2006).

[181] *Id.*

[182] *Id.* §1400(d)(1)(A).

[183] For example, Arizona mandates use of a "statewide nationally standardized norm-referenced achievement test in reading, language arts and mathematics[.]" ARIZ. REV. STAT. § 15-741 (West, Westlaw through 2010 legislation).

For standardized tests, the appropriate environment is one that provides an otherwise capable student with ADHD to compete fairly with students who do not have ADHD. Absent this procedural safeguard, the test scores are rendered meaningless and cannot accurately reflect student progress as required under the IDEA.

In enacting the IDEA, Congress expressly provided for the re-evaluation of state plans to measure their effectiveness in providing appropriate education to all disabled individuals.[184] Given the increasing illicit use of performance enhancing drugs by healthy middle and high school-aged students, the effective implementation of the Act is at risk. As part of any state education plan approved for funding under the IDEA, the state should be required to take appropriate measures to ensure that illicit drug use by healthy students does not detrimentally impact the ability of disabled students to compete in the classroom or on state-administered standardized tests.

B. Implement Social Norm Educational Programs

Many students who misuse drugs do so because they are unaware of the medical, psychological, and legal consequences of illicit drug use and abuse.[185] One of the most effective ways to address the problem of illicit drug use by students is through targeted educational campaigns that address misconceptions of such use.[186] Through early state-wide intervention, states can counter the potential adverse effects of illicit drug use while promoting student health and protecting the rights of disabled individuals. To be effective, any educational campaign must recognize that illicit stimulant use has become an accepted part of the academic experience for many students.[187] Unlike other forms of drug use, there is little stigma attached to the non-therapeutic use of stimulants. The culture of some schools may actually encourage students to use stimulants.[188] As one student at Columbia University acknowledged, "[a]s a kid, I was made to feel different for taking these drugs . . . [n]ow it's almost cool to take

---

[184] *See* 20 U.S.C. §1418(d)(2)(A)-(C) (2006).

[185] *See* DeSantis, *supra* note 123, at 317.

[186] *See, e.g.*, Cal. Dep't of Alcohol & Drug Programs, Preventing Prescription Drug Abuse: Colleges (2011), http://www.prescriptiondrugmisuse.org/index.php?page=colleges.

[187] *See, e.g.*, Higher Educ. Ctr. for Alcohol & Other Drug Abuse & Violence Prevention, Fraternity and Sorority Members and Alcohol and Other Drug Use (Aug. 2008), http://www.higheredcenter.org/files/product/fact_sheet5.pdf (recommending social norm marketing to combat the widespread drug and alcohol culture on college campuses).

[188] Andrew Jacobs, *The Adderall Advantage*, N.Y. TIMES, July 31, 2005, *available at* http://www.nytimes.com/2005/07/31/education/edlife/jacobs31.html.

them."[189] Today, students with legal stimulant prescriptions routinely sell or give pills to others, without regard for the consequences of their actions.[190]

The most effective means to prevent illicit stimulant use is to dispel misconceptions students have regarding the drugs. For example, one college used a social norms marketing campaign to target prescription drug misuse in college.[191] Of the students surveyed at the completion of the campaign, 36.6 percent acknowledged that they would be more cautious in using prescription drugs.[192] Other targeted social norms campaigns have documented significant reductions in risky behaviors among students within a few years of the campaign.[193] To effectively address illicit stimulant use, states should implement educational campaigns aimed at addressing both the physiological harm that may occur to individuals who use drugs without a prescription, and the impact illicit drug use has on disabled individuals who require assistance to succeed in the classroom.

Social norm campaigns should elicit student input and use appropriate visual media that bring credibility to the presentation to improve the likelihood that the message will be received. States must be proactive in addressing student perceptions of stimulant use. Early intervention through education is an essential first step, but states that receive federal funds under the IDEA must also take steps to ensure that student assessment is fair and accurately reflects the performance of disabled students. The state's power to take appropriate steps to protect the health of students and to protect the rights of the disabled is strongest when school authorities act in loco parentis.[194]

C. Protecting the Rights and Safety of Students

Unemancipated minors are subject to the control of their parents or guardians.[195] Minors placed in private or public schools for their education are subject to the care and control of the teachers and administrators of those schools who stand in loco parentis.[196] The nature of that power is both

---

[189] *Id.*

[190] See *id.*

[191] *See* Cal. Dep't of Alcohol & Drug Programs, *supra* note 186 (referencing a social norm study conducted by Western Washington University).

[192] *Id.*

[193] *See generally* Nat'l Social Norms Inst., Univ. of Va., *Articles on the Social Norms Approach-Measuring Misperceptions and Behavior*, http://www.socialnorm.org/ (last visited Sept. 5, 2010) (cataloging studies on social marketing campaigns to students).

[194] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995). In *Vernonia*, the Supreme Court noted that during the school day the teacher or school serves "in loco parentis" or "in the place of the parent." *See id.* at 654-55.

[195] *Id.* at 654 (citing 59 Am. Jur. 2d *Parent and Child* § 10 (1987)).

[196] *Id.*

custodial and tutelary, and it permits school officials a degree of supervision and control that cannot be exercised over adults.[197] Indeed, "a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."[198] While schools do not have an absolute duty to protect students from harm in all circumstances, schools do have a responsibility to protect students entrusted to their care from health risks.[199] As the United States Supreme Court has noted, states have a compelling interest in deterring illicit drug use by students in primary and secondary education because "[s]chool years are the time when the physical, psychological and addictive effects of drugs are most severe."[200]

The misuse of stimulants such as Ritalin and Adderall pose significant risk to school-aged students who may not be aware of the strong contraindications to their use. Indeed, the Court itself has noted that amphetamines produce an '"artificially induced heart rate increase, [p]eripheral vasoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response,' making them a 'very dangerous drug when used during exercise of any type."'[201] For students with undiagnosed heart defects, the risk is even greater. Dangerous complications, including death, may result from use of stimulants. Many students overdose as result of misuse and must seek medical intervention.[202]

The Supreme Court has acknowledged that "[t]the effects of drug-infested schools are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."[203] The illicit use of prescription stimulants by healthy students harms disabled individuals who must use the stimulants to compete in the classroom. Such use interferes with the school's ability to provide an appropriate education to individuals with ADHD and should not be tolerated. When a state accepts funding under the IDEA, it effectively agrees to take all reasonable steps to provide each disabled student with an education that is appropriate for the individual.[204] Illicit stimulant use interferes with that requirement and places students with ADHD

---

[197] New Jersey v. T.L.O., 469 U.S. 325, 336-337 (1985).

[198] *Id.* at 339.

[199] *Vernonia,* 515 U.S. at 656 (noting that "[f]or their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases").

[200] *Id.* at 662.

[201] *Id.* (quoting Jerald Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance, in* HERB APPENZELLER, MANAGING SPORTS AND RISK MANAGEMENT STRATEGIES 90, 90-91 (1993)).

[202] Beth Beavers, *Campus ADHD Prescription Abuse Increases,* UNIV. DAILY KANSAN, Sept. 2, 2009, *available at* http://www.kansan.com/news/2009/Sep/02/ADHD.

[203] *Vernonia,* 515 U.S. at 662.

[204] 20 U.S.C. § 1412(a) (2006).

at a competitive disadvantage in the classroom, in direct contravention of United States disability policy.

In view of the increased misuse of stimulants among students and the harm it causes to the user and to disabled individuals, state action to protect students from harm is warranted. States must ensure that student assessment accurately and fairly reflects student progress. Since student achievement is largely determined based on the results of standardized tests, states should implement random drug testing procedures prior to administering standardized tests.

Suspicionless drug testing in the middle school and high school environment is constitutional. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,[205] high school students challenged the constitutionality of the schools' suspicionless urinalysis drug testing policy. The school district's policy required all middle and high school students to consent to drug testing in order to participate in any competitive extracurricular activity, such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, or choir.[206] The test was designed to detect use of illegal drugs, including amphetamines.[207] After considering the reasonableness of the policy,[208] the privacy interest affected,[209] the character of the intrusion imposed by the policy,[210] and the ability of the policy to meet its stated goals,[211] the Court held that the policy was constitutional.[212]

The Court began its analysis by noting that in the context of safety, a search unsupported by probable cause may be reasonable "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[213] Special needs inhere in the public school context.[214] The Court placed great emphasis on the fact that the school district's policy was undertaken in furtherance of the district's responsibilities as guardian and tutor of the children entrusted to its care. Thus, the relevant question became whether the policy allowing for suspicionless searches was one that a reasonable guardian and tutor might undertake.[215] The Court found that the policy was reasonable because it was implemented to address the

---

[205] 536 U.S. 822 (2002).

[206] *Id.* at 826.

[207] *Id.*

[208] *Id.* at 828-30.

[209] *Id.* at 830-31.

[210] *Id.* at 832-34.

[211] *Id.* at 834-38.

[212] *Id.* at 838.

[213] *Id.* at 829 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)) (internal quotation marks omitted).

[214] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

[215] *Earls*, 536 U.S. at 830.

general nationwide epidemic of drug use, and because of the specific evidence of increased drug use in the school district.[216]

In assessing the students' privacy interest, the Court noted that students have a diminished expectation of privacy in public schools where the state is responsible for maintaining discipline, health, and safety.[217] It noted that students are routinely required to submit to physical examinations and vaccinations against disease.[218] Respondents attempted to draw a distinction between individuals engaged in extracurricular athletic activities who had a diminished expectation of privacy under existing law, and individuals engaged in non-athletic extracurricular activities who are not subject to regular physicals and communal undress.[219] The Court disagreed, noting that its prior decision allowing for suspicionless drug testing of high school athletes depended primarily upon the school's custodial responsibility and authority.[220]

Next, the Court considered the character of the intrusion.[221] The Court noted that the degree of the intrusion on privacy associated with sample collection largely depends on the way in which production of the urine sample is monitored.[222] Students were required to fill a sample cup behind closed doors and deliver the sample to an official stationed outside the bathroom.[223] The sample was not released to law enforcement officials, and it was only used to determine eligibility to continue participating in the activity.[224] In view of the non-intrusive mode of collection used by the district, the Court found that the intrusion was negligible.[225]

Finally, the Court considered the nature and immediacy of the government's concerns and the efficacy of the policy in meeting them.[226] The Court noted that "the nationwide drug epidemic makes the war against drugs a pressing concern in every school."[227] The need for state action is magnified, according to the Court, when the threat affects children "for whom [the state] has undertaken a special responsibility of care and direction."[228] The school district's evidence of increased drug use among students, coupled with rising

---

[216] *Id.* at 825.
[217] *Id.* at 830.
[218] *Id.* at 830-31.
[219] *Id.* at 831.
[220] *Id.*
[221] *Id.* at 832.
[222] *Id.*
[223] *Id.*
[224] *Id.* at 833.
[225] *Id.*
[226] *Id.* at 834.
[227] *Id.*
[228] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662 (1995).

drug use nationwide, convinced the Court that the school district's drug testing policy was a necessary and appropriate means to address the drug problems.

In view of the rising misuse of prescription stimulants by middle and high school students across the country, the substantial risk of harm associated with misuse of stimulants, and the negative impact such use has on the opportunities of disabled individuals to compete in the classroom, it is likely that the United States Supreme Court would uphold any carefully tailored, state-sponsored drug testing of students taking standardized tests. Although standardized tests are not technically extracurricular activities, they are competitive by design and the test results have significant consequences for students intending to continue their education in college. Randomly testing students for illicit use of stimulants to protect students from harm and to preserve the rights of disabled individuals is no less reasonable than testing students involved in Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, or other activities.

VI. CONCLUSION

Over the last 35 years, the IDEA and other laws have increased educational opportunities for individuals with disabilities and their families.[229] Despite this, a significant threat has emerged that threatens to undo decades of progress. On school campuses across the nation, an increasing number of students illegally use prescription drugs to enhance their natural ability in the classroom. The non-therapeutic use of powerful prescription stimulants poses significant risks for students and places disabled individuals at a competitive disadvantage in the classroom in direct contravention of United States disability policy. Breakthroughs in neuroscience present humanity with a promise and a predicament. Brain enhancement therapeutics has the potential to improve the quality of life for those living with neurological disorders or impairment, and forces humans to address the propriety of artificially elevating human capabilities. The use of stimulants to elevate abilities in the classroom raises difficult questions about nature, science, and fundamental fairness. Given the United States' express goal of providing equal opportunities for disabled individuals, policies and activities directed to the use of enhancement

---

[229] *See, e.g.*, Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (providing grant assistance to help educate children with disabilities); Elementary and Secondary Education Act Amendments of 1965, Pub. L. No. 89-313, 79 Stat. 1158; *see also* Handicapped Children's Early Education Assistance Act of 1968, Pub. L. No. 90-538, 82 Stat. 901 (authorizing support for exemplary early childhood programs); Economic Opportunities Amendments of 1972, Pub. L. No. 92-424, 86 Stat. 688 (authorizing support for increased Head Start enrollment for young children with disabilities).

technology must be based on a sound consideration of the impact such use will have on the rights of disabled individuals.

The Jones Act Fish Farmer

Timothy E. Steigelman*

I. INTRODUCTION

Aquaculture, the farming of aquatic organisms, is a growth industry in the United States.[1] Current domestic demand for seafood shows a market ripe for continued growth, as eighty-one percent of seafood consumed in the United States is imported, and forty percent of those imports are farm-raised fish and shellfish.[2] Maintaining current quantities of wild-caught seafood is unsustainable in the long term, and the U.S. government believes aquaculture will eventually be required to make up the difference.[3] Increasing domestic aquaculture production in the United States is an attractive option, as it will increase employment opportunities and provide a nearby food supply for coastal regions.[4]

Fish farms employ an aggregate workforce of approximately 10,500 people for a combined national payroll of nearly $170 million.[5] At last count, there were 1203 saltwater fish farms in operation in the United States, accounting for twenty percent of America's billion dollar aquaculture industry.[6] Assuming that the number of workers is proportional to the value of the harvest, one can estimate that 3000 workers in the United States presently perform saltwater aquaculture. That number, however, is bound to increase as American aquaculture expands in the near future. Saltwater aquaculture in particular presents unique growth opportunities.[7]

---

* J.D., University of Maine School of Law, *summa cum laude*; M.A., University of Maryland; B.S., United States Naval Academy. The author is an associate at the law firm Kelly, Remmel & Zimmerman in Portland, Maine.

[1] *See generally* U.S. DEP'T OF AGRIC., 2005 CENSUS OF AQUACULTURE (2006), *available at* http://www.agcensus.usda.gov/Publications/2002/Aquaculture/AQUACEN.pdf.

[2] U.S. Dep't of Commerce, *Quick Stats on Aquaculture* (Mar. 12, 2007), http://aquaculture.noaa.gov/pdf/15_aq_statistics.pdf.

[3] *Id. But see* Rögnvaldur Hannesson, *Aquaculture and Fisheries*, 27 MARINE POL'Y 169 (2003) (explaining that statistical modeling shows that while aquaculture may be helpful, it cannot compensate for ruinous mismanagement of wild fisheries).

[4] National Oceanic Atmospheric Administration Fisheries Service Northeast Region, *Changing Tides: Aquaculture* (Feb. 2008) at 1, http://www.nero.noaa.gov/nero/outreach/CTFeb2008.pdf [hereinafter *Changing Tides*].

[5] U.S. DEP'T OF AGRIC., *supra* note 1, at 88. The field employs an additional 3,600 unpaid workers. *Id.*

[6] *Id.* at 13; U.S. Dep't of Commerce, *supra* note 2.

[7] *See generally* U.S. Dep't of Commerce, *supra* note 2; *Changing Tides*, *supra* note 4.

Despite the opportunities, American aquaculture has yet to expand seaward. No commercial saltwater farms are in offshore waters;[8] instead, America's saltwater fish farms are situated either in inshore waters such as bays and rivers, or on land adjacent to the saltwater or brackish water that they use.[9]

A key impediment to commercial offshore aquaculture is the lack of a cohesive regulatory regime for permitting, pollution control, and the interplay between federal and state powers.[10] One recent attempt to remedy the regulatory problem was the proposed National Offshore Aquaculture Act of 2007,[11] which took into account views from industry and research groups and was intended to allay fears about offshore aquaculture's environmental impact.[12] The bill died in committee,[13] and the unsatisfying status quo of a lack of a comprehensive national policy endures.[14]

Meanwhile, legal commentators addressing offshore aquaculture have already explained how the regulatory framework is incomplete[15] and recommended possible solutions to fix it.[16] These commentators, however, have not sufficiently discussed legal protection for the people who will work in offshore aquaculture.[17] Specifically, it is unclear which compensatory scheme

---

[8] *Changing Tides*, *supra* note 4; Melissa Schatzberg, *Salmon Aquaculture in Federal Waters: Shaping Offshore Aquaculture Through the Coastal Zone Management Act*, 55 STAN. L. REV. 249, 270 (2002).

[9] *See* U.S. DEP'T OF AGRIC., *supra* note 1, at A-3.

[10] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-594, OFFSHORE MARINE AQUACULTURE: MULTIPLE ADMINISTRATIVE AND ENVIRONMENTAL ISSUES NEED TO BE ADDRESSED IN ESTABLISHING A U.S. REGULATORY FRAMEWORK (2008).

[11] National Offshore Aquaculture Act of 2007, H.R. 2010, 110th Cong. (2007).

[12] *See* NOAA, *U.S. Aquaculture: The National Offshore Aquaculture Act of 2007*, 1, http://aquaculture.noaa.gov/pdf/05_overview_env.pdf (last visited Sept. 23, 2010).

[13] *See* THOMAS, Library of Congress, Bill Summary and Status - 110th Congress (2007-2008) - H.R. 2010, http://thomas.loc.gov/home/LegislativeData.php (select "110th Congress", select "Bill Number" on the drop-down menu, then search for H.R. 2010) (last visited Sept. 23, 2010) (showing subcommittee hearing as last major action on the bill). *See also* Press Release, U.S. House of Representatives Comm. on Natural Res., Rahall Urges Caution Against Hasty Development of Offshore Aquaculture (May 9, 2008), http://resourcescommittee.house.gov/ (follow the "Newsroom" link, then search for "aquaculture").

[14] *See* Press Release, NOAA, NOAA to Pursue National Policy for Sustainable Marine Aquaculture (Sept. 3, 2009), http://aquaculture.noaa.gov/pdf/aqnatlpol09.pdf. The press release makes it clear that NOAA is pursuing the offshore aquaculture policy in response to a regional fishery group attempting to start offshore aquaculture in federal waters.

[15] *See* Jeremy Firestone et al., *Regulating Offshore Wind Power and Aquaculture: Messages from Land and Sea*, 14 CORNELL J.L. & PUB. POL'Y 71, 78-87, 111 (2004); Rachael E. Salcido, *Offshore Federalism and Ocean Industrialization*, 82 TUL. L. REV. 1355, 1394-96 (2008); Schatzberg, *supra* note 8.

[16] *See, e.g.*, Lynne D. Davies, *Revising the National Offshore Aquaculture Act of 2007*, 13 OCEAN & COASTAL L.J. 95, 117-20 (2007).

[17] As wind, wave, and tidal power generation sites begin to spring up off America's coasts,

offshore aquaculture workers will be allowed to pursue if they are injured: state workers' compensation, the Longshore and Harbor Workers' Compensation Act (LHWCA),[18] or the Jones Act[19] and other maritime remedies.[20] The courts have not answered this question either; although two recent cases involved saltwater aquaculture workers, the defendants did not contest Jones Act seaman status in either case.[21]

Because the law is currently unclear and marine aquaculture is growing, it is only a matter of time until courts face the question of how to compensate aquaculture workers injured near shore and offshore. This article seeks to solve the problem by finding the proper remedial scheme for injured aquaculture workers. Part II will examine the current state of the law, showing where the confusion lies. This discussion will examine requirements for compensation under the Jones Act and other maritime remedies, the LHWCA, and state workers' compensation laws. The discussion will show that, with lingering questions, the Jones Act and other maritime remedies either already apply or should be extended to offshore aquaculture workers. In contrast, remedies for nearshore marine aquaculture workers present a more difficult question because of overlapping state and federal compensation schemes.[22] This article concludes in Part III with three recommended solutions, one for each branch of

---

people will inevitably be injured at those waterborne locations. Unaddressed further herein, but worth mention, is that many of the jurisdictional problems that aquaculture workers face would likely also be encountered by maritime workers in the burgeoning renewable energy sector, especially offshore wind power.

[18] 33 U.S.C. §§ 901-50 (2006). Congress enacted the LHWCA initially to remove stevedores from the class of Jones Act seaman, instead providing them with scheduled compensation along with other injured land-based maritime workers such as stevedores. *See* McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 346-47 (1991). The LHWCA was later amended to further prevent longshoremen and other harbor workers from bringing an unseaworthiness claim. *Id.* at 347-48. Further amendments to the LHWCA included an express exception for aquaculture workers, which prompted the confusion discussed herein. *See infra* note 73 for discussion of the aquaculture exception to LHWCA.

[19] 46 U.S.C. § 30104 (2006 & Supp. II 2008). *See also* Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001) ("A Jones Act claim is an *in personam* action for a seaman who suffers injury in the course of employment due to negligence of his employer, the vessel owner, or crew members.").

[20] *See Lewis*, 531 U.S. at 441 ("Unseaworthiness is a claim under general maritime law based on the vessel owner's duty to ensure that the vessel is reasonably fit to be at sea. A claim for maintenance and cure concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship.") (citations omitted).

[21] Karlsson v. Kona Blue Water Farms, LLC, No. 07-00242-BMK, 2008 WL 4753340, at *1 (D. Haw. Oct. 24, 2008); Marzoll v. Marine Harvest US, Inc., No. 08-261-B-S, 2009 WL 4456321, at *15 (D. Me. Nov. 29, 2009).

[22] Aquaculture workers who work wholly on land are properly protected by state workers' compensation and are therefore not addressed herein.

government, aimed at ensuring that injured aquaculture workers are properly compensated.

II. CURRENT STATE OF THE LAW

A. Hypothetical

Call him Ishmael.[23] Ishmael is a 22-year-old worker employed by an aquaculture company. Ishmael's employer owns several aquaculture facilities, including an offshore marine aquaculture site approximately fifteen nautical miles from shore, and an open-water marine aquaculture site one nautical mile from shore in a broad bay.[24] The two sites are similar, consisting of several large underwater "net pens" containing fish. Each site uses four net pens that are square-shaped at the top and connected by decking over the water. Workers work, rest, and eat in a cruciform building on the common borders between the net pens. The entire site, except the net pens, float above the water's surface and resembles a barge with large holes in the deck; the holes are the tops of the net pens.[25] The whole facility is anchored to the ocean floor, and every month or two the company weighs anchor and the site is towed to a new location.[26] Ishmael works on the offshore site, working ten-hour shifts for five days, followed by three days off. He takes a boat each day from shore to the offshore aquaculture site each workday, nearly an hour ride each way.

Ishmael's friend, Ahab, also works for Ishmael's employer. Ahab works as a deckhand on the utility boat that ferries people and supplies between shore and the two saltwater aquaculture sites. When the boat is not ferrying, it operates in the vicinity of the offshore site, where its workers catch wild baitfish and perform other duties to support the offshore site. Ahab works all day aboard the boat, except for small incidental trips ashore to pick up parts and perform other tasks for the boat.

---

[23] The names in this hypothetical are borrowed from and with apologies to Herman Melville.

[24] As there are currently no aquaculture sites in U.S. offshore waters, assume this hypothetical takes place in the near future, when NOAA achieves its pursuit of offshore aquaculture policy. *See supra* note 14.

[25] *See* D.C.B. Scott & J.F. Muir, *Offshore Cage Systems—A Practical Overview*, *in* OPTIONS MÉDITERRANÉENNES: MEDITERRANEAN OFFSHORE MARICULTURE 82-84 (J. Muir & B. Basurco, eds., 2000), *available at* http://ressources.ciheam.org/om/pdf/b30/00600651.pdf (last visited Sept. 23, 2010). The hypothetical floating aquaculture site is based on the Cruive offshore fish farm from Campbeltown Developments Ltd., pictured on 82.

[26] *See* Press Release, MIT Sea Grant College Program, Self-propelled Aquaculture Cage Debuts in Culebra (July 15, 2008), http://seagrant.mit.edu/news/press_releases.php?ID=54 (noting that "cages are routinely repositioned when their shallow sites are fallowed to control disease").

If Ishmael is injured while working on the offshore site, how will he pay his bills? What if Ishmael is injured at the bay location? If Ahab receives a similar injury while his boat is near the offshore site, is he treated differently? These questions lead to a maze of overlapping jurisdictional issues that only grow more confusing as one gets closer to shore.

B. Injured Seaman

Before looking at aquaculture, a comparatively straightforward discussion of the Jones Act and traditional maritime remedies is in order. In the hypothetical, Ahab is the deckhand injured while working aboard the utility boat near the offshore aquaculture site. There is little doubt that Ahab will be able to bring a Jones Act negligence action against his employer.[27] To maintain a negligence action against the aquaculture company,[28] an injured employee must show he was a "seaman," a term of art undefined in the Jones Act.[29] A further refinement on the Jones Act seaman defines him as a "master or member of a crew of any vessel."[30] Ahab will qualify as a Jones Act seaman.

In order to merit the protection of the Jones Act, "a seaman must be doing the ship's work"[31] and "must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and nature."[32] Under the facts of the hypothetical, Ahab is a deckhand aboard a small boat that ferries people and supplies between land and the offshore aquaculture site. Because a deckhand performs a ship's work, Ahab's employment-related connection to the utility boat is sufficient[33] to meet the Jones Act's "nature and duration" test.[34]

---

[27] Ahab will also be able to bring the traditional maritime actions of unseaworthiness and maintenance and cure. *See supra* note 20.

[28] Under the Supreme Court case *The Osceola*, seamen were barred from bringing negligence actions against their employers. 189 U.S. 158, 175 (1903). Congress responded by passing the Jones Act in 1920. Chandris, Inc. v. Latsis, 515 U.S. 347, 354 (1995).

[29] 46 U.S.C. § 30104 (2006 & Supp. II 2008) (referring to, without defining, "seaman").

[30] 33 U.S.C. § 902(3)(G) (2006 & Supp. III 2009). "Thus, it is odd but true that the key requirement for Jones Act coverage [that is, seaman status] now appears in another statute." McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 347 (1991).

[31] *McDermott*, 498 U.S. at 355.

[32] *Chandris*, 515 U.S. at 368.

[33] *But compare Chandris*, 515 U.S. at 370 (noting the duration and nature of employment may determine Jones Act coverage) *with id.* at 377-78 (Stevens, J., dissenting) (concluding that the majority's holding would allow a crew member injured at sea to be excluded from the Jones Act definition of "seaman").

[34] "A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Chandris*, 515 U.S. at 371. Because essentially all of Ahab's working time is spent aboard the vessel, or ashore doing the vessel's work, the thirty percent guideline is easily met.

To receive protection under the Jones Act, Ahab must also demonstrate that the utility boat is a "vessel in navigation."[35] The term "'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[36] Under 2005 Supreme Court precedent, if there is a practical—rather than theoretical—possibility that the craft can be used for transport on the water, it is likely to be considered a "vessel."[37] In the hypothetical, the utility boat is practically capable of transportation—it plies the waters on a daily basis. Thus, the utility boat is a "vessel," and Ahab, therefore, is a Jones Act seaman.[38]

As a Jones Act seaman, Ahab may bring a negligence action against his employer to compensate him for any injuries sustained. His is the archetypal case of the seaman injured at sea, so it is uncontroversial that he merits Jones Act protection. But what about Ishmael, the offshore fish farmer?

C. Injury at the Offshore Site

Current law provides little certainty as to Ishmael's proper recourse if he is injured performing offshore aquaculture. The same analysis used for Ahab applies to determine whether Ishmael is a Jones Act seaman:[39] he must show he is a "master or member of a crew of any vessel[.]"[40] This is a two-part inquiry, requiring the injured worker to (1) show he has a sufficient employment-related connection with (2) a "vessel."[41]

In order to examine Ishmael's employment status, assume for the moment that the floating aquaculture rig is a "vessel." The nature and duration of Ishmael's connection requires that he spend "about 30 percent of his time in the service of a vessel in navigation[.]"[42] Ishmael meets this durational requirement because he works ten hours a day—essentially his entire workday—aboard the offshore site.[43]

---

[35] *McDermott*, 498 U.S. at 355.

[36] 1 U.S.C. § 3 (2006); *see* Stewart v. Dutra Constr. Co., 543 U.S. 481, 489-90 (2005) (collecting Jones Act cases).

[37] *See Stewart*, 543 U.S. at 496.

[38] *See, e.g.*, Harbor Tug & Barge Co. v. Papai, 520 U.S. 548 (1997) (showing the formulation "Jones Act seaman" as a quotidian term of art).

[39] To understand the desirability of achieving seaman status under the Jones Act, see Shailendra U. Kulkarni, *The Seaman Status Situation: Historical Perspectives and Modern Movements in the U.S. Remedial Regime*, 31 TUL. MAR. L.J. 121, 122-23 (2006).

[40] 33 U.S.C. § 902(3)(G) (2006 & Supp. III 2009).

[41] *Stewart*, 543 U.S. at 488; McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 355 (1991).

[42] Chandris, Inc. v. Latsis, 515 U.S. 347, 371 (1995). *See also* Dorr v. Me. Mar. Acad., 670 A.2d 930, 933 (Me. 1996).

[43] *See McDermott*, 498 U.S. at 355.

But is the aquaculture site a "vessel"? Prior to the Supreme Court's most recent pronouncement on the subject, the definition of "vessel" varied depending on the circuit in which the case was litigated. Under the former First Circuit rule, for example, Jones Act status might have depended on whether or not the would-be vessel was in motion at the moment the injury occurred.[44] The Fifth Circuit, meanwhile, relied on a long list of indicia that provided very little predictability.[45] The Supreme Court attempted to bring order to the chaos in *Stewart v. Dutra Construction Co.*, abrogating any requirement to prove either movement at the time of the injury, or that the "primary purpose" of the watercraft was navigation or commerce.[46]

The *Stewart* court instead applied the Rules of Construction Act definition of "vessel" to the Jones Act requirement.[47] The watercraft in question was the *Super Scoop*, a dredge that suspended a large clamshell bucket under the water. The clamshell was used to remove silt from the ocean floor, which was dumped onto another nearby barge.[48] The *Super Scoop* had little propulsion of its own, relying instead on tugs to move it any significant distance.[49] The Supreme Court held that because the *Super Scoop* was "only temporarily stationary" for repairs and "had not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport[,]" it was "practically capable of maritime transportation," and therefore a "vessel."[50]

One case applying *Stewart* may help answer the question of whether an offshore aquaculture site is a "vessel." In *Holmes v. Atlantic Sounding Co., Inc.*, the Fifth Circuit addressed whether a berthing barge, "in effect, a floating dormitory," was a vessel.[51] The owner-employer towed the barge to job sites, and workers lived aboard the barge for the duration of the project.[52] The barge had no propulsion, no crew to speak of, no captain or deckhands, but only two cooks and two janitors to provide for and clean up after the domiciled workers. The barge lacked navigational lights or instruments of any kind, was never intended to transport passengers, cargo, or equipment, and had never been

---

[44] *See* Stewart v. Dutra Constr. Co., 230 F.3d 461, 469 (1st Cir. 2000), *rev'd*, 543 U.S. 481 (2005); Fisher v. Nichols, 81 F.3d 319, 321-22 (2d Cir. 1996) (collecting cases showing the inconsistencies in the vessel status inquiry).

[45] Holmes v. Atl. Sounding Co., Inc., 437 F.3d 441, 446 (5th Cir. 2006); *see infra* note 55 for the list of indicia.

[46] *Stewart*, 543 U.S. at 495.

[47] *Id.* at 489-90 (quoting 1 U.S.C. § 3 (2006)) ("The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.").

[48] *Id.* at 484. The dredge (n.) was used to dredge (v.).

[49] *Id.* at 484-85.

[50] *Id.* at 496-97.

[51] Holmes v. Atl. Sounding Co., Inc., 437 F.3d 441, 443 (5th Cir. 2006).

[52] *Id.* at 443-44.

offshore.[53] The Fifth Circuit's description makes the berthing barge seem like little more than a floating building—a moveable dorm.[54] Recounting the applicable standard, the court first listed the traditional Fifth Circuit factors for determining "vessel" status,[55] and then addressed *Stewart*.[56] Because the berthing barge transported dormitory rooms, a galley, and supplies to support it, the court ruled the barge was "practically capable" of transport.[57] Additionally, the raked bow, external tanks to assist in flotation, and relative frequency with which the barge was relocated all helped the court rule that the berthing barge was, in fact, a "vessel."[58] This holding is useful both for its application of

---

[53] *Id.*

[54] To underscore the barge's slight nautical credentials, the court recounted that the barge had a raked bow, portable water pumps, life rings, a radio used for communicating with the dredge, bollards on deck, and was often affixed to its location by anchor. *Id.* at 444.

[55] *Id.* at 446 (enumerating factors to consider when deciding whether the craft is a vessel or not, including

> (1) whether the owner assembled or constructed the craft to transport passengers, cargo, or equipment across navigable waters; (2) whether the craft is engaged in that service; (3) whether the owner intended to move the craft on a regular basis; (4) the length of time that the craft has remained stationary; and (5) the existence of other "objective vessel features," such as: (a) navigational aids; (b) lifeboats and other life-saving equipment; (c) a raked bow; (d) bilge pumps; (e) crew quarters; and (f) registration with the Coast Guard as a vessel.)

Non-vessels, on the other hand, share certain characteristics:

> (1) The structure was constructed to be used primarily as a work platform; (2) the structure is moored or otherwise secured at the time of the accident; and (3) although the platform is capable of movement, and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform's primary purpose.

Id. at 446-47.

[56] *Id.* at 447-48.

[57] *Id.* at 448; *see also* 1 U.S.C. § 3 (2006).

[58] *Holmes*, 437 F.3d at 449. The court was not blind to the barge's lack of propulsion, but properly considered that as only one factor to be analyzed: "it was not the *Super Scoop's* limited means of self-propulsion that rendered it a vessel." *Id.* The Fifth Circuit also recognized that its traditional list of "vessel" and "non-vessel" attributes, *supra* note 55, was underinclusive, according to *Stewart*, because "the class of waterborne structures that are vessels . . . is broader than [the Fifth Circuit] [has] heretofore held." *Id.* Compare the berthing barge with the non-vessel barge in *Burchett v. Cargill, Inc.*, in which the barge was permanently moored, but had "a raked bow, a ballast system, anchor lights, life boats and jackets, . . . a radar unit[,] . . . an eating area[,] and locker rooms." 48 F.3d 173, 175 (5th Cir. 1995).

The Fifth Circuit did not meaningfully discuss whether the "in navigation" part of the traditional "vessel in navigation" formula has any independent meaning. The court states early on that there must be a "vessel in navigation (or an identifiable group of vessels)," *Holmes*, 437 F.3d at 445 (quoting Chandris, Inc. v. Latsis, 515 U.S. 347, 359 (1995)), but the coda "in navigation" does not again appear in the decision. This is curious after the Supreme Court's statement that "the 'in navigation' requirement is an element of the vessel status of a watercraft." Stewart v. Dutra Constr. Co., 543 U.S. 481, 496 (2005). In the same paragraph

Stewart to new facts, and because the Supreme Court frequently adopts the Fifth Circuit's jurisprudence in maritime law.[59]

The aforementioned case law guides the inquiry of whether an offshore aquaculture platform is a "vessel." This is a close question, and although an aquaculture site is not identical to a dredge or berthing barge, there are good reasons to grant the aquaculture site vessel status. Like the berthing barge in *Holmes*, Ishmael's offshore aquaculture facility is not self-propelled but is repositioned by tugboat.[60] Also like the berthing barge, the hypothetical platform has bits and bollards on deck that it can use to tie a boat or barge alongside. The berthing barge actually transported cargo from place to place, whenever it was repositioned.[61] Similarly, the shed on the aquaculture facility houses supplies and equipment. Considering that the aquaculture facility is occasionally repositioned when necessary,[62] the actual movement of equipment across the water shows that the facility is "practically capable" of transport, and therefore a vessel.[63] Because Ishmael meets the durational requirement,

---

that mentioned the "in navigation" requirement, the *Stewart* court discussed the longstanding dichotomy between watercraft that are practically capable of water transport, as opposed to a mere theoretical possibility. *Id.* It is all the more confusing because the Supreme Court previously purported to "jettison the aid *in navigation* language" that was a longstanding requirement for a Jones Act seaman. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 358 (1991) (emphasis added). Not long thereafter, the Court reiterated that "the 'in navigation' requirement is an element of the vessel status." *Stewart*, 543 U.S at 496. It seems possible, though unstated by either the *Stewart* or the *Holmes* courts, that the "in navigation" requirement may become code for the *Holmes* court's line of inquiry—whether using the craft for transport is practically possible. While the term "in navigation" is likely to persist in maritime jurisprudence, the formulation may slowly die out through neglect, being referred to but not meaningfully analyzed, as the Fifth Circuit did in *Holmes*. 437 F.3d at 445.

[59] *See, e.g.*, *Chandris*, 515 U.S. at 371 (adopting the thirty percent guideline, *supra* note 34, from the Fifth Circuit).

[60] *But see* Scott & Muir, *supra* note 25, at 83 ("Some [aquaculture] systems are . . . self-propelling."); MIT Sea Grant College Program, *supra* note 26 (stating that when repositioning an aquaculture facility, "towboats haul the enormous cages to another site"). The article discusses an innovative solution that fixes propellers directly to the submerged fish net pens, for efficient transport. *See also* Andrea Cohen, *MIT Tests Self-Propelled Cage for Fish Farming*, MIT NEWS (Sept. 2, 2008), http://web.mit.edu/newsoffice/2008/aquaculture-0902.html. If the aquaculture facility is self-propelled and frequently piloted to a new location, it would bolster the argument that it is, in fact, a vessel.

[61] *Holmes*, 437 F.3d at 448.

[62] *See* MIT Sea Grant College Program, *supra* note 26.

[63] *Holmes*, 437 F.3d at 448 (quoting 1 U.S.C. § 3). However, were the offshore facility rigidly and permanently affixed to the ocean floor like an oil rig, it would not be a vessel, but instead an "artificial island." *See* 43 U.S.C. § 1333(a)(1) (2006). The fewer times the aquaculture facility is moved, the more the factual inquiry as to vessel status will require using an unsatisfying list of indicia, like the Fifth Circuit's list at *supra* note 55. *See also* Herb's Welding, Inc. v. Gray, 470 U.S. 414, 417 n.2 (1985) (noting that floating oil rigs have been

working sufficient hours each day aboard a "vessel," Ishmael is therefore a Jones Act seaman.

Other traditional maritime remedies should be addressed briefly. Unseaworthiness and "maintenance and cure" are two typical causes of action for maritime workers.[64] However, both require that a "vessel" exist: an unseaworthiness suit alleges that the vessel itself is unseaworthy, while maintenance and cure may be sought when a seaman is injured in the service of his or her vessel.[65] Without a "vessel" in the first place, an unseaworthy condition cannot exist, and a seaman cannot be entitled to maintenance and cure. Therefore, like a Jones Act suit, other traditional maritime remedies rise or fall with the existence of a vessel.[66]

In addition to the traditional maritime remedies, two other possible recourses should be considered: a claim under the Longshore and Harbor Workers' Compensation Act (LHWCA) and a general maritime negligence action. The LHWCA would likely be unavailing to Ishmael.[67] The LHWCA and Jones Act are generally exclusive remedies,[68] but the preclusive effect only attaches following a formal award of LHWCA benefits.[69] The LHWCA provides

---

considered vessels, so workers assigned to the floating rigs are entitled to typical seamen's remedies).

[64] *See* Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001). Unseaworthiness is often the preferred claim, because it provides compensation without requiring a plaintiff to prove negligence; maintenance and cure has a similar practical benefit, in that the employer funds the injured seaman's recovery, without the seaman having to prove fault. *See* Napier v. F/V Deesie, Inc., 454 F.3d 61, 64 n.1 (1st Cir. 2006).

[65] *Napier*, 454 F.3d at 64 n.1.

[66] Because of this common requirement for a "vessel," references in the text hereafter to the Jones Act should generally be understood to apply equally to the other traditional remedies of unseaworthiness and maintenance and cure. This omission is meant to spare the reader from frequent repetition of the triune seaman's remedies.

[67] Statutory predicates expressly extend LHWCA coverage where it would otherwise be unclear. The best example is the Offshore Continental Shelf Lands Act (OCSLA), which extends the LHWCA to seamen working on artificial islands, such as oil rigs attached to the seabed, that are exploiting natural resources on the ocean floor. 43 U.S.C. § 1333 (2006). This is unlikely to apply to an aquaculture facility, because the OCSLA is intended to apply to oil and mineral exploration. *See, e.g.*, Demette v. Falcon Drilling Co., 280 F.3d 492, 498, 501-02 (5th Cir. 2002) (holding that a floating drilling rig exploring for oil falls within the scope of the OSCLA and that even though the craft was a vessel, the LHWCA applied because the plaintiff was injured doing mineral exploitation work typical of the offshore continental shelf, meeting the OSCLA extension requirements); *overruled on other grounds by* Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 788 & n.8 (5th Cir. 2009) (en banc). Because Ishmael is not doing the type of work for which the OCSLA was enacted, it will not extend LHWCA benefits to the offshore fish farm, so Ishmael will have to qualify for LHWCA benefits on his own.

[68] McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 353-54 (1991).

[69] Receiving voluntary LHWCA payments, given without a formal award, does not bar an

compensation to injured employees "engaged in maritime employment," including longshoremen and other harbor workers.[70] Although the LHWCA expressly excludes aquaculture workers from coverage,[71] the exclusion is contingent on workers' eligibility for state workers' compensation.[72] Because the general understanding is that state laws do not reach the high seas,[73] the categorical aquaculture exclusion would arguably be irrelevant to the offshore

---

injured plaintiff from pursuing a Jones Act claim, because the underlying issue of seaman status was never litigated. Sw. Marine, Inc. v. Gizoni, 502 U.S. 81, 91 (1991). *See also* Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 563 n.2 (1997) (Stevens, J., dissenting); Kalesnick v. Seacoast Ocean Servs. Inc., 866 F. Supp. 36, 38-39 (D. Me. 1994) (finding that although the Compensation Board did not rule on the plaintiff's Jones Act status, the board—in approving a compensation agreement—implicitly foreclosed Jones Act jurisdiction), *vacated on other grounds*, No. 94-45-P-H, 1994 WL 588573 (D. Me. Sept. 27, 1994); CNA Ins. Co. v. Workers' Comp. Appeals Bd., 68 Cal. Rptr. 2d 115, 121 (1997).

[70] 33 U.S.C. § 902(3) (2006 & Supp. III 2009).

[71] *Id.* § 902(3)(E).

[72] *Id.* § 902(3).

[73] Ishmael will be excluded from LHWCA benefits if he is eligible for state workers' compensation. As stated in the hypothetical, the offshore aquaculture facility is fifteen nautical miles out to sea. Although not ironclad, the general understanding is that state laws do not reach onto the high seas. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 394 n.10 (1970); *In re* Air Crash Off Long Island, N.Y., 209 F.3d 200, 215-26 (2d Cir. 2000) (Sotomayor, J., dissenting) (stating that while state waters generally extend out to three nautical miles, the high seas unquestionably begin no further than twelve nautical miles from shore; congressional enactments and presidential statements leave the zone between three and twelve nautical miles in legal limbo, so the term "high seas" may begin at three nautical miles under domestic law, but begin at twelve nautical miles for international law purposes). While the dissent's nuanced discussion is more convincing than the majority's, it would benefit from the recognition that if, for domestic law reasons, the United States were to treat the "high seas" as beginning at three nautical miles, that reduced limit could be recognized by the international community, thereby bringing the nation's high seas limit in to three nautical miles for all purposes through the operation of customary international law. *See* 48 C.J.S. *International Law* § 2 (2009); 44B AM. JUR. 2d *International Law* § 7 (2009). *Cf.* DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.5.1 at *5-4 to 5-5 (2007). Because the hypothetical facility in this discussion is fifteen nautical miles out to sea, it is unquestionably on the high seas, and therefore beyond the reach of state jurisdiction. *See* United States v. Louisiana, 363 U.S. 1 (1960) (stating that Texas and Florida enjoy unique state waters that extend to nine nautical miles); *Air Crash Off Long Island*, 209 F.3d at 219 (referring to Texas's extended maritime boundary). Being beyond the reach of state laws, state workers' compensation provisions cannot apply to Ishmael. *See generally* S. Pac. Co. v. Jensen, 244 U.S. 205 (1917); *see also* Kollias v. D & G Marine Maint., 29 F.3d 67, 74-75 (2d Cir. 1994) (stating that the LHWCA extends to navigable waters, including the high seas, where states are unable to legislate). Without state workers' compensation, the LHWCA aquaculture exception does not apply, and Ishmael will be able to pursue an LHWCA claim free from that exclusion. 33 U.S.C. § 902(3). *See also infra* Part II.D.2 for discussion of whether that pursuit will be fruitful and how several states' workers' compensation schemes affect LHWCA coverage.

fish farmer.[74] The plain text of the statute and supporting documents that explicitly exclude aquaculture workers, however, would be difficult to overcome.[75]

Because Ishmael was injured on navigable waters, he meets the situs requirement for LHWCA coverage.[76] In addition to situs, however, there is an "occupational status" test for LHWCA coverage that Ishmael likely will not meet.[77] Aquaculture is an excluded category of workers under the LHWCA, underscoring congressional reluctance to recognize aquaculture workers as maritime.[78] Moreover, the Supreme Court already ruled that in passing the

---

[74] The argument that the § 902(3)(E) "aquaculture" exception should not apply to offshore aquaculture relies on factual and legislative history. The "aquaculture" exception was enacted as part of the 1984 amendments to reduce the number of possible LHWCA beneficiaries. Alcala v. Dir., Office of Workers' Comp. Programs, 141 F.3d 942, 944 (9th Cir. 1998). As discussed *supra*, there are not now, nor were there in 1984, any offshore aquaculture facilities. Without offshore facilities at the time, it is difficult to conceive how Congress intended to exclude offshore aquaculture workers from LHWCA benefits because that class of workers did not yet exist. The Senate Committee report to the amendment explained that the aquaculture exception was aimed at "the domestic shellfish cultivation and harvesting industry which utilizes municipally leased and/or private growing waters and beds for the controlled growing" of shellfish and finfish. S. REP. NO. 98-81, at 29 (1983). The House report further explained that although "the definition of maritime employment has never been interpreted to mean the cleaning, processing, or canning of fish and fish products[,] . . . to foreclose any future problem of interpretation, the term 'aquaculture operations' should be understood as including such activities." H.R. REP. NO. 98-1027, at 23 (1984) (Conf. Rep.). While the legislative history shows that "aquaculture" in the LHWCA was intended to cover both cannery workers and landlocked fish farmers, extrapolating that exclusion offshore appears to be a stretch.

[75] Section 902(3)(E) of the LHWCA notwithstanding, the text of the act unequivocally excludes "aquaculture workers." Additionally, applicable regulations fill the gap left in the Senate report, purporting to exclude aquaculture workers, regardless of whether the injury occurs on navigable waters. 20 C.F.R. § 701.301(a)(12)(iii) & (iii)(E) (2010).

[76] *See* Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 321 n.30 (1983) (stating that an injury occurring on navigable waters has long been understood to meet the situs requirement for LHWCA coverage); Zapata Haynie Corp. v. Barnard, 933 F.2d 256, 259 (4th Cir. 1991).

[77] *Zapata*, 933 F.2d at 259; *see also Perini*, 459 U.S. at 324 (holding that "when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3)," unless excluded by "any other provision of the Act").

[78] This analysis is admittedly circular: Ishmael is not excluded under § 902(3)(E) because he does not have state workers' compensation, as required under § 902(3). Even so, the very existence of the (inapplicable) aquaculture exclusion serves to exclude Ishmael from the LHWCA because it shows his job is not sufficiently maritime. This is a similar line of inquiry as that undertaken in *Green v. Vermilion Corp.*, where the Fifth Circuit found that a camp worker, excluded under § 902(3)(B), was "not . . . an employee for which LHWCA benefits were intended." 144 F.3d 332, 335 (5th Cir. 1998). The *Green* court came to this decision after discussing legislative history, but absent from that analysis was any mention whether the plaintiff was covered under workers' compensation, *id.*, which is a prerequisite for both the camp and aquaculture exclusions. 33 U.S.C. § 902(3) (2006 & Supp. III 2009). *But see Green*,

LHWCA, "Congress did not seek to cover all those who breathe salt air," but instead retained some requirement that the covered occupations relate to the loading and unloading of ships.[79] Under current law, LHWCA coverage is likely not available to Ishmael when injured on the offshore aquaculture facility.

Finally, it is unclear whether Ishmael may be able to bring a general maritime claim, whether as a *Sieracki* seaman[80] or not.[81] In the Fifth Circuit's *Green v. Vermilion*,[82] a case somewhat similar to the hypothetical, plaintiff Green was injured while working at a hunting club on the Louisiana bayou. He was

---

144 F.3d at 338 (noting the availability of Louisiana Workers' Compensation). While it may seem unsatisfying to consider a possibly inapplicable exception as a reflection of legislative intent, America's experience with aquaculture lags behind the rest of the world in output. U.S. Dep't of Commerce, *supra* note 2. Therefore, unlike the fish spotter in *Zapata*, 933 F.2d at 260, one could argue that it is unlikely Ishmael will be able to claim historical lineage to quintessentially nautical forebears, and would therefore fail the LHWCA occupational status test. *But see infra* note 107 for discussion of historical aquaculture.

[79] Herb's Welding v. Gray, 470 U.S. 414, 423-24 (1985). This case came after *Perini* and therefore alters its comparatively permissive situs-status assumption. The *Herb's Welding* court explains:

> Gray was a welder. His work had nothing to do with the loading or unloading process, nor is there any indication that he was even employed in the maintenance of equipment used in such tasks. Gray's welding work was far removed from traditional LHWCA activities, notwithstanding the fact that he unloaded his own gear upon arriving at a platform by boat. He built and maintained pipelines and the platforms themselves. There is nothing inherently maritime about those tasks. They are also performed on land, and their nature is not significantly altered by the marine environment, particularly since exploration and development of the Continental Shelf are not themselves maritime commerce.

Id. at 425. Because of the volume of aquaculture conducted ashore, *see* U.S. DEP'T OF AGRIC., *supra* note 1, one can imagine aquaculture receiving a similarly chilly reception in a decision extending *Herb's Welding* to exclude aquaculture workers from LHWCA coverage by failing the "status" test.

[80] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 95-97 (1946). The term "*Sieracki* seaman" comes from this case. A *Sieracki* seamen is a sort of seaman *pro hac vice*, a category of worker that came into existence to extend the traditional maritime remedy of unseaworthiness to longshoremen, who otherwise might have been left without any remedy for injuries sustained aboard a vessel. The LHWCA's 1972 amendments were belatedly passed to prevent harbor workers from bringing unseaworthiness actions. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 347-48 (1991). *But see infra* note 86 and accompanying text showing that, at least in the Fifth Circuit, *Sieracki* seamen still occasionally appear.

[81] *See* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959) (holding that a vessel owner owes a duty of reasonable care "to all who are on board for purposes not inimical to [the owner's] legitimate interests"). *Kermarec* leaves open the possibility of a general negligence claim.

[82] 144 F.3d 332 (5th Cir. 1998).

injured aboard a supply vessel as he prepared to unload its cargo for the camp, a task that was not the main part of his job.[83] The fact that Green worked at a camp excluded him from LHWCA coverage.[84] However, because he was injured on board the supply boat, the injury occurred on the navigable waters, providing the situs requirement for admiralty jurisdiction.[85] The court found "a sufficient nexus to maritime activity . . . to assert admiralty jurisdiction."[86] Because Green was excluded from the LHWCA and did not receive the benefit of its protection, he was not bound by its exclusivity provision.[87] Existing in one of the few remaining "pockets of *Sieracki* seamen," Green was allowed to proceed with a suit in admiralty against his employer.[88]

Green's suit was allowed to proceed with a "general maritime negligence claim."[89] It can be inferred that the court allowed Green's general maritime negligence claim to proceed because, like the plaintiff in a previous case, Green was a *Sieracki* seaman,[90] not a permanent member of a crew, and therefore not barred by precedent from bringing a negligence action outside the Jones Act.[91]

There is one major factual difference between Green and Ishmael: Green was unquestionably aboard a "vessel" when he was injured.[92] In short, a *Sieracki* claim is not a panacea, because, like the Jones Act, it requires the existence of a "vessel."[93] If Ishmael cannot qualify his aquaculture facility as a vessel, *Sieracki* seaman status may not be any more helpful than the traditional

---

[83] *Id.* at 334.

[84] *Id.* at 334-35. *See also* 33 U.S.C. § 902(3)(B) (2006 & Supp. III 2009). This exclusion was added in the same amendment that added the aquaculture exclusion. *See supra* note 74.

[85] *Green*, 144 F.3d at 336.

[86] *Id.* The court also noted that admiralty jurisdiction may be present even when LHWCA "maritime employment" is not present. *Id.*

[87] *Id.* at 337.

[88] *Id.* at 337-38 (quoting Aparicio v. Swan Lake, 643 F.2d 1109, 1118 (5th Cir. 1981)).

[89] *Id.* at 338.

[90] *Id.* (citing Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953)).

[91] *Pope & Talbot*, 346 U.S. at 413-14 & n.6 (distinguishing *Sieracki* seaman as not affected by the abrogation of a general maritime negligence action in *The Osceola*, 189 U.S. 158, 175 (1903)). *Pope & Talbot* also extends to *Sieracki* seamen the general maritime remedy of negligence. *Id. See also* Hancock v. Diamond Offshore Drilling, Inc., No. 07-3200, 2008 U.S. Dist. LEXIS 60934, at *4 (E.D. La. Aug. 8, 2008) (noting "[t]he tendency in the jurisprudence has been to harmonize" the Jones Act and general maritime law); Aaron K. Rives, *The Sieracki Seaman: An Update*, 6 LOY. MAR. L.J. 93 (2008) (collecting cases discussing the interplay between the LHWCA and *Sieracki* claims).

[92] *Green*, 144 F.3d at 336 (noting that the plaintiff was aboard a vessel, which in turn was on the navigable waters of the United States).

[93] *See, e.g.*, Seas Shipping Co. v. Sieracki, 328 U.S. 85, 89-90 (1946) (discussing the existence of a vessel, though not in mandatory terms); *Green*, 144 F.3d at 338.

maritime remedies. Ishmael's last hope in finding redress may be in a general maritime negligence action.[94]

The question of whether *Sieracki* seaman status, general negligence, or indeed any remedy applies to Ishmael can be stated simply: when injured on the navigable waters of the United States, but not on a "vessel," what is the proper scheme for compensation?

One might try to answer the question by looking to similar non-vessels placed offshore. Unfortunately, offshore platforms, the most readily available analogue,[95] are unavailing in comparison because the "legislative history of the [Offshore Continental Shelf] Lands Act makes it clear that [those] structures were to be treated as islands or as federal enclaves within a landlocked State, not as vessels."[96] There are no similar federal statutes to specify the applicable law for aquaculture facilities.[97]

One moderately helpful guidepost is that when plaintiffs receive seaman status, it forecloses *Sieracki* or general maritime negligence claims.[98] Even more helpful are cases in which a plaintiff fails the seaman status inquiry, leaving the court to wrestle with which compensation scheme ought to apply. One such case is *Cavin v. State*.[99] Although the case was remanded to clear up factual questions about seaman status, the Alaska Supreme Court reached into Fifth Circuit precedent, ruling that if the plaintiff is not a Jones Act seaman, he can still recover for unseaworthiness.[100] The holding may not seem helpful on its face, but key to the court's reasoning were the 1972 LHWCA amendments:

> The statute manifests no intention to expand the abolition of the [*Sieracki* seaman] construct beyond the coverage of the LHWCA. We refuse to read into it

---

[94] *See* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959). As in *Green*, the *Kermarec* court assumed the existence of a vessel.

[95] An interesting digression: NOAA understands that oil and gas platforms could conceivably be recycled to become aquaculture platforms. Candidly, NOAA states that "the use of these platforms [for aquaculture] introduces a difficult set of liability issues" that NOAA did not address with its drafted 2007 Aquaculture Act. NOAA, *Frequently Asked Questions on Aquaculture & The National Offshore Aquaculture Act of 2007*, at *6 (Mar. 12, 2007), *available at* http://aquaculture.noaa.gov/pdf/03_faqoffshore07.pdf. It seems that in the context of the OCSLA, NOAA lawyers looked at the very intersection of LHWCA, aquaculture, and seaman's remedies discussed herein, and declined to address it.

[96] *In re* Dearborn Marine Serv. Inc., 499 F.2d 263, 273 (5th Cir. 1974) (quoting Rodrigue v. Aetna Cas. & Surety Co., 395 U.S. 352, 361 (1969)). *See also Rodrigue*, 395 U.S. at 365-66 & nn.11-12 (establishing that fixed offshore platforms are to be classified as extensions of the land).

[97] There is also no pending legislation discussing such a possibility. *See supra* note 73 (discussing the ineffectiveness of state law for offshore aquaculture).

[98] Smith v. Harbor Towing & Fleeting, Inc., 910 F.2d 312, 315 (5th Cir. 1990); Bridges v. Penrod Drilling Co., 740 F.2d 361, 364 (5th Cir. 1984).

[99] 3 P.3d 323 (Alaska 2000).

[100] *Id.* at 332.

> the abolition of judicially-built remedies as they apply to maritime workers not covered by the LHWCA, including . . . those amphibious workers who may be covered only by a state compensation law or who may have no compensation law coverage at all. Had Congress intended to affect the substantive rights of persons not covered by the LHWCA, it could readily have manifested that intention.[101]

In other words, the existence of the LHWCA—and failure to qualify for its protection—should not bar Ishmael from maritime remedies otherwise available. As discussed *supra*, Ishmael likely would not qualify for LHWCA benefits due to the "status" requirement under the LHWCA. This could put him in a predicament of being excluded from state workers' compensation by virtue of being outside state waters,[102] while simultaneously being exempt from federal LHWCA benefits.[103]

It would be the height of injustice if the LHWCA's "status" inquiry were to have any collateral effect on determining whether the federal courts may exercise admiralty jurisdiction over Ishmael's injury. As the Alaska Supreme Court properly gleaned, the foreclosure of the LHWCA should have no effect on the availability of other maritime remedies.[104] True, Congress does not consider aquaculture to be sufficiently maritime to warrant LHWCA protection.[105] Even so, that should not have any preclusive effect on maritime remedies such as a general maritime negligence claim.

Turning to the availability of a general negligence claim, the court's admiralty jurisdiction over Ishmael must be established first. Relating to torts in admiralty, "[m]aritime law applies only where the wrong occurring on or over navigable waters 'bear[s] a significant relationship to traditional maritime activity.'"[106] While saltwater aquaculture as "traditional maritime activity" seems a stretch at first, aquaculture in the navigable waters of the United States

---

[101] *Id.* (quoting Aparicio v. Swan Lake, 643 F.2d 1109, 1116 (5th Cir. 1981)).

[102] At fifteen nautical miles out to sea, the hypothetical offshore aquaculture facility is situated on the high seas. *See* United Nations Convention on the Law of the Sea arts. 2-4, 36, Dec. 10, 1982, 1833 U.N.T.S. 397; Proclamation No. 5928, 55 Fed. Reg. 777 (Dec. 27, 1988) (declaring the United States would exercise sovereignty over territorial seas out to twelve nautical miles). *See also supra* note 73.

[103] This complete bar from any compensatory scheme is the root of Ishmael's problem. Being categorically excluded from statutory compensation schemes militates toward seeking a solution to cement Ishmael's fault-based remedies. Because fault-based remedies such as the Jones Act or maritime negligence already apply to Ishmael or would require a relatively minor extension of existing law, they would be easier to accomplish than extending no-fault compensatory coverage, which would require statutory amendment. *See also infra* note 153.

[104] *Cavin*, 3 P.3d at 332.

[105] *See supra* note 78. Congress did not consider aquaculture to be sufficiently similar to longshoring that it should be included for LHWCA protections.

[106] Powers v. Bethlehem Steel Corp., 477 F.2d 643, 648 (1st Cir. 1973) (quoting Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972)).

actually predates this country's founding, and has been practiced periodically since the early days of the republic, and even earlier internationally.[107] Offshore aquaculture should be considered a natural extension of historical aquaculture, so that any injury that Ishmael suffers on the navigable waters therefore comes within the ambit of admiralty jurisdiction.[108] This will solve the problem of whether the facility is a vessel, because "[e]very species of tort, however occurring, and *whether on board a vessel or not, if upon the high seas* or navigable waters, is of admiralty cognizance."[109] If the Jones Act and *Sieracki* status are unavailable for want of a "vessel," then maritime jurisdiction and general negligence will allow Ishmael at least one avenue for recovery.

D. Injury in the Bay

Because of the interplay between state and federal powers, Ishmael's search for redress only gets more complicated as he gets closer to shore. Assume now that Ishmael suffered his injury while working at a similar floating aquaculture facility located in a bay. At one nautical mile from shore, the near-shore aquaculture facility is inside state waters.[110] Determining the remedies

---

[107] The Hawaiian people built fish ponds, called loko i'a, in brackish waters. At least 75, and perhaps as many as 500 loko i'a existed throughout the islands. U.S. Environmental Protection Agency, *Project Loko I'a*, *available at* http://www.epa.gov/region09/water/lokoia.html (last updated Aug. 26, 2010). *See* Kamali'i Elementary School, *Restoration of Ko'ie'ie Loko I'a*, http://www.kamalii.k12.hi.us/fishpond/restoration.html (last visited Sept. 4, 2010). *See also* Donald Webster, *Maryland Oyster Culture*, at 2-5 (2007), *available at* http://www.mdsg.umd.edu/images/uploads/siteimages/extension/1_Historical%20Background3.pdf (last visited Sept. 4, 2010) (discussing developments in oyster aquaculture in the Chesapeake Bay dating back to 1820). The Chinese practiced saltwater aquaculture since at least 1600 A.D. N. Hishamunda & R.P. Subasinghe, *Aquaculture Development in* China, Food and Agriculture Organization of the United Nations (2003), http://www.fao.org/docrep/006/y4762e/y4762e04.htm#bm04.

[108] *See* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 538-43 (1995). The court's exercise of admiralty jurisdiction over joint tortfeasors both on land and on navigable waters, *id.*, suggests that admiralty jurisdiction exists despite a lack of LHWCA status, leaving Ishmael's injury within admiralty jurisdiction. *See also* David W. Robertson & Michael F. Sturley, *The Admiralty Extension Act Solution*, 43 J. MAR. L. & COM. 209 (2003).

[109] *Jerome B. Grubart*, 513 U.S. at 550 (Thomas, J., concurring) (quoting Thomas v. Lane, 23 F. Cas. 957, 960 (C.C.D. Me. 1833)) (emphasis added). At first blush, it seems incongruous that a worker is not "maritime enough" for LHWCA purposes, but is somehow sufficiently maritime for admiralty jurisdiction. However, the LHWCA was written for a specific purpose, and Congress discussed and specifically excluded aquaculture from its protection. The seeming contradiction is answered by the precedent extending admiralty jurisdiction ashore in certain cases, like *Jerome B. Grubart*, while LHWCA benefits are unavailable to a welder working on an ocean platform in *Herb's Welding*. Given that dichotomy, aquaculture as admiralty-but-not-LHWCA is supported in the case law, even if it is not intuitive.

[110] *See supra* note 73.

available to Ishmael in this hypothetical requires first an examination of the effect of being closer to shore and under state jurisdiction, then a discussion of whether Ishmael is excluded from LHWCA coverage by the interplay of LHWCA and state law.

1. Jurisdictional overlap: the twilight zone

The Supreme Court has long struggled to delimit the boundaries between state and federal remedial schemes for injured workers.[111] The touchstone case in this area, *Southern Pacific Co. v. Jensen*, initially held that because stevedores' work is maritime in nature and admiralty jurisdiction is vested by the Constitution with the federal government, state workers' compensation laws cannot extend protection to longshoremen.[112] Over time, that case lent its name to a broadly applicable principle, known as the "*Jensen* line,"[113] which prevented state coverage of workers "seaward of the water's edge."[114] Congress enacted the LHWCA to protect longshoremen who crossed the *Jensen* line during the course of the work day, and in so doing, repeatedly walked in and out of state coverage.[115] While the idea of a "line" persisted in jurisprudence, the more accurate description is that "the border between federal and state compensation schemes [is] less a line than a 'twilight zone,' in which 'employees must have their rights determined case by case.'"[116]

Congress' 1972 amendments to the LHWCA extended federal coverage landward to include injuries occurring on or adjacent to the navigable waters, and specified a two-part situs and status test.[117] This landward extension of benefits created concurrent jurisdiction[118] between state and federal schemes in the landward area.[119] The 1984 amendments reduced the number of workers

---

[111] *See* Green v. Vermilion Corp., 144 F.3d 332, 338 (5th Cir. 1998) (collecting cases).

[112] S. Pac. Co. v. Jensen, 244 U.S. 205, 213-18 (1917).

[113] For an interesting discussion of the *Jensen* case, see Matthew H. Frederick, *Adrift in the Harbor: Ambiguous-Amphibious Controversies and Seaman's Access to Workers' Compensation Benefits*, 81 TEX. L. REV. 1671 (2003).

[114] Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 306 n.14 (1983).

[115] Chandris, Inc. v. Latsis, 515 U.S. 347, 387 & n.10 (1995) (Stevens, J., dissenting).

[116] Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 718 (1980) (quoting Davis v. Dep't of Labor, 317 U.S. 249, 256 (1942)).

[117] *See* Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999).

[118] The holding referring to a "twilight zone" represented the abandonment of the previously unworkable formulation of "maritime but local" for injuries relegated to state remedies. Green v. Vermilion Corp., 144 F.3d 332, 341 (5th Cir. 1998).

[119] *Sun Ship*, 447 U.S. at 722-26. *See also* Anaya v. Traylor Bros., Inc., 478 F.3d 251, 254-55 (5th Cir. 2007) (holding that when the maritime status of an employee was determined, the LHWCA was the sole remedy).

covered under the LHWCA, not by moving the line, but by excluding categories of workers. Among those excluded were aquaculture workers.[120]

With the "twilight zone" having now replaced the *Jensen* line, courts are left to grapple with the same issues originally addressed in *Jensen*: states have an interest in providing a remedy for injured workers, while selection between various remedies should be predictable for employers and employees alike. In the aforementioned *Green* case, the Fifth Circuit faced a dilemma similar to that faced by Ishmael, as the plaintiff was excluded from LHWCA coverage by virtue of working at a recreational camp.[121] The court had to decide how adequately to protect the worker injured on navigable waters, who is subject to both federal and state jurisdiction. Finding initially that the LHWCA did not apply, the court "refuse[d] to expose maritime workers to the variegated state workers' compensation schemes, especially where Congress has expressly found that 'most State Workmen's Compensation laws provide benefits which are inadequate.'"[122] In the name of ensuring uniformity in admiralty law, the court allowed the plaintiff general maritime law remedies, even in the face of a state workers' compensation exclusivity clause.[123]

2. State workers' compensation

As the major point of contention in *Green* shows, state workers' compensation laws are a key part of the analysis of the "twilight zone" of LHWCA and state schemes. If Ishmael is eligible for state workers' compensation while working at the aquaculture facility in the bay, he will be excluded from LHWCA coverage.[124] It will be useful, then, to determine which states are most likely to have nearshore aquaculture and examine these states' workers' compensation laws. Using data from the U.S. Department of Agriculture, the states most likely to use nearshore aquaculture include

---

[120] *See Bienvenu*, 164 F.3d at 914-18 (DeMoss, J., dissenting).

[121] *Green*, 144 F.3d. at 334-35. *Compare* 33 U.S.C. § 902(3)(B) (2006 & Supp. III 2009), *with* § 902(3)(E) (aquaculture worker exception subject to same requirement as camp employee).

[122] *Green*, 144 F.3d at 338 (quoting H.R. DOC. NO. 92-1441, at 4707 (1972)).

[123] *Id.* at 338-41. For a good discussion of the LHWCA and *Green*, see *Bienvenu*, 164 F.3d at 914-22 (DeMoss, J., dissenting). Although Judge DeMoss did not carry the day, his dissent seems to have the better understanding of the history and competing concerns.

[124] *See* 33 U.S.C. § 902(3)(E). In contrast, if Ishmael is eligible for LHWCA benefits, then as a "covered" LHWCA employee, in addition to the scheduled compensation, § 905(b) will be his sole fault-based cause of action available for any injuries sustained. *See* Prestenbach v. Global Int'l Marine, Inc., 244 F. App'x 557, 561 n.3 (5th Cir. 2007) (requiring § 905(b) exclusivity for the LHWCA-covered plaintiff after discussing the inapplicability of *Sieracki* and *Kermarec*).

Louisiana, Washington, Florida, Virginia, and Maine.[125] Each of these states' workers' compensation laws will be examined to determine what effect the workers' compensation will have on LHWCA coverage.

(a) Louisiana. Workers' compensation in Louisiana applies to "every person performing services arising out of and incidental to his employment," with some exceptions for small businesses.[126] The statute does not expressly include workers on state waters, but the legislative history shows a clear intent to include waterborne workers, as the previous version of the statute included only workers in hazardous occupations, such as those working on "vessels, boats, and other water crafts, [and] terminal docks."[127] Additionally, the Louisiana law purports to extend workers' compensation to classes of employees "outside the territorial limits of the state,"[128] but not to "master, officers or members of the crew of, any vessel used in interstate or foreign commerce not registered or enrolled in the State of Louisiana."[129] One Louisiana appellate court combined those two sections, concluding that because an injury occurred aboard a vessel while offshore, the plaintiff was a seaman, and therefore was not covered under Louisiana workers' compensation.[130] Ishmael would qualify for compensation if he worked in Louisiana state waters, making him ineligible for LHWCA benefits due to the LHWCA's aquaculture exclusion.[131]

(b) Washington. Washington excludes from its workers' compensation the "master or member of a crew of any vessel, or . . . employers and workers for whom a right or obligation exists under the maritime laws or federal employees' compensation act."[132] This language reflects a clear legislative intent to exclude LHWCA beneficiaries from state workers' compensation.[133]

---

[125] This list of states was selected using data from the U.S. Department of Agriculture 2005 Aquaculture Census, *supra* note 1. The top twelve states were initially selected, based on aquaculture sales in 2005. That list was reduced based on ocean access, eliminating land-locked states. To further shorten the list, no two states from the same federal circuit were included. The discussion of several states is not intended to be an exhaustive concordance of state law on the subject. It instead provides an overview of various state workers' compensation schemes, illustrating how Ishmael would fare in various locations throughout the country.

[126] LA. REV. STAT. ANN. § 23:1035(A) (West, Westlaw through 2009 Reg. Sess.).

[127] *Id.* § 23:1035 (1975) (amended 1976). The current version of the statute reads "every person," rather than the previous long enumerated list of hazardous trades). *Id.* § 23:1035(A) (West, Westlaw through 2009 Reg. Sess.).

[128] *Id.* § 23:1035.1(1).

[129] *Id.* § 23:1037.

[130] Jones v. Tidex/Tidewater Marine Co., 801 So. 2d 541, 543 (La. Ct. App. 2001).

[131] *See* 33 U.S.C. § 902(3)(E) (2006 & Supp. III 2009); Green v. Vermilion Corp., 144 F.3d 332, 335 (5th Cir. 1998); Frederick, *supra* note 113, at 1724-25.

[132] WASH. REV. CODE ANN. § 51.12.100(1) (West, Westlaw through 2010 legislation). Like other schemes, Washington also provides for extraterritorial coverage. *Id.* § 51.12.120.

[133] Gorman v. Garlock, Inc., 118 P.3d 311, 320 (Wash. 2005). *But see* WASH. REV. CODE ANN. § 51.12.102 (West, Westlaw through 2010 legislation) (allowing the singular exception to

Washington's workers' compensation could leave Ishmael in a jurisdictional quandary: Because he is an aquaculture worker, he is exempt from the LHWCA if he is covered under state workers' compensation. But, he is exempt from state workers' compensation if he is eligible for federal LHWCA benefits.[134]

(c) Florida. Florida specifically excludes from its workers' compensation coverage any employee who is covered under the LHWCA.[135] Ishmael, as an aquaculture worker, is excluded from LHWCA coverage if he is "subject to coverage under a State workers' compensation law."[136] Like Washington, Florida's workers' compensation laws create a prisoner's dilemma with the LHWCA, as state coverage requires the exclusion of federal coverage, and vice versa. In a 1998 case where a worker was injured on a barge while performing maritime construction, one Florida court undertook a fact-based evaluation, finding the injured plaintiff covered under the LHWCA, and therefore ineligible for state workers' compensation.[137] The Florida court noted that due to concurrent jurisdiction and independent federal and state decisions, it is possible that an injured worker could be left ineligible for any compensation scheme.[138] This is a valid concern for Ishmael.

(d) Virginia. Virginia eschews any jurisdictional problems with the LHWCA. Its act provides that any amounts paid as voluntary LHWCA payments before an order mandating payment may be deducted from any subsequent required payments under the Virginia workers' compensation system.[139] Because the state does not have an exclusivity provision for the LHWCA and instead embraces concurrent jurisdiction, Virginia state

---

the rule, providing temporary state benefits to LHWCA workers injured by asbestos).

[134] *See infra* Part II.D.2(c) for discussion of jurisdictional exclusivity clauses.

[135] FLA. STAT. ANN. § 440.09(2) (West, Westlaw through 2010 Second Reg. Sess.).

[136] 33 U.S.C. § 902(3).

[137] FCCI Fund v. Cayce's Excavation, Inc., 726 So. 2d 778, 780-83 (Fla. Dist. Ct. App. 1998).

[138] *Id.* at 783 & n.5. *See also id.* at n.6 (suggesting that amending the state statute to allow concurrent, rather than exclusive jurisdiction, would solve the possibility of leaving an injured worker without a remedy). One wonders whether findings of fact, for example, in a state workers' compensation claim could be asserted as offensive collateral estoppel in a future claim for LHWCA benefits, as the facts have already been litigated and decided. Additionally, it is unclear whether amending only the state statute would prevent Ishmael from being left without a remedy, as the exclusivity provision would still exist in the LHWCA, at § 902(3). For a good discussion of this case and broader LHWCA and state compensation concerns, *see* Frederick, *supra* note 113, at 1693-94.

[139] VA. CODE ANN. § 65.2-520 (West, Westlaw through 2010 Reg. Sess.) (amended in 2007 following Newport News Shipbuilding and Dry Dock Co. v. Holmes, No. 2314-05-1, 2006 WL 850843, at *2-3 (Va. Ct. App. April 4, 2006) (holding that only one-fourth of such amount may be deducted from a future state compensation award)).

compensation would be available to Ishmael, which in turn forecloses the LHWCA through the aquaculture exception.[140]

(e) Maine. Workers' compensation in Maine excludes those "engaged in maritime employment or in interstate or foreign commerce who are within the exclusive jurisdiction of admiralty law or the laws of the United States."[141] Although "maritime employment" sounds like an LHWCA exclusion, the Maine courts have never applied the definition that way.[142] In fact, the Maine Supreme Judicial Court generously allowed a plaintiff to recover under both LHWCA and state workers' compensation.[143] As in the Virginia example, however, this stands in contrast to a more miserly reading of the LHWCA, as the ability to collect under the state compensation scheme generally should prevent Ishmael's coverage under LHWCA.[144]

The foregoing shows how states' compensation schemes may preclude or allow LHWCA benefits, and underscores how the result may vary between states. The competing values of uniformity of law under federal jurisdiction and state legislatures' prerogative to provide for the welfare of their citizens are worthy goals that may come into sharp conflict depending on which state controls the waters on which Ishmael works.

III. RECOMMENDATION

A. Ideal End State

Saltwater aquaculture workers should be granted seaman status to pursue the Jones Act and other maritime remedies because the current state of the law is unworkable.[145] Because of the similarities between watercraft recently ruled "vessels"[146] and floating aquaculture facilities, floating aquaculture facilities are arguably already vessels under existing law. If the floating fish farms are vessels, then Ishmael should be considered a crewmember thereof, and

---

[140] 33 U.S.C. § 902(3)(E).

[141] ME. REV. STAT. ANN. tit. 39-A, § 102(11)(A)(1) (West, Westlaw through 2009 Second Reg. Sess.).

[142] *See, e.g.*, Dorr v. Me. Mar. Acad., 670 A.2d 930, 932 n.2 (Me. 1996) (recognizing concurrent jurisdiction between LHWCA and Maine workers' compensation).

[143] Webber v. Bath Iron Works Corp., 656 A.2d 748, 750 (Me. 1995).

[144] 33 U.S.C. § 902(3).

[145] *See* Todd M. Powers & Megan C. Ahrens, *Seaman Status in the Wake of Stewart: A Blurred Distinction Between Land- and Sea-Based Workers*, 6 LOY. MAR. L.J. 71 (2008). After a full discussion of the unsatisfying fact-specific Jones Act determinations, the authors note that until a solution is brought forth, the twilight zone between seaman and non-seaman will remain a vexing issue for litigants. This section seeks to provide possible avenues for such a solution.

[146] *See supra* notes 63-66 and accompanying text.

therefore a Jones Act seaman. Furthermore, seaman status for offshore aquaculture workers will help provide a uniform national standard.

"The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.'"[147] Offshore aquaculture workers, working on their floating vessels at sea, are subject to the same dangers as any traditional seaman.[148] The perils of offshore aquaculture combine with the traditional desire for uniformity in admiralty jurisdiction, making vessel status and Jones Act coverage the preferred outcome.

If Ishmael was injured at the bay aquaculture facility, one nautical mile from shore, the analysis is somewhat less clear. Although the bay site is necessarily situated on the navigable waters of the United States, the policy argument for uniformity in admiralty is perhaps less important one nautical mile off coast than for the offshore site.[149] Additionally, the "special hazards" of seamen are less threatening for workers closer to shore, where ocean swells are not as great and the sanctuary of dry land is nearby.

Despite the reduced policy reasons for seaman status for inshore workers, at least one circuit already ruled that the LHWCA should not apply to plaintiffs situated similarly to Ishmael.[150] Weighing the competing values of state compensation schemes against the uniformity of admiralty jurisdiction, the Fifth Circuit in *Green* conferred *Sieracki* seaman status, despite the availability and purported exclusivity of workers' compensation.[151] If the Jones Act is unavailable to Ishmael, *Sieracki* seaman status and a general maritime negligence action seem like the next best course for aquaculture workers to take through the murky jurisdictional waters near shore.

If the Jones Act or any other maritime remedy applies, it should apply equally to offshore and nearshore aquaculture. Given the holding in *Green*, *Sieracki* seaman status could be a good fit, but it is only one court's solution,

---

[147] Chandris, Inc. v. Latsis, 515 U.S. 347, 369-70 (1995) (quoting Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)).

[148] In fact, the offshore fish farmers likely face more perils than seafarers on traditional vessels. Moored to the ocean floor and bereft of any self-propulsion, Ishmael's aquaculture barge will be unable to maneuver for wind and seas, making it vulnerable to adverse conditions. *See* DAVID O. DODGE & STEPHEN E. KYRISS, SEAMANSHIP: FUNDAMENTALS FOR THE DECK OFFICER 104-05 (1981). Moreover, like any other barge, the aquaculture facility has very low freeboard and may lack a raked bow, so people walking across the decking of the barge are more likely to be washed overboard than a deckhand on a typical ship. *But see* St. Romain v. Indus. Fabrication and Repair Serv., Inc., 203 F.3d 376, 380 (5th Cir. 2000) ("Whether [plaintiff] faced perils of the sea is not outcome determinative of seaman status."); *Chandris*, 515 U.S. at 361 ("Seaman status is not coextensive with seamen's risks.").

[149] *See supra* note 118 (discussing the now-defunct "maritime but local" standard).

[150] Green v. Vermilion Corp., 144 F.3d 332, 338-41 (5th Cir. 1998).

[151] *See id.* at 338.

and even then, not uniformly applied within that circuit.[152] The questions of vessel status, LHWCA, and maritime jurisdiction create uncertainty for employers and workers alike. Therefore, permanently extending seaman status to saltwater aquaculture workers is probably the best way to protect aquaculture workers and provide certainty on all sides.[153] The following are solutions that each branch of government could implement to extend Jones Act coverage to saltwater aquaculture workers.

B. Judicial

A judicial decision could allow a plaintiff like Ishmael to proceed with a general maritime negligence claim, grant him *Sieracki* status, or even full seaman status. Regarding normal or *Sieracki* seaman status, a court could hold that an aquaculture barge is a "vessel," and Ishmael is a crewmember thereof. Even if he is not a crewmember, Ishmael would be considered a *Sieracki* seaman so long as the aquaculture barge is a vessel. The murky jurisdictional overlap and fact-bound inquiries in this area of the law have already led to disparate results, even in the same circuit.[154] Nevertheless, a case-by-case development of law is how admiralty law is created and is the most likely solution when an injured aquaculture worker like Ishmael brings his lawsuit. However, there may be other possible, yet less likely, solutions from the other branches of government.

C. Legislative

Congress could alter the Jones Act or the LHWCA to confer Jones Act seaman status on saltwater fish farmers, but amending either one for this

---

[152] *See* Bienvenu v. Texaco, Inc., 164 F.3d 901, 914-22 (5th Cir. 1999) (DeMoss, J., dissenting). *But see* Freeze v. Lost Isle Partners, 116 Cal. Rptr. 2d 520 (App. 2002) (following *Green* in case of restaurant employee, similarly-situated in terms of the LHWCA).

[153] While it is beyond the scope of this discussion to weigh the relative merits of tort lawsuits against statutory compensation schedules, there are certain value judgments inherent in an outcome that favors fault-based approaches, as recommended herein. Making aquaculture workers seamen is a practical expedient. A little tinkering with the definition of "vessel," perhaps a slight extension of *Stewart*, and predictable seaman status will inure to aquaculture workers on the navigable waters. By contrast, the LHWCA could only be extended to aquaculture workers by repeal of an exclusion currently supported by the congressional record, while state workers' compensation schemes could not realistically be changed *en masse*. As it is deeply unsatisfying to think that aquaculture workers, as a class, may be without a remedy, cementing vessel status—and therefore seaman status—is probably the most readily achievable action, and would make sure that at least some deserving plaintiffs would be fully compensated. *See infra* Part III.B-D for proposed solutions.

[154] *See Bienvenu*, 164 F.3d at 914-22 (DeMoss, J., dissenting).

narrow issue is unlikely. Because the Rules of Construction Act defines "vessel" for Jones Act purposes, the Jones Act could be amended to include saltwater aquaculture workers as "seamen." Although it is a seemingly simple fix, such a specific inclusion appears unlikely because the Jones Act does not contain any categorical inclusions or exclusions.[155]

Amending the LHWCA is an equally unlikely and even less elegant avenue than creating Jones Act categories. The LHWCA already discusses aquaculture workers,[156] and the act improbably redefines the Jones Act seaman.[157] A short few words could be added to LHWCA language about a "master or member of a crew of any vessel,"[158] such as: "provided that a floating aquaculture facility may be considered a 'vessel.'" This would perhaps make vessel status further contingent on an aquaculture barge occasionally changing its location. This litany of possibilities only underscores the difficulty, and perhaps improbability, of statutory change.

If there were a statutory change in this area, perhaps the most likely result would be incorporating the Jones Act by reference in a future aquaculture act. Similar to how the Offshore Continental Shelf Lands Act applied the LHWCA to platform workers on the continental shelf,[159] a future aquaculture act could include a clause that defines floating aquaculture barges like Ishmael's as vessels. To ensure the availability of a general maritime negligence claim, the aquaculture act could specify that all aquaculture workers injured on the navigable waters are within admiralty jurisdiction and therefore may pursue appropriate maritime remedies.[160] Such ambiguous drafting would allow for a general maritime negligence claim while leaving open the ability for a plaintiff to prove seaman status for a Jones Act claim. Because the most recent would-be aquaculture act is trapped in legislative limbo, however, the wait for legislative action may be long and fruitless.

D. Executive: Administrative

While conceptually straightforward, perhaps the least likely avenue for conferring Jones Act status on aquaculture workers would be a federal

---

[155] *See* 46 U.S.C. § 30104 (2006 & Supp. II 2008).

[156] 33 U.S.C. § 902(3)(E) (2006 & Supp. III 2009).

[157] "[T]he key requirement for Jones Act coverage [that is, seaman status] now appears in another statute," the LHWCA. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 347 (1991).

[158] 33 U.S.C. § 902(3)(G) (2006 & Supp. III 2009).

[159] *See supra* note 67.

[160] Because Ishmael was injured within admiralty jurisdiction, a general maritime negligence claim should remain open to him even without that new wording. However, such an enactment would at least make it clear that aquaculture workers do have some remedy, and that proper remedy is a maritime negligence claim.

regulation to that effect. Whether modifying the Rules of Construction Act or the LHWCA, a regulation could define aquaculture barges as vessels, which would by extension make Ishmael a Jones Act seaman. One circuit already applied LHWCA regulations to an aquaculture inquiry, albeit in dicta.[161] An appropriate executive branch agency, such as the U.S. Department of Labor, could create a new regulation to define an aquaculture barge as a "vessel."[162] Because barge-like craft are "vessels," the new administrative rules would not be contrary to law, and would therefore likely be respected by the courts.[163] Given the ability to create administrative regulations and the notice-and-comment procedure allowing agency deference over the outcome of a final rule, a new regulation defining a "vessel" could theoretically confer Jones Act seaman status on saltwater aquaculture workers. As the executive agencies have only half-heartedly drafted aquaculture legislation, however, an administrative regulation papering over the problem is unlikely.

IV. CONCLUSION

General maritime negligence is probably currently available to Ishmael when he is injured offshore, and it is possible that Jones Act status is already available regardless of how close to shore he works. Overlapping jurisdictional issues complicate the picture in nearshore waters because of the LHWCA's exclusivity provision. Future judicial decisions will hopefully clarify that floating saltwater fish farms are, in fact, vessels, making Ishmael a Jones Act seaman.

Until that decision is rendered, however, injured aquaculture workers like Ishmael have a panoply of remedies from which to choose, but with little predictability of result. For the injured fish farmer looking for redress, pleadings and arguments in the alternative are probably the best course of action. Ishmael should seek seaman status, pursuing the Jones Act and traditional seaman remedies. He should also assert his entitlement to a general maritime negligence cause of action. Pleading in the alternative may be cumbersome, but better that than have to explain to a plaintiff why he does not qualify for any remedial scheme. Until the law is clarified, a clear way out of Ishmael's predicament may be as elusive as a white whale.

---

[161] Alcala v. Dir. of Workers Comp., U.S. Dep't of Labor, 141 F.3d 942, 944-45 (9th Cir. 1998) (citing 20 C.F.R. § 701.301(a)(12)(iii)(E) (1994)).

[162] As Department of Labor regulations address the LHWCA, that agency comes to mind first. Specifically, 20 C.F.R. § 701.301 already contains LHWCA definitions, such as the aforementioned definition of aquaculture. Because the LHWCA defines Jones Act seaman status, the Department of Labor could probably promulgate new regulations to include saltwater aquaculture platforms as "vessels" under the LHWCA.

[163] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865-66 (1984).

Ke Kānāwai Māmalahoe: Equality in Our Splintered Profession

Troy J.H. Andrade*

For CJ Richardson . . .

PREFACE

The words "Equal Justice Under Law," carved into the western facade of the United States Supreme Court building, exemplify the nation's commitment to principles of fairness and equality—principles that run deep within the American construct of justice.[1] For Americans, these principles have been "a rallying cry, a promise, an article of national faith,"[2] claiming its origins in the nation's Declaration of Independence.[3]

In Hawai'i, equality has been a mandate codified in the first law:

> Kamehameha and Ka-hauku'i paddled to Papa'i and on to Kea'au in Puna where some men and women were fishing, and a little child sat on the back of one of the men. Seeing them about to go away, Kamehameha leaped from his canoe intending to catch and kill the men, but they all escaped with the women except two men who stayed to protect the man with the child. During the struggle Kamehameha caught his foot in a crevice of the rock and was stuck fast; and the fishermen beat him over the head with a paddle. Had it not been that one of the men was hampered with the child and their ignorance that this was Kamehameha with whom they were struggling, Kamehameha would have been killed that day.

---

* J.D. Candidate 2011, William S. Richardson School of Law, University of Hawai'i at Mānoa.

[1] Supreme Court of the United States, *The Court Building*, http://www.supremecourt.gov/about/courtbuilding.aspx (last visited Sept. 26, 2010).

[2] Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 245 (1983).

[3] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal . . . ."); *see also* Abraham Lincoln, President of the United States, Gettysburg Address, para. 1 (Nov. 19, 1863), *available at* http://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm ("Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal"); Barack H. Obama, President of the United States, 2009 Inaugural Speech (Jan. 20, 2009), *available at* http://nytimes.com (search "Obama inaugural address transcript"; then select "All Results Since 1851"; then follow "Transcript – Barack Obama's Inaugural Address – Text") (declaring that there is a promise "that all are equal, all are free, and all deserve a change to pursue their full measure of happiness").

> This quarrel was named Ka-lele-iki, and from the striking of Kamehameha's head with a paddle came the law of Mamala-hoe (Broken paddle) for Kamehameha.[4]

With the memory of a wooden paddle shattered across his face, Kamehameha, the first sovereign of the Hawaiian Islands, would forever internalize the responsibility he had to his people.[5] In his royal edict, Ke Kānāwai Māmalahoe [Law of the Splintered Paddle],[6] the first law of the Kingdom of Hawai'i, Kamehameha galvanized the supremacy of the law, protected people from physical harm, and enshrined equal rights for all.[7]

Centuries later, Kamehameha's vision of equality, like the words "Equal Justice Under Law," although admirably close, have failed to come to fruition in many aspects of life.[8] Discrimination and exclusion have impeded the practice of law and have truly splintered the legal profession.[9]

I. INTRODUCTION

Adorned in a traditional lei hulu mamo (feather lei), an ancient Hawaiian symbol of nobility, Kathleen Sullivan successfully defended a Native Hawaiian school from challenges to its Hawaiian-only admissions policy.[10] A former Dean of Stanford Law School, an honoree of the 100 Most Influential Lawyers in America, a veteran practitioner before the U.S. Supreme Court, a Marshall Scholar, and once considered a possible nominee to the Supreme Court,[11]

---

[4] SAMUEL H. KAMAKAU, RULING CHIEFS OF HAWAI'I 125-26 (rev. ed. 1992).

[5] *See* CAROL CHANG, THE LAW OF THE SPLINTERED PADDLE: KĀNĀWAI MĀMALAHOE (Haw. Legal Auxiliary 1994), *available at* http://www.hawaii.edu/uhelp/files/LawOfTheSplinteredPaddle.pdf.

[6] *Id.* at 16.

[7] *Id.* at v, 16.

[8] *See generally* ISLANDS IN CAPTIVITY: THE INTERNATIONAL TRIBUNAL ON THE RIGHTS OF INDIGENOUS HAWAIIANS (Ward Churchill & Sharon H. Venne eds., South End Press 2004) (noting that Kamehameha's indigenous people, the Native Hawaiians, suffer the highest rates of serious illness, prison incarceration and homelessness, the lowest rates of higher education attainment, family income and limited self-governance over land, culture and politics in their own homeland).

[9] *See infra* Parts II-III, discussing the history of exclusion in the legal profession, and the exclusion of minorities from the legal profession because of the bar examination.

[10] Kamehameha Schools Communication Division, *Defenders of the Cause: Kamehameha's Legal Defense Team for Doe v. Kamehameha Schools includes Counsel with Local and National Expertise*, IMUA, at 30 (Mar. 2005), *available at* http://www.ksbe.edu/newsroom/imua/mar05/imua_mar05.pdf (noting that "Sullivan wore the lei hulu while defending Kamehameha's cause in court hearings on Nov. 4"); *see also* Doe v. Kamehameha Schools, 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, 550 U.S. 931 (2007).

[11] Charlie Savage, *Wider World of Choices to Fill Souter's Vacancy*, N.Y. TIMES, May 1, 2009, at A1.

Sullivan has established herself as a preeminent legal scholar and advocate.[12] In a 2009 interview, Supreme Court Associate Justice Ruth Bader Ginsburg called Sullivan's *Constitutional Law*[13] "one of the finest casebooks in all of law school"—memorializing the legal community's immense respect for this constitutional law expert.[14]

How then—given her exceptional credentials and curriculum vitae, matched only by an elite few—did this Harvard Law-trained scholar advocate fail the California bar examination in 2005?[15] Where did she go wrong? Should the bar have denied Sullivan admission because of her score on one exam even though a justice of the Supreme Court relies heavily upon her work? What is the rationale for the bar examination? Is the bar examination an accurate arbiter for the profession? The larger question: Could justice be served, particularly for the marginalized, without the Kathleen Sullivans of the world?

The answers are not simple. Perhaps the bar examination is a "rite of passage" to the legal profession;[16] perhaps it is the locked gate that is opened only for those with the "endurance to sit and concentrate for eight grueling hours";[17] perhaps it is a way to weed out the potential "bad apples."[18] Finally, as one law professor aptly noted, perhaps the bar examination continues to exist because "no one has advanced a persuasive substitute."[19] Sullivan's minor failure, amid a legal career full of accolades and accomplishments, illuminates the splinters in the bar admissions system and the need for reform within the legal profession.

The bar examination has been an insurmountable barrier for many legally trained bar applicants for much, if not all, of its existence. It has "place[d] an indefensible premium on the applicant's ability to absorb and then disgorge a mass of factual data at a two- or three-day sitting."[20] There exist, however, more profound justifications for the bar examination's ultimate elimination.

---

[12] Stanford Law School, Kathleen M. Sullivan: Stanley Morrison Professor of Law and Former Dean, http://www.law.stanford.edu/directory/profile/57/ (last visited Sept. 26, 2010).

[13] KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (15th ed. 2004).

[14] Interview by Brian Lamb with Ruth Bader Ginsburg, Associate Justice, U.S. Supreme Court, in Washington, D.C. (July 1, 2009), *available at* http://supremecourt.c-span.org/Video/JusticeOwnWords/SC_Jus_Ginsburg.aspx.

[15] James Bandler & Nathan Koppel, *Even Top Lawyers Fail California Exam*, WALL ST. J., Dec. 5, 2005, at A1 (noting that Kathleen Sullivan was among many to fail the California bar examination).

[16] Interview with Nicole S. Pinaula, in Honolulu, Haw. (Feb. 16, 2010).

[17] Interview with Ha'aheo M. Kaho'ohalahala, in Honolulu, Haw. (Feb. 9, 2010).

[18] Interview with Randy J. Compton, in Honolulu, Haw. (Feb. 10, 2010).

[19] STEPHEN GILLERS, REGULATION OF LAWYERS 552 (7th ed. 2005).

[20] Edward F. Bell, *Do Bar Examinations Serve a Useful Purpose?*, 57 A.B.A. J. 1215, 1215 (1971).

The examination is, unfortunately, a recapitulation of centuries of overt exclusion and discrimination from the legal profession.[21]

In an attempt to heal the societal wounds of the bar examination, this comment proposes an alternative for bar admissions in the twenty-first century. Using the State of Hawai'i as a model for reform, this comment suggests that the use of a diploma privilege, combined with retooled legal pedagogical practices and mandatory continuing legal education courses and pro bono service, offers a persuasive substitute for the bar examination that will help mend our splintered profession. Part II of this comment unearths the origins and exclusionary history of bar admissions and unveils the fragmented foundation upon which this profession is built. Part III discusses the bar examination as an instrument of exclusion for minorities. Part IV analyzes the diploma privilege as a viable alternative to the bar examination. Part IV also examines a dormant commerce clause challenge to the diploma privilege in the Wisconsin case *Wiesmueller v. Kosobucki*[22] and offers a constitutional argument that validates this privilege. Finally, Part V proposes steps to reform bar admissions and the legal profession in Hawai'i, with the goals of creating a more diverse bar and increasing community access to legal services.

This comment is in no way a condemnation of the legal profession or of those involved in the bar admissions process. It is the author's sincere hope that this piece serves as a call to action for the legal community and aspiring attorneys.

II. SPLINTERED: EXCLUSION IN THE LEGAL PROFESSION

In a society where written laws were unnecessary and an elite few ruled, Kamehameha's "Law of the Splintered Paddle" symbolized a dramatic effort to afford rights to the common individual.[23] Akin to the symbolism of Ke Kānāwai Māmalahoe, the United States and the legal profession have made efforts to address historical wrongs.[24]

Principles of fairness and equality demand that individuals should not suffer discrimination based on immutable characteristics.[25] From *Brown v. Board of Education*[26] to the Lilly Ledbetter Fair Pay Act of 2009,[27] the United States has

---

[21] *See infra* Parts II-III.

[22] 667 F. Supp. 2d 1001 (W.D. Wis. 2009).

[23] *See* CHANG, *supra* note 5, at iii.

[24] *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[25] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (holding that discrimination based upon immutable characteristics violates "the basic concept of our system that legal burdens should bear some relationship to individual responsibility").

[26] 347 U.S. 483 (1954) (mandating the desegregation of public educational institutions).

taken admirable strides to address the exclusion of individuals from society and from better opportunities. The legal profession has also taken steps to eliminate historical exclusion.[28] The creation of diversity studies and panels, the use of affirmative action programs, and the advent of the Access to Justice movement have primed the modern legal professional for a unique and truly special career that is on the verge of eliminating discrimination.[29] This encouraging atmosphere, however, has not always existed. Steeped within our own profession's history—a history that every attorney has a stake in—are unfortunate instances of exclusion.

A. Unfortunate History of Exclusion

Former U.S. Secretary of Labor Willard Wirtz once described the legal profession as the "worst segregated group in the whole economy."[30] Notions of paternalism and racism permeated American society in the nineteenth and twentieth centuries, resulting in the effective exclusion of women, racial minorities, and foreign citizens from the legal profession.[31]

In 1878, when Clara Shortridge Foltz attempted to join the bar, she faced instant criticism: "[A] woman can't keep a secret, and for that reason if no other, I doubt if anybody will ever consult a woman lawyer."[32] In 1869, the Supreme Court of Illinois denied Myra Bradwell admission to the bar, reasoning that: "God designed the sexes to occupy different spheres of action,

---

[27] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (amending the Civil Rights Act of 1964 to allow the statute of limitations to begin with each new discriminatory paycheck in the context of equal-pay litigation and not at the date that payment was agreed upon).

[28] *See generally* HAW. ACCESS TO JUSTICE COMM'N, HAWAI'I ACCESS TO JUSTICE COMMISSION ANNUAL REPORT 7 (2009) [hereinafter ANNUAL REPORT], http://www.hsba.org/resources/1/Access%20to%20Justice/ATJ_Annual%20Report%2008-09/1-16-10%20-%20annual%20report%202009_final1.pdf; *see also* Susan Essoyan, *Justice for All?*, HONOLULU STAR-BULLETIN, Apr. 20, 2008, *available at* http://archives.starbulletin.com/2008/04/20/news/story01.html (detailing the pressing need for more lawyers that serve low-income individuals); Susan Essoyan, *Family Needs Legal Help to Save Home*, HONOLULU STAR-BULLETIN, Apr. 20, 2008, *available at* http://archives.starbulletin.com/2008/04/20/news/story02.html; Simeon R. Acoba, *Pro Bono Celebration: The Access to Justice Commission*, HAW. B.J., Dec. 2008, at 4.

[29] *See* ANNUAL REPORT, *supra* note 28.

[30] GERALDINE R. SEGAL, BLACKS IN THE LAW: PHILADELPHIA AND THE NATION 24 (1983) (citations omitted).

[31] *See infra* note 39.

[32] Sandra Day O'Connor, *First Women: The Contribution of American Women to the Law*, 28 VAL. U. L. REV. xiii, xiii (1994) (citing Virginia Elwood-Akers, *Clara Shortridge Foltz, California's First Woman Lawyer*, 28 PAC. HISTORIAN 23, 25 (1984)).

and that it belonged to men to make, apply and execute the laws."[33] The U.S. Supreme Court agreed, declaring: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[34] Beneath these words existed a "romantic paternalism" that put women "not on a pedestal, but in a cage."[35] Women were effectively excluded from the legal profession.[36]

In 1844, *The Daily Eastern Argus* criticized Macon Bolling Allen's application for admission to the bar: "[I]s the practice of law so much more respectable than hoeing potatoes that a lawyer can be disgraced by contact with a black man, and not a farmer?"[37] Prior to the Civil War, many states restricted the practice of law to white males. Upon passage of the Civil War amendments,[38] African Americans were allowed to practice law in federal courts.[39] State courts, however, would remain closed to African Americans.[40] In one instance, the Maryland Court of Appeals in 1877 held that the "14th Amendment has no application"[41] to the state's statutory racial barrier to the practice of law. In another, more poignant instance, after an African American successfully passed the Florida bar examination in 1897, a bar examiner admitted, "Well, I can't forget he's a nigger and I'll be damned if I'll stay here to see him admitted."[42]

Even after obtaining admissions into all courts, African American lawyers were barred not only from white firms, but they also suffered discrimination at the hands of the government.[43] During the Franklin D. Roosevelt Administration, one African American attorney, seeking a federal government

---

[33] *In re* Bradwell, 55 Ill. 535, 539 (1869).

[34] Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

[35] Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

[36] Clara Shortridge Foltz, an advocate for women's equality, would fight through the adversity to become the first female attorney in Californian history. Myra Bradwell would not succumb to the male-dominated judicial process; she too would become an attorney. *See* Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987-88).

[37] J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, at 93 (1993).

[38] U.S. CONST. amend. XIII-XV.

[39] *See generally* Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, *in* THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 913 (Steve Sheppard ed. 1999).

[40] *In re* Taylor, 48 Md. 28, 33 (1877).

[41] *Id.*

[42] *See* Finkelman, *supra* note 39, at 931.

[43] *Id.* at 928.

position, waited three hours while every white applicant was interviewed.[44] The interviewer eventually told the African American attorney that the position was reserved for whites only.[45] The African American attorney painfully confronted his arduous dilemma: "One is driven to hate either his color or his country."[46] Thus, although concerted efforts to update admissions standards did crack open the door to professional opportunity, "the great wall of ethnic exclusion . . . still cut through the legal profession."[47] African Americans were effectively excluded from the legal profession.[48]

Troubled by "the influx of foreigners," prominent Connecticut lawyer Theron G. Strong articulated that the rising proportion of Jewish lawyers was "extraordinary and overwhelming—so much so as to make it appear that their numbers were likely to predominate."[49] With decades of discrimination against foreign citizens, Attorney William Rowe warned of the "great flood of foreign blood . . . sweeping into the bar."[50] Rowe asked: how are "we to preserve our Anglo-Saxon law of the land under such conditions?"[51] In 1909, the American Bar Association responded and prohibited noncitizens, particularly immigrants from eastern and southern Europe, from practicing law. One bar member summarized the bar's actions: "It is a matter of patriotism, and a national and political question."[52]

The growing anti-Jewish sentiment in the legal profession in the United States would be quickly overshadowed by the exclusion of Jewish individuals from the legal profession in Europe.[53] In Nazi Germany, officials passed laws that discriminated against and excluded Jewish individuals from the legal profession.[54] Without legal representation and political power, Jewish

---

[44] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWS AND SOCIAL CHANGE IN MODERN AMERICA 188 (1976).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] SMITH, *supra* note 37, at 93-96 (noting that Macon Bolling Allen became the first African American lawyer and first African American appointed to a judicial post).

[49] Jerold J. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-1922*, *in* LAW IN AMERICAN HISTORY 585 (Donald Fleming & Bernard Bailyn eds., 1971) (citing THERON G. STRONG, LANDMARKS OF A LAWYER'S LIFETIME 347 (1914)).

[50] *Id.* (citing William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 593, 602-03 (1917)).

[51] William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 593, 603 (1917).

[52] *See* Auerbach, *supra* note 49, at 585 (citing ABA Reports, 34 (1909), 743-44)).

[53] RONNIE S. LANDAU, THE NAZI HOLOCAUST 136 (2006) (noting that in September 1938 it "became impossible for any Jewish lawyer to practi[c]e his profession").

[54] *Id.*

individuals were excluded from decision-making.[55] In Europe, the hatred of Jewish individuals led to the atrocity and horrors of the Holocaust. Jewish individuals were effectively excluded from the legal profession.[56]

B. Hawai'i's History of Exclusion

Hawai'i has not escaped litigation arising from the exclusion of individuals from the legal profession. The Hawaiian jurisdiction has its own significant history of exclusion from the bar dating back to when Hawai'i was a sovereign nation.

During the Kingdom of Hawai'i era, the issue of admission arose within the context of admitting a foreign resident to the bar. In 1883, the Supreme Court of Hawai'i excluded Clarence W. Ashford, an 1880 graduate of the University of Michigan, from the bar of the Kingdom of Hawai'i because Ashford was not a citizen of the kingdom, even though he had practiced law in Michigan for a year and was admitted to the California bar.[57] The law stated: "The Supreme Court shall have power to examine and admit as practitioners in the Courts of Record, such persons being *Hawaiian subjects* of good moral character, as said Court may find qualified for that purpose."[58] The Supreme Court noted that "[w]e are therefore obliged to hold that the petitioner not being a Hawaiian subject cannot be admitted to practice in this Court."[59] Foreign citizens were effectively excluded from the legal profession.

In 1971, Dennis Walker Potts sued the justices of the Supreme Court of Hawai'i for denying him admission to the bar because he did not meet the residency requirement.[60] The Supreme Court of Hawai'i had previously held that "[t]he fact that a lawyer is licensed to engage in the general practice of law in one state does not give him a vested right to freely exercise such license in other states."[61] The United States District Court for the District of Hawai'i, however, ruled in favor of Potts, holding that "the preexamination residential requirements imposed . . . upon United States citizens applying for leave to take Hawaii's bar examination contravene the Equal Protection Clause of the Fourteenth Amendment, and are thus invalid."[62]

---

[55] *Id.*

[56] *But see In re* Griffiths, 413 U.S. 717, 729 (1973) (holding unconstitutional the exclusion of noncitizens).

[57] *In re* Ashford, 4 Haw. 614, 616 (1883).

[58] *Id.* (citing Haw. Civil Code § 1,065) (emphasis added).

[59] *Id.*

[60] Potts v. Honorable Justices of Supreme Court, 332 F. Supp. 1392, 1398 (D. Haw. 1971).

[61] *In re* Petition of Avery, 44 Haw. 597, 598, 358 P.2d 709, 710 (1961) (citations omitted).

[62] *Potts*, 332 F. Supp. at 1398.

The legal profession's history can be characterized as one of discrete and sometimes outright exclusion. Kamehameha's vision of equality has, thus far, eluded many in the legal profession. Excluding individuals from the bar based on their citizenship, residency status, race, ethnic identity, or gender was thought to be a thing of the past. An analysis of the subversive effects of the bar examination on minorities in the U.S. and Hawai'i illuminates the urgent need for reform.

III. SHARD OF INEQUALITY: ANALYZING THE BAR EXAMINATION AS A SUBVERSIVE INSTRUMENT OF EXCLUSION

Remnants of a history of exclusion, like the dispersed shards of wood from Kamehameha's broken paddle, remain in the legal profession. The shard of inequality in the legal profession—the bar examination—has continued to be an effective tool of exclusion.

The constructs of admission to the legal profession have been strictly tailored over time to control the quality of professionals.[63] What started as a broad mechanism of creating qualified professionals, however, has evolved into a system that emphasizes the memorization capability of a prospective lawyer. An analysis of the history and the effects of bar admissions in the United States offers a glimpse into the changing socio-political landscape of the legal profession. Dissecting the effects of race on bar examination performance in Hawai'i and the failed attempts of litigating these disparities across the United States illustrate the dire need for statewide reform.

A. History and Effects of the Bar Examination

During early American colonial history, local courts granted candidates bar admission after they completed an apprenticeship.[64] The length of an apprenticeship varied with jurisdiction, but tended to extend across long periods of time.[65] Following the American Revolution, states began to develop

---

[63] *See generally* ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 165-66 (1965); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 25 (1983); *see also* JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 281-83 (1950).

[64] NAT'L CONFERENCE OF BAR EXAM'RS, THE BAR EXAMINERS' HANDBOOK 15 (Stuart Duhl ed., 2d ed. 1980) (citing Randall T. Shepard, *On Licensing Lawyers: Why Uniformity is Good and Nationalization is Bad*, 60 N.Y.U. ANN. SUR. AM. L. 453 (2004)).

[65] *Id.* at 15 (noting that at one time bar admission in Massachusetts required an eleven-year apprenticeship).

their own specific requirements for admission, which ranged from apprenticeships to oral and written examinations.[66]

A growing public sentiment against elitist lawyers, however, pressured the bar admission gates to open to any white man, eliminating a fiscal barrier to entrance.[67] By the Civil War era, examinations were commonplace, but these exams tended to be a mere formality.[68]

Christopher Columbus Langdell brought about the advent of legal educational institutions in 1870 with the creation of a standardized curriculum, which included case methods and Socratic teaching.[69] Some argue that with the movement toward formalized curriculums came the rise of accreditation to regulate the quality of a legal education.[70] The accreditation gap is often cited as the origin of the standard written bar examination.[71]

The bar examination initially developed as a mechanism of exclusion: "Educational reform was an effective vehicle for the exclusion of ethnic minority-group members."[72] The implementation of a bar examination, which eliminates the diploma privilege, in some instances was the product of outright racially discriminatory animus:

> Once African Americans gained access to legal training, "they changed the rules, and announced that hereafter everybody would have to take the exam." John Wrighten believed that the new requirement was an attempt to "punish African Americans." The legislator who introduced the bill that established the new requirement announced that it was designed to "bar Negroes and some undesirable whites."[73]

---

[66] *Id.*

[67] *See* CHROUST, *supra* note 63, at 171; *see, e.g.*, IND. CONST. art. VII, § 21 (1915) (repealed Nov. 8, 1932) (authorizing that "every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice"); SUP. CT. OF OHIO RULES OF PRACTICE XVI, § 6 (1883) (noting that the applicant need only show a signed certificate from a practicing attorney stating the applicant had "regularly and attentively studied law"); Finkelman, *supra* note 39, at 930 (acknowledging a New Hampshire law that "any citizen over twenty-one was entitled to be admitted to practice").

[68] Joel Seligman, *Why the Bar Exam Should be Abolished*, JURIS DR., Aug./Sept. 1978, at 48 (retelling the anecdote of an applicant that was tested while his examiner, Abraham Lincoln, bathed, and quoting that "[t]he whole proceeding was so unusual and queer, if not grotesque, that I was at a loss to determine whether I was really being examined at all").

[69] John H. Schlegel, *Langdell's Legacy or, the Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1520 (1984).

[70] Michael Bard & Barbara A. Bamford, *The Bar: Professional Association or Medieval Guild?*, 19 CATH. U. L. REV. 393, 397 n. 23 (1970) (noting that "[i]n 1921 the ABA . . . began the practice of 'approving' or 'accrediting' law schools").

[71] *See id.*

[72] *See* AUERBACH, *supra* note 44, at 108.

[73] R. Scott Baker, *Schooling and White Supremacy: The African American Struggle for*

Legal educational institutions created further obstacles for minority students, such as tuition increases. "Professional barriers were high[,] but not insurmountable for th[ose] young m[e]n who could afford to attend college and who excelled at Harvard, Yale, or Columbia Law School."[74] Ironically, due to the structure of the system, "the[] exclusiveness [of these schools] increased in direct proportion to diminishing financial resources and prevailing definitions of ethnic inferiority."[75]

Many argue that the bar examination is not an accurate arbiter of success as a lawyer. Dean Oliver S. Rundell of the Wisconsin School of Law articulated:

> A bar examination is framed without any specific relationship to the particular educational background of the individuals who take it. It must be comprehensive in character and must call largely for information respecting things everyone is supposed to know. It necessarily emphasizes memory at the expense of reasoning and this is true no matter how conscious an effort is made to avoid such an emphasis.[76]

The late retired Supreme Court of Hawai'i Chief Justice William S. Richardson believed that the bar examination was a mere formality and would have eliminated it altogether.[77] Richardson, having never taken the Hawai'i bar,[78] asserted that "anyone who could meet and pass the challenges during three years at an accredited law school was more than equipped to practice law: 'Let the consumers determine a lawyer's success; let the marketplace be the final arbiter.'"[79]

The bar examination may not, on its face, seem discriminatory, but the negative result—recreating a cycle of privilege and denying admission largely to those in populations that are in desperate need of representation—is devastating to a profession that prides itself on justice for all. The bar examination becomes a subversive instrument of exclusion.

Some scholars argue that minority performance on the bar examination "generates concern that the bar examination . . . may be infected with racial,

---

Educational Equality and Access in South Carolina, 1945-1970, *in* TOWARD THE MEETING OF THE WATERS: CURRENTS IN THE CIVIL RIGHTS MOVEMENT OF SOUTH CAROLINA DURING THE TWENTIETH CENTURY 300, 305 (Winfred B. Moore & Orville V. Burton eds., 2008).

[74] Jerold S. Auerbach, *Book Review*, 15 AM. J. LEGAL HIST. 334, 334 (1971).

[75] *Id.*

[76] Richard A. Stack, Jr., Commentary, *Admission Upon Diploma to the Wisconsin Bar*, 58 MARQ. L. REV. 109, 125 (1974) (citing 18 B. EXAMINER 244 (1949)).

[77] CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982, at 97-98 (1985) (citing Interview by Carol S. Dodd with William S. Richardson, Chief Justice, Haw. Sup. Ct., in Honolulu, Haw. (June 30, 1982)).

[78] *Id.* at 97 (noting that Richardson's opponents were quick to remind others that he had never taken the bar).

[79] *Id.* at 98.

ethnic, cultural, gender, and/or economic bias unrelated to the competent practice of law."[80] One study conducted in Pennsylvania noted the implicit and explicit discrimination that occurred in the administration of the bar examination.[81] A glance at the first-time bar passage rate provides an illustrative example of the disparate impact the bar examination has on minority applicants: 91.9% for Caucasians, 80.7% for Asian Americans, 75.8% for Mexican Americans, 74.8% for Hispanics, 66.36% for Native Americans, and 61.4% for African Americans.[82] A recent New York study provides similar strong patterns of racial disparity in the bar passage rate: 86.8% for Caucasians, 80.1% for Asian/Pacific Islanders, 69.6% for Hispanics, and 54% for African Americans.[83]

Studies have evidenced that bar examinations disproportionately exclude people of color from the practice of law.[84] The results of the bar examination, to a certain extent, mirror the performance of minorities on the Law School Admissions Test (LSAT).[85] Standardized testing, however, has historically been an inaccurate indicator of success,[86] leading some to assert that "[b]ar

---

[80] Cecil J. Hunt II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 723 (1996); *see also* Maurice Emsellem, *Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination*, 61 N.Y. ST. B.J. 42 (1989).

[81] Peter J. Liacouras et al., *The Report of the Philadelphia Bar Association Special Committee on Pennsylvania Bar Admission Procedures - Racial Discrimination in Administration of the Pennsylvania Bar Examination*, 44 TULSA L.Q. 141 (1970-71) (concluding that (1) certain practices raised the "strongest presumption" that blacks "are indeed discriminated against under the procedures used" in Pennsylvania, (2) that certain "examination practices raise a serious presumption that a not insubstantial number of all candidates have been delayed or deprived of admission to the Bar through unequal or arbitrary and capricious actions," and (3) that a "thorough review of the bar examination process raises grave doubts concerning the validity of the Pennsylvania bar examination").

[82] Linda F. Wightman, LSAC National Longitudinal Bar Passage Study 27 (1998), *available at* http://www.unc.edu/edp/pdf/NLBPS.pdf (last visited Apr. 25, 2010).

[83] MICHAEL KANE ET AL., IMPACT OF THE INCREASE IN THE PASSING SCORE OF THE NEW YORK BAR EXAM (2007), http://www.nybarexam.org/summary2.pdf.

[84] *See* Society of American Law Teachers Statement on the Bar Exam, 52 J. LEGAL EDUC. 446, 449-51 (2002) [hereinafter SALT Statement]; Susan M. Case, *The Testing Column, Men and Women: Differences in Performance on the MBE*, B. EXAMINER 44 (2006).

[85] *See, e.g.*, Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41 (2006); Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107 (2006); John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167 (2006).

[86] *See* SALT Statement, *supra* note 84, at 450; Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed*

admission examinations as now administered place an indefensible premium on the applicant's ability to absorb and then disgorge a mass of factual data at a two or three day sitting."[87]

Proponents of the bar examination counter that it does a fair job in testing and assessing a candidate's competency to be a lawyer.[88] But is the bar examination an accurate indicator of success in the legal profession? Attempts to litigate this issue have all failed.

B. Bar Examination Challenges in the Courts

Over the years, many bar applicants have filed unsuccessful lawsuits attempting to unearth the hidden tragedies of the bar examination.[89] Many legal challenges have failed because courts have generally refused to use demographic statistics in the context of employment discrimination claims.[90]

Most bar applicants have bought the assumption that the bar examination does an accurate job in measuring one's fitness to practice law. With no validation of the bar examination, however, it is almost impossible to determine the correlation between the test and job performance as a lawyer. At the core of many of the failed lawsuits have been attempts to use the test validation argument established in *Griggs v. Duke Power Co.*[91] to assert a violation of equal protection under the Fourteenth Amendment.[92] In *Griggs*, the U.S. Supreme Court ruled that Title VII prohibited the use of any testing process, regardless of intent or motive, which disproportionately excluded members of a protected minority, unless such tests were "demonstrably a reasonable measure of job performance."[93]

In *Tyler v. Vickery*,[94] and subsequently in *Parrish v. Board of Commissioners of the Alabama State Bar*,[95] the Fifth Circuit Court of Appeals denied the plaintiffs' use of *Griggs*' Title VII test validation argument. Although the state bar examiners regulate who can and cannot become a lawyer (in some sense serving as an employer), the *Vickery* court held that the Title VII

Alternatives, 45 CASE W. RES. L. REV. 1191 (1995).

[87] Bell, *supra* note 20, at 1215.

[88] *See, e.g.*, Suzanne Darrow-Kleinhaus, *A Response to the Society of American Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442 (2004)

[89] *See* Hunt, *supra* note 80.

[90] *Id.*

[91] 401 U.S. 424 (1971).

[92] *See, e.g.* Tyler v. Vickery, 517 F.2d 1089, 1096 (5th Cir. 1975); Parrish v. Bd. of Comm'rs of the Ala. State Bar, 533 F.2d 942 (5th Cir. 1976).

[93] *Griggs*, 401 U.S. at 436.

[94] *Tyler*, 517 F.2d at 1096.

[95] *Parrish*, 533 F.2d at 949 (determining that the court will not require test validation per the rationale of the court in *Tyler*).

test validation argument did not apply to the state bar examiners because the scope of Title VII was expressly limited to employers, employment agencies, and labor unions.[96] The court in *Pettit v. Gingerich* also denied the application of a Title VII standard to resolve the plaintiffs' equal protection claim under the Fourteenth Amendment.[97]

Professor Cecil Hunt, however, suggests that a "ray of hope" may still exist for judicial challenges to the bar examination.[98] For example, in 1989, a New York federal district court struck down a state department policy that relied exclusively on Scholastic Aptitude Test scores to determine merit scholarships as unconstitutional under the rational relation test on the basis of gender discrimination.[99] Also, in 1976, a Virginia court held that the board of bar examiners was an agent of the courts and were thus held to the same standards as "employers," specifically under Title VII.[100] The court, however, decided not to extend Title VII test validation standards to licensing examinations because of federalism concerns.[101]

Is the bar examination an accurate gatekeeper to the legal profession? No one knows. Courts have skirted around this central issue and have ruled that test validations are unnecessary for the legal profession.

C. Race and the Bar Examination in Hawai'i

Analyses of the bar examination's effect on racial exclusion in Hawai'i's legal profession have been sparse because Hawai'i, like many states, does not regularly collect or maintain data on the race, ethnicity, or gender of its bar examination candidates. This has led some to demand a "demographic

---

[96] *Tyler*, 517 F.2d at 1096 (citing 42 U.S.C. § 2000e).

[97] 427 F. Supp. 282, 293 (D. Md. 1977), *aff'd*, 582 F.2d 869 (4th Cir. 1978).

[98] *See* Hunt, *supra* note 80, at 760.

[99] Sharif v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 364 (S.D.N.Y. 1989). The rational relation test is a level of scrutiny under the Fourteenth Amendment's equal protection clause, in which laws will be upheld if there is a legitimate government interest that is rationally related to the government's actions.

[100] Woodard v. Va. Bd. of Bar Exam'rs, 420 F. Supp. 211, 213 (E.D. Va. 1976) (noting that the "Board's statutory origin, its role in performing the sovereign function of licensing professions, and the statutory restrictions placed on its authority are the primary factors supporting the Court's conclusion that an agency relationship exists") (citations omitted), *aff'd*, 598 F.2d 1345 (4th Cir. 1979), *overruled on other grounds by* Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006).

[101] *Id.* at 214 (holding that "[t]he Supreme Court has recognized 'that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions'" (citing Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975))).

assessment" because "[f]ailing to pursue a demographic study is a refusal to acknowledge that race, racial difference, sex, sexual orientation, and economic background have been significant and decisive barriers to practice."[102]

Despite the lack of statistical information from the State, the William S. Richardson School of Law (WSRSL) keeps records of student undergraduate grade point averages (GPAs), LSAT scores, law school GPAs, bar passage, and ethnicity.[103] The data has not been systematically analyzed, but the law school monitors these statistics carefully in its effort to enhance the diversity of the bar.[104] WSRSL Associate Dean of Student Services Laurie Arial Tochiki acknowledged the disparate impact that the bar examination, LSAT, and admissions process generally has had on individuals of Native Hawaiian, Filipino, Polynesian, and Micronesian descent.[105] WSRSL has taken strides to diversify its student body with the establishment of the Ulu Lehua Program.[106] The initiatives of the law school, however, do not reflect the realities of the bar.[107] Thus, it is not surprising that these minorities are in fact minorities in the legal profession.[108] The unfortunate reality is that a disparate impact exists. The exclusion of individuals from the legal profession through a standardized examination has had a significant impact on society.[109] The problem is not that a minority individual is failing the bar examination and will have to pay more to retest. The problem is, as one attorney and scholar aptly noted, that "[r]acial

---

[102] Sonny M. Ganaden, *To Be Real: The Necessity of Demographic Information for the Hawaii Bar*, 13 HAW. B. J. 179, 187 (2009).

[103] E-mail from Laurie Arial Tochiki, Assoc. Dean of Student Servs., William S. Richardson Sch. of Law, to author (Apr. 24, 2010, 13:34 HST) (on file with author).

[104] *Id.*

[105] *Id.*

[106] *See* ERIC K. YAMAMOTO, UNIVERSITY OF HAWAI'I AT MĀNOA WILLIAM S. RICHARDSON SCHOOL OF LAW PRE-ADMISSIONS PROGRAM REVIEW COMMITTEE, FINAL REPORT OF PRE-ADMISSIONS PROGRAM REVIEW COMMITTEE (1998) (on file with author) (acknowledging that WSRSL has taken steps to mitigate the disparate impact of racial minorities in the bar. In 1974, WSRSL established the Pre-Admission Program, now called the Ulu Lehua Program. The Ulu Lehua Program reflects the law school's commitment to diversity. Ulu Lehua scholars are selected for admission to WSRSL for varied reasons: "exceptional personal talents, particularly in providing service to Hawaii's poor, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, and ethnic background.").

[107] HAWAI'I BAR JOURNAL, MEDIA KIT 5 (2010), *available at* http://www.hsba.org/resources/1/Benefits/2010%20HBJ%20Media%20Kit.pdf (noting that Hawaiians or Part-Hawaiians make up 7.7% of the bar and all "[o]ther ethnicities" comprising approximately 18.4% compared to 35.5% Caucasians, 26.8% Japanese, and 11.6% Chinese).

[108] See Appendix A for the self-reported ethnicities of members of the Hawai'i State Bar.

[109] *See supra* Part III.A, discussing the bar examination as an effective tool to exclude ethnic minorities from the legal profession.

exclusion in the practice of law amounts to racial exclusion from the system of law."[110]

What can be done to heal these societal fissures? Is there a way to mend the pieces of our splintered legal profession? Are there successful alternatives to the bar examination that have been and can be implemented?

IV. MENDING THE PIECES: ADMISSION BY DIPLOMA PRIVILEGE

The inflicted wounds of the bar examination can be healed. Mending the pieces of our splintered profession lies with the diploma privilege. The diploma privilege is a nuanced system in which graduates of in-state law schools are admitted to the state bar association upon completion of a prescribed curriculum. Wisconsin has such a system, which places the burden of determining the competency of applicants not on bar examiners, but rather upon in-state educational institutions that have a prescribed curriculum. The Wisconsin Supreme Court and the state bar association regulate these institutions.[111] As discussed later in this comment, the success of the diploma privilege in the state of Wisconsin is rooted in the thought and compromise that have gone into establishing the system.

A. Diploma Privilege in Context

Essential to understanding the diploma privilege is a contextual analysis of the struggle between legal educators and practitioners. This struggle exists today and seeks to answer the question of who should set the standards and regulate the legal profession.

The diploma privilege traces its origin to Virginia in 1842, when the William and Mary College and the University of Virginia sought and obtained legislative authorization to allow their graduates admission to the bar without examination.[112] In 1855, Theodore Dwight arranged for law students to be admitted to practice in New York State after being examined by three lawyers.[113] The diploma privilege would follow in 1859 to Albany Law School, then to Columbia University and New York University in 1860.[114] With the privilege, law schools could attract more students.[115] The leadership

---

[110] VERNON E. JORDAN, JR. & LEE A. DANIELS, MAKE IT PLAIN: STANDING UP AND SPEAKING OUT 144 (2008).

[111] *See infra* Part IV.B.

[112] Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L.J. 36, 39 (1974-75).

[113] STEVENS, *supra* note 63, at 26.

[114] *Id.*

[115] *Id.*

of the New York bar was "not pleased with the diploma privilege, which it felt took control of entry into the profession away from practitioners and gave it to legal educators."[116]

American Social Science Association president Lewis Delafield, a leading critic of the privilege, attacked the "prevalent notion among laymen, which is shared by many professional men and has found expression from certain judges, that the gates to the bar should be wide open, and easy admission allowed to all applicants."[117] Delafield exclaimed "that the 'unworthy' had to be 'excluded' and 'rejected.'"[118] In 1877, the American Social Science Association urged the creation of a national lawyer's group.[119] The American Bar Association (ABA) emerged from these discussions.[120]

In the late nineteenth century, law schools started to look for methods to minimize competition for their institutions. Many developed the diploma privilege, "which gave legislative approval to individual law schools to determine the quality of student needed to pass the bar."[121] The ABA, however, wanted to regain control of its admissions process:

> The ABA opposed the privilege from the time of its creation and sought to institute local bar examinations, controlled by practitioners, as a better way of improving standards. Although the privilege was abolished locally by some jurisdictions, little major action took place nationally, until 1892, when the ABA began an outright assault. The system declined more rapidly after the ABA attack. In 1917, the numerous California and Minnesota schools lost the privilege, although twenty-two schools in fifteen states still enjoyed its advantages.[122]

The popularity of the diploma privilege would soon plummet with the growing influence of the bar associations.

B. Wisconsin's Diploma Privilege

The state of Wisconsin is the last stronghold for the diploma privilege. Applied to both the public University of Wisconsin Law School (UWLS) and the private Marquette University Law School (MULS), Wisconsin has shown considerable deference to legal educational institutions within its territorial boundaries to determine who is qualified to practice law:

---

[116] *Id.*

[117] *Id.* at 27.

[118] *Id.* at 27 (citing Lewis L. Delafield, *The Conditions of Admissions to the Bar*, 7 PENN MONTHLY 960 (1876)).

[119] *Id.*

[120] *Id.*

[121] *Id.* at 98.

[122] *Id.* at 98-99.

> [W]e may properly presume that their diplomas evidence a sufficient degree of qualifications to entitle them to admission to the bar. That presumption arises from the fact that it is the business of these institutions to train candidates for the practice of the law and to that end they have learned faculties and maintain the standards requisite to merit the approval of the council of legal education and admission to the bar of the American Bar Association.[123]

In 1971, Wisconsin reformed admissions to the bar by admitting students from in-state schools upon showing completion of a strictly prescribed curriculum.[124] Wisconsin Supreme Court Rule 40.03 (Rule 40.03) further delineated the competency requirements for the diploma privilege.[125] Rule

---

[123] *In re* Admission of Certain Persons to the Bar, 247 N.W. 877, 878 (Wis. 1933).

[124] WIS. STAT. § 256.28(1)(b) (1971).

[125] Legal competence requirement: Diploma privilege. An applicant who has been awarded a first professional degree in law from a law school in this state that is fully, not provisionally, approved by the American bar association shall satisfy the legal competence requirement by presenting to the clerk certification of the board showing:

(1) Satisfactory completion of legal studies leading to the first professional degree in law. The law school shall certify to the board satisfactory completion of not less than 84 semester credits earned by the applicant for purposes of the degree awarded.

(2) Satisfactory completion of study in mandatory and elective subject matter areas. The law school shall certify to the board satisfactory completion of not less than 60 semester credits in the mandatory and elective subject matter areas as provided in (a) and (b). All semester credits so certified shall have been earned in regular law school courses having as their primary and direct purpose the study of rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state.

(a) *Elective subject matter areas; 60-credit rule.*

Not less than 60 semester credits shall have been earned in regular law school courses in the subject matter areas generally known as: Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. The 60-credit subject matter requirement may be satisfied by combinations of the curricular offerings in each approved law school in this state.

(b) *Mandatory subject matter areas; 30-credit rule.*

Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates.

(c) *Law school certification of subject matter content of curricular offerings.*

Upon the request of the supreme court, the dean of each such law school shall file with the clerk a certified statement setting forth the courses taught in the law school which satisfy the requirements for a first professional degree in law, together with a statement of the percentage of time devoted in each course to the subject matter of the areas of law specified in this rule.

WIS. SUP. CT. R. 40.03.

40.03 requires that any applicant that earns a law degree from an ABA-accredited law school "in this state" shall be eligible for admission to the bar upon showing: first, satisfactory completion of at least eighty-four credits of study; and second, satisfactory completion of mandatory and elective courses in specified subject matter areas.[126]

Rule 40.03(2)(a) requires students to take any combination of sixty credit hours of classes chosen from thirty specified topics.[127] The rule also requires that thirty of those sixty credit hours be spent in certain mandatory classes.[128] The thirty-credit and sixty-credit rule has led one author to proclaim that "Wisconsin has the most restrictive diploma privilege statute ever written."[129] The specified curriculum includes, theoretically, the courses necessary to become an effective lawyer in Wisconsin.

The mandated curriculum is only a small aspect of Wisconsin's diploma privilege. The diploma privilege is premised on the success of the law schools in preparing their students for a career in law. Both UWLS and MULS have created innovative and progressive curricula that "prepare [students] for the modern world by forcing up-to-date concerns into the classroom."[130] The University of Wisconsin's "Law in Action" program, discussed *infra*, offers a modern interdisciplinary approach to the study of law. As proof of a strict curriculum, UWLS Professor Beverly Moran, who has graded the bar examination in Wisconsin, commented that "an essay that will pass for Wisconsin bar examination purposes would fail if submitted for a University of Wisconsin Law School course."[131] Given the highly structured curriculum and a commitment to education beyond the lecture hall, it is not surprising that both law schools have ranked within the top tier of law schools in the nation.[132]

The success of the diploma privilege in Wisconsin is also derived, as Professor Moran argues, from the unique characteristics and relationships of the legal educational institutions, the government, and the bar association within the state.[133] Professor Moran asserts that the diploma privilege has worked in Wisconsin because of three characteristics: first, Wisconsin is a small state

---

[126] *Id. See also* Appendix B for comparative chart of courses.

[127] WIS. SUP. CT. R. 40.03 § (2)(a).

[128] *Id.* § (2)(b).

[129] Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L.J. 36, 42 (1974).

[130] Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 655 (2000).

[131] *Id.* at 650.

[132] *See Schools of Law: The Top 100 Schools*, U.S. NEWS & WORLD REPORT, May 2010, at 74 (noting that UWLS is currently ranked 28th); *see also The Top Law Schools*, U.S. NEWS & WORLD REPORT, May 2009, at 75 (noting that MULS was ranked 87th in 2009).

[133] Moran, *supra* note 130, at 645.

with a small practicing bar; second, there are close relationships between the bar, the judiciary, the legislature, and the law schools within the state; and third, the public and the bar have great regard for the state's law schools.[134]

Wisconsin's diploma privilege has been successful on many fronts. The diploma privilege has been instrumental in addressing the issue of diversity in the legal profession: "Wisconsin avoids the disparate impact on minority applicants that bar examinations have imposed for decades."[135] The diploma privilege's success in turning out qualified legal professionals is evidenced through the high bar passage percentage rate for Wisconsin law students when taking the bar examination in other jurisdictions.[136] For a couple of years, Wisconsin graduates out-performed applicants from other states on the California bar examination, which is considered one of the toughest in the country, and on the Illinois bar examination.[137]

For all the good evident in the diploma privilege, however, some argue for its final demise. A recent challenge in federal court asserted that the Wisconsin diploma privilege is unconstitutional because it violates the dormant commerce clause by discriminating against out-of-state law schools.[138]

C. Constitutional Challenge to the Diploma Privilege

In 2007, Wisconsin resident Christopher Wiesmueller challenged, pro se, the Wisconsin diploma privilege on grounds that the privilege and similar requirements for bar admission violated the U.S. Constitution's Commerce Clause.[139] He sued the Wisconsin Board of Bar Examiners and the Wisconsin Supreme Court. Wiesmueller asserted that he was not trying to eliminate the diploma privilege in Wisconsin but that he instead hoped that the state "wouldn't impose a bar exam on everybody."[140] He articulated: "A lot of people see this as an attack on the diploma privilege and that's not the way I view it. Frankly, it's an attack on the bar exam."[141]

---

[134] *Id.* at 655.

[135] *Id.* at 653; *see also* Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 931-36 (1997); Hunt, *supra* note 80, at 733-86; John Antonides, *Minorities and Bar Exam: Color Them Angry*, JURIS DR., Aug./Sept. 1978, at 56.

[136] Moran, *supra* note 130, at 650.

[137] *Id.*

[138] *See infra* Part IV.C.

[139] Trial Pleading, Wiesmueller v. Kosobucki, 2007 WL 6799812 (W.D. Wis. 2007) (No. 07 C 0211 S).

[140] Erica Perez, *Lawsuit Challenges Policy that Lets Some Grads Skip Bar Exam*, JOURNAL SENTINEL, July 12, 2009, *available at* http://www.jsonline.com/news/education/50497957.html.

[141] Jack Zemlicka, *Attorney is Intent on Revisions to Bar Admission*, WIS. L.J., June 30, 2008, http://www.wislawjournal.com/article.cfm/2008/06/30/Attorney-is-intent-on-revisions-to-bar-admission.

Procedurally, the case was prolonged by appeals, motions to dismiss, and issues of mootness for class certification purposes. On June 28, 2007, United States District Judge John C. Shabaz dismissed the case for failure to state a claim upon which relief may be granted and denied class certification, finding that the issue had become moot because Wiesmueller had become a member of the Wisconsin bar.[142] Wiesmueller appealed, and the Court of Appeals for the Seventh Circuit reversed.[143] On remand, United States District Judge Barbara B. Crabb ruled in favor of the plaintiffs, granting class certification because Corinne Wiesmueller, Christopher Wiesmueller's wife, and Heather Devan were now the plaintiffs, represented by Christopher Wiesmueller.[144] Judge Crabb certified the following class for injunctive relief:

> All persons who (1) graduated or will graduate with a professional degree in law from any law school outside Wisconsin accredited by the American Bar Association; (2) apply to the Wisconsin Board of Bar examiners for a character and fitness evaluation to practice law in Wisconsin before their law school graduation or within thirty days of their graduation; and (3) have not yet been admitted to the Wisconsin bar.[145]

Wiesmueller again appealed Judge Shabaz's decision on new grounds, challenging the dismissal for failure to state a claim.[146] The Seventh Circuit again reversed and remanded the case to the district court, holding that the plaintiffs had indeed stated a claim upon which relief may be granted and that the "plaintiffs were denied an opportunity to try to prove their case."[147] On October 30, 2009, Judge Crabb denied the plaintiffs' motion for summary judgment, holding that the class plaintiffs could not seek summary judgment on a claim not raised in the complaint, and that the motion for summary judgment was premature.[148] In a scathing rebuke of Attorney Wiesmueller, Judge Crabb wrote that "counsel's inexperience is apparent," and ultimately denied class certification due to ineffective counsel.[149] In March 2010, the case was settled for $7,500.[150]

---

[142] Wiesmueller v. Kosubucki [sic], No. 07-C-211-S, 2007 WL 4882649 (W.D. Wis. June 28, 2007).

[143] Wiesmueller v. Kosobucki, 513 F.3d 784 (7th Cir. 2008).

[144] Wiesmueller v. Kosobucki, 251 F.R.D. 365, 367 (W.D. Wis. 2008).

[145] *Id.* at 368.

[146] Plaintiff-Appellants' Principal Brief & Short Appendix at 6, Wiesmueller v. Kosobucki, 571 F.3d 699 (7th Cir. 2009) (No. 08-2527), 2008 WL 3977134 at *6.

[147] Wiesmueller v. Kosobucki, 571 F.3d 699, 707 (7th Cir. 2009).

[148] Wiesmueller v. Kosobucki, 667 F. Supp. 2d 1001, 1003-04 (W.D. Wis. 2009).

[149] *Id.* at 1005.

[150] Bruce Vielmetti, *Marquette, UW Law Grads Retain Diploma Privilege in Wisconsin*, JOURNAL SENTINEL (Mar. 24, 2010), http://www.jsonline.com/news/wisconsin/89040482.html (noting that under the settlement agreement, the Wiesmuellers can "never again challenge the

Although the court did not make a decision on the merits of the case, the issues raised are worth detailed discussion because they provide insight into the constitutional validity of the diploma privilege system. As previously stated, at the heart of the case is a challenge to the constitutional validity of the diploma privilege under the dormant commerce clause. The first step toward ascertaining the constitutionality of Rule 40.03 is defining the dormant commerce clause.

1. Dormant commerce clause

The U.S. Constitution reserves to Congress the power to "regulate Commerce . . . among the several States."[151] Courts have interpreted the Commerce Clause for the past century and a half to also have a negative implication on the power of states to regulate commerce.[152] The negative implication, commonly referred to as the dormant commerce clause, is "driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[153]

Justice Felix Frankfurter explained the dormant commerce clause: "[T]he doctrine [is] that the commerce clause, by its own force and without national legislation, puts it into the power of the Court to place limits on state authority."[154] The dormant or negative commerce clause, therefore, is a judicial construct giving the states power to regulate commerce unless the state action is preempted by federal action. There are, however, countervailing constitutional rationales to consider in a traditional dormant commerce clause analysis: "The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens chose for the common weal."[155]

---

bar admission policies, they can't assist, be part of or support anyone else's challenge").

[151] U.S. CONST. art. I, § 8, cl. 3.

[152] Dep't of Revenue v. Davis, 553 U.S. 328, 337 (2008); *see also* Cooley v. Bd. of Wardens, 53 U.S. 299, 318-19 (1852); *cf.* Gibbons v. Ogden, 22 U.S. 1, 200-11 (1824) (Marshall, C.J.) (dictum).

[153] *Davis*, 553 U.S. at 337-338 (citing New Energy Co. v. Limbach, 486 U.S. 269, 273-74 (1988)).

[154] FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY & WHITE 18 (Quadrangle Paperback 1964) (1937); *see also* Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

[155] *Davis*, 553 U.S. at 338 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

It is essential to note that should Congress legislate on the issue, the question becomes one of preemption.[156] In this situation, however, because Congress has not acted, the Wisconsin diploma privilege was challenged on grounds that it excessively burdens commerce among the states. The Court has, however, carved out particular exceptions to the traditional dormant commerce clause analysis.

2. Government function

One exception to the traditional dormant commerce clause analysis is the government function rationale. In the 2008 case *Department of Revenue of Kansas v. Davis*, the U.S. Supreme Court reiterated that "a government function is not susceptible to standard dormant commerce clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the [Commerce] Clause abhors."[157]

Admission to the legal profession is arguably a government function and thus falls outside the paradigm of traditional dormant commerce clause analysis. Courts have often found that the regulation of attorneys is traditionally a power of the states.[158] In *Goldfarb v. Virginia State Bar*, the Court found that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the court.'"[159] Moreover, the Wisconsin Supreme Court Rules (Wis. Sup. Ct. R.) state that a lawyer "is a representative of clients, an officer of the legal system and a public citizen having special responsibility to the quality of justice."[160]

3. Facial neutrality

Assuming, arguendo, that the court does not accept the government function argument, Wis. Sup. Ct. R. 40 would still survive a traditional dormant commerce clause analysis. Under a traditional analysis, the threshold question to ask is whether the state action—here, Wis. Sup. Ct. R. 40—is facially,

---

[156] *See* W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652-53 (1981) ("If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980) (articulating that Congress may confer "upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy").

[157] *Davis*, 553 U.S. at 341.

[158] *See, e.g.*, Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975).

[159] *Id.*

[160] WIS. SUP. CT. R. 20 preamble.

effectually, or purposefully discriminatory: "The threshold inquiry we must make in deciding whether the [regulation] violates the Commerce Clause is whether it 'is basically a protectionist measure, or if it can fairly be viewed as a law directed to legitimate local concerns with effects upon interstate commerce that are only incidental.'"[161] This standard amounts to a two-tiered approach in which the rule is either facially discriminatory and thus per se illegal, or facially neutral and thus subject to a balancing test as set out in *Pike v. Bruce Church, Inc.*[162] Under the *Pike* balancing test, absent a discriminatory purpose, a law will "be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits."[163]

Wiesmueller argued that the diploma privilege is unconstitutional as applied against ABA-approved law school graduates from outside of the state of Wisconsin because the words "in this state" in Wis. Sup. Ct. R. 40 constitute facial discrimination.[164] The Seventh Circuit Court, however, has noted that "'no clear line' [exists] separating the category of state regulation that is virtually per se invalid and the category subject to the *Pike* test."[165]

Using the Seventh Circuit's analysis in *Scariano v. Justices of the Supreme Court of Indiana,*[166] it can be argued that the diploma privilege is facially neutral and does not discriminate against out-of-state law school graduates. In *Scariano*, the Seventh Circuit upheld an Indiana rule that allowed residents to be admitted to the bar without examination.[167] The court held that the rule, which provided conditional admission for practicing attorneys upon submission of an affidavit of intent to practice law in Indiana, did not discriminate against out-of-state practitioners.[168] Under the Indiana rule, should the applicant participate in active practice for five years, he or she would be admitted to the bar.[169] The court held that "[t]he mere fact that nearly everyone—particularly state residents with a political voice—labors under the same yoke negates any claims of discrimination."[170]

---

[161] *See* Alliance for Clean Coal v. Bayh, 72 F.3d 556, 559 (7th Cir. 1995) (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)).

[162] 397 U.S. 137 (1970).

[163] *Id.* at 142.

[164] Principal Brief and Short Appendix of Plaintiff-Appellant at 11 n.2, Wiesmueller v. Kosobucki, No. 08-2527 (7th Cir. Aug. 13, 2008), 2008 WL 3977134 at *11.

[165] Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 657 (7th Cir. 1995) (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)).

[166] 38 F.3d 920 (7th Cir. 1994).

[167] *Id.* at 927.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 928.

Whether the privilege passes constitutional muster depends on the balancing analysis of the burdens on interstate commerce and the benefits to the state.[171] The burden on commerce is minimal; the burden on out-of-state law school graduates is the same burden all candidates must face upon admission to the bar of a given jurisdiction—the bar examination.[172]

The putative local benefits, however, are many. The main benefit of the diploma privilege is that it ensures that all legal professionals are competent in Wisconsin law. The purpose of state-controlled bar admission is to ensure competent professionals in a given jurisdiction. If state-specific content is not being tested on a bar examination, then states should not control the admissions process and should move toward a national admissions process. During oral arguments before the U.S. Court of Appeals for the Seventh Circuit in *Wiesmueller v. Kosobucki*, Judge Richard Posner questioned the validity of the amount of Wisconsin law that is taught at UWLS and MULS. Professor Gordon Smith, a former Wisconsin professor, noted however, that "[a]s a former Contracts professor at Wisconsin, I can attest that every section of Contracts uses so-called 'Wisconsin Materials,' which are heavy on Wisconsin law."[173] Smith further noted that "faculty at Wisconsin have an unusually strong attachment to the home state's law, even if that seems foreign to two judges who have spent their academic careers at the University of Chicago Law School."[174] Thus, the bar examination is unnecessary in Wisconsin because the Wisconsin law schools test heavily on Wisconsin law, which gets to the heart of testing in a specific jurisdiction.

Another benefit is that local relationships can flourish with the diploma privilege. In an analogous case, *Goetz v. Harrison*, the Supreme Court of Montana in 1969 upheld its diploma privilege on the grounds that its law school is small and is the only one in the state.[175] The Montana Supreme Court also stated that it is further able to maintain a close relationship with the faculty, students, and curriculum.[176]

---

[171] *Id.*

[172] *See generally* NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2010 22 (2010), http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide_2010.pdf [hereinafter COMPREHENSIVE GUIDE].

[173] Ashby Jones, *Does Wisconsin's 'Diploma Privilege' Violate the Constitution*, WALL ST. J. L. BLOG (Apr. 14, 2009, 7:17pm), http://blogs.wsj.com/law/2009/04/14/does-wisconsins-diploma-privilege-violate-the-constitution/.

[174] *Id.*

[175] 462 P.2d 891, 895 (Mont. 1969).

[176] *Id.* (acknowledging that "[t]he Chief Justice is well acquainted with the instructors, familiar with the type of instruction given at the school, and able to determine accurately that standards are maintained").

Thus, the local benefits of the diploma privilege outweigh the burden on commerce, and the privilege clears constitutional challenge. The state of Wisconsin has many interests in protecting the diploma privilege. Arguments that the diploma privilege will create incompetency in the profession are unfounded and contradicted by the fact that Wisconsin's legal system has been effective even though most of its bar members have never taken the bar examination.[177]

V. KE KĀNĀWAI MĀMALAHOE: A PERSUASIVE SUBSTITUTE FOR THE BAR EXAMINATION IN HAWAI'I

Kamehameha's splintered paddle would come to symbolize the lesson gleaned from his experience: "good leaders make laws that safeguard the right of the people to work and play in peace and harmony."[178] A twenty-first century *Ke Kānāwai Māmalahoe*, reflective of Kamehameha's vision of equality, is essential to address the deep-seated inequities in the legal profession.

This comment has challenged the pervasiveness of exclusion in the legal profession and endeavored to constructively analyze one suggested alternative. But for all the good that it can accomplish, simply adding the diploma privilege is not enough. Statewide reform of the legal profession is necessary to bring the profession into the twenty-first century. Reform of admissions to the legal profession, however, cannot be a plight fought just by a new contingent of law students and budding attorneys. All stakeholders, including the state judiciary, the bar association, and WSRSL, must engage in this reform.

Some may perceive this comment as a law student's selfish call for the elimination of the bar examination. That is far from this author's intent. Simply put, reform is necessary to diversify the bar and increase access to the courts.[179] An increase in the number of minorities in the legal profession would

---

[177] REPORT OF THE COMMISSION ON LEGAL EDUCATION OF THE STATE BAR OF WISCONSIN (June 1996), *available at* http://www.wisbar.org/AM/Template.cfm?Section=Research_and_Reports&Template=/CM/ContentDisplay.cfm&ContentID=32065 (noting that "[a]lthough the membership of the State Bar of Wisconsin includes graduates of many law schools, a majority graduate from either Marquette University Law School or the University of Wisconsin Law School, the only law schools in the state").

[178] CHANG, *supra* note 5, at 16.

[179] Ronald T.Y. Moon, Speech at the Hawaii State Bar Association's Young Lawyer's Division annual meeting, Hilton Hawaiian Village (Oct. 24, 2008) [hereinafter Moon Speech] ("[T]he value and commitment we place on diversity can and will affect the public's trust and confidence in our profession and in our justice system as a whole . . . I encourage each of you to take stock of the racial and ethnic—as well as gender—diversity within your own firms, explore cultural sensitivity training seminars and programs, and establish a diversity criteria for recruitment that will promote all of the benefits that come with diversity and cultural

lead to an "improvement in public perception of the bar and the judicial system, legal services for underrepresented groups would increase, and the bar in general would become a more public-minded body."[180] Retired Chief Justice Ronald Moon of the Supreme Court of Hawai'i also addressed the pressing need for a more diverse bar that is representative of all of the citizens of Hawai'i.[181] The suggested reform must, therefore, answer key questions: How do we diversify the bar, and how do we increase access to justice in Hawai'i?

Using Hawai'i as a model, the necessary reform begins with replacing the main impediment to a diverse bar association—the bar examination—with an inclusive system in which graduates of WSRSL, upon implementation of a prescribed curriculum, will be automatically admitted to the bar, with the caveat that graduates perform at least twenty hours of pro bono work per year to retain membership.

Professor Lorenzo A. Trujillo, like Professor Moran, points to three factors to determine the suitability of the diploma privilege for bar admission in a particular state: "[f]irst, the state should be small with a correspondingly small practicing bar; second, there should be a close relationship among the state's bar judiciary, legislature, and law school; and third, both the public and the bar should hold the state's law schools in high esteem."[182] Thus, integral to the success of a new system are the relationships that are constructed and cemented between the law school, the bar association, and the state supreme court. Each institution will have to amend policies or rules to effectuate the necessary changes. Hawai'i—as a small state with a small bar, close relationships among the judiciary, legislature and law school, and a law school that has a high reputation within the legal and public communities—provides a suitable environment for the diploma privilege. The following portion of this article describes the steps that each institution must take.

---

sensitivity.").

[180] Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 83 (2007).

[181] *See* Moon Speech, *supra* note 179; *see also* Press Release, Supreme Court of Hawai'i, *Supreme Court Establishes Commission to Increase Access to Justice* (May 1, 2008), *available at* http://www.courts.state.hi.us/news_and_reports/press_releases/2008/05/supreme_court_establishes_commission_to_increase_access_to_justice.html (quoting Justice Simeon R. Acoba, Jr.'s comment that "Chief Justice Moon has been a prime mover in the Judiciary's efforts to afford equal access to the courts to those who, up until now, have faced barriers that have been insurmountable") (internal quotation marks omitted).

[182] Trujillo, *supra* note 180, at 96-97.

A. Legal Education Reform: Restructuring Curriculum

Chief Justice William S. Richardson envisioned the expansion of educational and professional opportunities[183] for Hawai'i students and advocated for the creation of a state law school.[184] His dream would be realized with the founding of the University of Hawai'i at Mānoa Law School—later named after him—the premiere legal educational institution in the fiftieth state. The purpose of the school was to provide a quality legal education for the citizens of Hawai'i. As one legislator aptly noted, "Hawaii's reservoir of talent will therefore be employed to the pressing problems of our changing technological society by the establishment of a law school."[185] A legislative committee concurred that "the establishment of a full three-year law school will fill a pressing need to provide expanded opportunities for Hawaii's students to acquire education and training in law."[186]

Inherent in its inception was the notion that Hawai'i needed a law school to serve the needs of its unique and diverse community. The legislature sought "the development of a law program curriculum that takes into account the University's existing academic strengths and the *special needs of Hawaii*."[187] Given the truly unique and special qualities inherent to the only law school in the state, WSRSL could benefit from a structured reform of legal pedagogy.

1. Law in action

> Students must learn to read carefully. They must distinguish cases and construe statutes. They must fashion a legal argument and respond to one. They must

---

[183] DODD, *supra* note 77, at 97 (noting that Chief Justice Richardson's reformation of the bar admissions process led to an increase in the bar passage rate from an average of 51% before his tenure to 91% by 1978).

[184] *Id.* (quoting Richardson: "We watched in frustration as our lands were lost to us under laws which were completely foreign to the ancient Hawaiian concepts of land ownership, and we saw our people made liable for 'crimes' that did not exist under the old Hawaiian system. I know that some of you may disagree with me, but I believe we must accept the fact that we live under a system of laws and courts, which have replaced the traditional ways of our ancestors, and, in order to preserve our people, culture, and land, we must take an active role in the system. The law can be used by creative attorneys as a sword for advancing the rights of our Hawaiian people.").

[185] Haw. Stand. Comm. Rep. No. 694, 6th Leg., Reg. Sess., in 1971 House Journal, at 524 (1971) (Statement of Rep. Robert Kimura).

[186] Haw. Stand. Comm. Rep. No. 797, 6th Leg., Reg. Sess., in 1971 Senate Journal, at 1145 (report of the Senate Ways and Means Comm.).

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

> draft a complaint. But this is not enough. The challenge is to prepare students to deal with the law in action during their legal careers.[188]

Wisconsin's signature *Law in Action* approach to legal education provides that "in order to truly understand the law, you need not only to know the 'law on the books,' but also to look beyond the statutes and cases and study how the law plays out in practice."[189] Thus, the core of the program answers the larger question: "Why should this matter to people in the real world?"[190] A Wisconsin professor notes that the legal curriculum should "represent[] the dominant ideas of law as process (providing legitimated means for the emergence of public policy decisions and their adaptation to experience) and as function (providing, or legitimating other provision, for the operational needs of society and of individual life)."[191] Reforming legal pedagogy requires shifting the notion of law as static to one in which law becomes "processes of shaping social order—by defining and measuring law's roles in society by the social functions to which it contributes and in which it participates."[192]

The *Law in Action* program necessitates a faculty devoted to service to the state and the nation. The law professor "can better keep in touch, and at the same time be of the most help to society, through activity in the fields of research or service."[193] Engaging a faculty dedicated to the betterment of society, as opposed to mere regurgitation of appellate decisions, provides one critical step to reforming the law school. With national and international scholars and advocates ushering law students through their education, WSRSL has the foundation to set this program in motion.[194] WSRSL students are engaged and encouraged to answer the questions: What is really going on? What are the social, political, and economic implications of laws and policies?

Modeled after Wisconsin Law School, the *Law in Action* program would best serve the needs of Hawai'i's community.

---

[188] Stewart Macaulay, *Wisconsin's Legal Tradition*, 24 GARGOYLE 6, 9 (1994), *available at* http://law.wisc.edu/facstaff/macaulay/papers/wisconsin_legal_tradition.pdf.

[189] Kenneth B. Davis, Jr., *Law in Action: The Dean's View*, 30 GARGOYLE 2, 2 (2004), *available at* http://law.wisc.edu/alumni/gargoyle/archive/30_1/gargoyle_30_1_1.pdf.

[190] *Id.* at 4.

[191] Willard Hurst, *Changing Responsibilities of the Law School: 1868-1968*, 1968 WIS. L. REV. 336, 337 (1968).

[192] *Id.* at 344.

[193] John E. Conway, *The Law School: Service to the State and Nation*, 1968 WIS. L. REV. 345, 345 (1968).

[194] *See* UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF LAW, CATALOG 13-15 (2010), http://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/webFM/2010CatalogwithInserts.pdf (noting the many accomplishments of the WSRSL deans and faculty).

2. Changes to the WSRSL curriculum

The thirty- and sixty-credit rule in Wis. Sup. Ct. R. 40.03 mandates specific core and elective courses, respectively, that must be taken to fulfill the credit requirement. The present WSRSL curriculum almost mirrors the thirty-credit curriculum mandated under Wis. Sup. Ct. R. 40.03.[195] (See Appendix B for a comparison chart of the required courses in each of the legal educational institutions.) It should be further noted that according to a 2010 self-study, many WSRSL students chose to enroll in the upper division courses that are tested on the bar examination.[196] Law school, for most students at WSRSL, becomes a large bar preparation course, thus bolstering the argument for a curriculum that reflects what is tested on the bar examination.

Courses that WSRSL should require upon implementation of a diploma privilege include: Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Legal Writing and Research, Real Property, Torts, Evidence, Professional Responsibility, Trusts and Estates, an Advanced Legal Research course, and a clinical course. Aside from these required courses, students would select electives from the list as specified in Wis. Sup. Ct. R. 40.03, leaving the current courses taught at WSRSL intact.

Some of the policies instituted at WSRSL would remain. For example, the mandated sixty hours of pro bono service during a student's education and the clinical requirement provide students opportunities to gain real world experience.[197] The use of interdisciplinary coursework, practicum, and pro bono service provides benefits to all—professors can expand their syllabi, students can have structured and thought-provoking dialogue, and the community benefits from having well-rounded scholar advocates. Should WSRSL incorporate this reform, there would be an easier road to amending Hawai'i Supreme Court rules and enlisting the support of the bar association.

---

[195] *Compare* UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF LAW, STUDENT HANDBOOK 6 (2010-11), http://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/StudentHandbookJuly182008.pdf (noting that the current curriculum of the WSRSL requires Civil Procedure (6 credits), Contracts (6 credits), Criminal Justice (4 credits), Legal Practice (6 credits), Real Property (4 credits), Torts (4 credits), Constitutional Law I (3 credits), Professional Responsibility (3 credits), Second Year Seminar (4 credits), and a Clinical Experience (at least 2 credits)) *with* Wis. Sup. Ct. R. 40.03 (2010).

[196] UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF LAW, 2010 SELF-STUDY 31-34 (2010) (on file with author).

[197] UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF LAW, STUDENT HANDBOOK 80 (2010-11), *available at* http://www.law.hawaii.edu/StudentHandbook.

B. Court Reform: Amending Supreme Court Rules and Providing Accountability

The next and ultimately most important steps toward reformation lie under the sole purview of the Supreme Court of Hawai'i. The Hawai'i Constitution mandates that "the [s]upreme [c]ourt shall have power to promulgate rules and regulations in all civil and criminal cases for all courts related to process, practice, procedure, and appeals, which shall have the force and effect of law."[198] Furthermore, the Supreme Court of Hawai'i has held that "the power to regulate the admission . . . of attorneys is judicial in nature and is inherent in the courts."[199]

As the sole regulator of bar admissions, the Hawai'i Supreme Court has the discretion to implement new rules and procedures for admittance. The court should supplement Hawai'i Supreme Court Rule 1 (Haw. Sup. Ct. R. 1) (Bar Admissions) language with language identical to Wis. Sup. Ct. R. 40 to allow graduates of law schools within the state to be admitted to the Hawai'i bar upon showing completion of the prescribed curriculum and satisfactory completion of pro bono service. To effectuate this recommendation, a judicial commission should be established to evaluate the use of a diploma privilege in Hawai'i and to begin a discussion of a uniquely Hawaiian curriculum.[200]

The notion of treating a group of individuals with certain privileges to practice in the bar is not uncommon in Hawai'i. The court has granted and continues to grant certain privileges to different groups of individuals. Haw. Sup. Ct. R. 1.8, for example, allows faculty members of WSRSL to be admitted to practice in Hawai'i upon proof that they are admitted in another jurisdiction.[201] Theoretically, a UWLS graduate (with a diploma privilege) could move to Hawai'i and become a Professor of Law at WSRSL, thus

---

[198] HAW. CONST. art. VI, § 7.

[199] *In re* W.D.P., 104 Haw. 435, 438, 91 P.3d 1078, 1081 (2004) (citing *In re* Trask, 46 Haw. 404, 415, 380 P.2d 751, 758 (1963)); *see also* Ginger v. Circuit Court for County of Wayne, 372 F.2d 621, 625 (6th Cir. 1967) (noting that state supreme courts "have exclusive jurisdiction over the admission of attorneys"); *In re* Vanderperren, 661 N.W.2d 27, 29 (Wis. 2003) (holding that "[t]he duty to examine applicants' qualifications for bar admission rests initially on the Board, and this court relies heavily on the Board's investigation and evaluation; however, this court retains supervisory authority and has the ultimate responsibility for regulating admission to the . . . bar.") (citation omitted); *In re* Krule, 741 N.E. 2d 259, 260 (Ill. 2000) (articulating that "the final judgment regarding admission of an applicant to the practice of law rests with this court").

[200] Wisconsin implemented its diploma privilege through legislative action. Given the particularly special relationships that need to be fostered, it would be essential for the State Judiciary to take it upon itself to promulgate a rule to effectuate this reform.

[201] HAW. SUP. CT. R. 1.8.

garnering admission to practice in Hawai'i, having never taken a bar exam.[202] This exception to the general rule that all applicants must take a bar examination further justifies the use of a diploma privilege in the State.

The Hawai'i Supreme Court Rules should also be amended to mandate twenty hours of pro bono service per year for all WSRSL graduates to maintain bar membership. This offers several advantages: first, the bar association and the judiciary would have an incentive to provide for the diploma privilege; second, this rule would consequently increase access to justice, considering the large cohort of lawyers entering the profession; and third, lawyers in Hawai'i will have a direct connection with the community and those individuals who are in dire need of legal support. Some who may question the validity of such a policy need look only to the Supreme Court's determination on such issues. For example, in *Schware v. Board of Bar Examiners*, the U.S. Supreme Court held that while "[a] State can require high standards of qualification, such as good moral character or proficiency in its law . . . any qualification must have a rational connection with the applicant's fitness or capacity to practice law."[203]

The Supreme Court of Hawai'i has taken ardent strides to implement programs and reforms to increase access to justice.[204] Through the implementation of bar admission reform, the Supreme Court can make good on its commitment to increase diversity within the bar and expand access to justice.[205]

C. Bar Reform: Mandating Continuing Legal Education

A goal of the Hawai'i State Bar Association (HSBA) is to "eliminate unfair bias, prejudice and discrimination and to create *meaningful* opportunities for underrepresented groups in the legal system."[206] The educational attainment gap for minority students has been duly noted; therefore, bar admission reform would be one meaningful way to afford these underrepresented groups a voice in the system.[207]

Implementing a diploma privilege necessitates cooperation and interaction between all affected institutions. The HSBA will become more visible during the process of setting a curriculum for students in collaboration with the Hawai'i Supreme Court and WSRSL. Members of the HSBA will also have a shared commitment and connection to service within the island community. In

---

[202] *See id.*

[203] 353 U.S. 233, 239 (1957).

[204] *See* ANNUAL REPORT, *supra* note 28.

[205] *Id.*

[206] Haw. State Bar Ass'n, Hawai'i State Bar Association, http://www.hsba.org/HSBA_Mission.aspx (last visited Apr. 25, 2010) (emphasis added).

[207] STEVENS, *supra* note 63, at 25.

establishing committees and task forces, and advocating for this diploma privilege reform, the bar association can take the lead to ensure the best lawyers.

The proposed reform involves not just ensuring an initially qualified bar, but also demanding the highest professional competency and performance. One of the steps that the bar can take to raise the caliber of all practicing attorneys after admission is to require more credit hours of continuing legal education. The current abysmal three-credit hour requirement is one of the lowest in the nation.[208] Requiring more CLE courses will update attorneys on changes in the law and will raise the quality of the bar, theoretically ensuring competent lawyers.

The HSBA can further help in reforms by encouraging members and member firms to assess, critique, and reform their hiring and promotion practices. As retired Chief Justice Moon asserted, the bar must take steps to diversify its hallways by setting hiring criteria that increases racial and socio-economic diversity within the profession.[209]

D. Practical Concerns

As with any movement for reform, practical concerns must be taken into consideration. This section discusses the probable concerns of such reform as well as proposed responses.

Who determines admissions? The major concern with this reform is determining who will be the arbiter of bar admissions. Under this reform, the law school would be the institutional gatekeeper to determine competence, and the Supreme Court would still have the function of determining character and fitness.

Will Hawai'i law school graduates have the option to take the bar examination instead of participating in the new curriculum? No. Under this reform, all Hawai'i law school graduates need to participate and bear the same burden to ensure their commitment to the bar and the judiciary. In exchange for the elimination of the bar examination, law students would be required to take the prescribed curriculum and perform twenty hours of pro bono service per year (which WSRSL already mandates for students). Thus, the courts and the bar association would have to work more closely with the law school to set a curriculum and ensure that everyone follows through on their commitments.

What will happen to the specialized fields that make WSRSL unique, such as the Environmental Law and Native Hawaiian Law Programs? The specialized

---

[208] *See* COMPREHENSIVE GUIDE, *supra* note 172, at 39-40 (noting that most other states require more than ten hours of continuing legal education courses).

[209] *See* Moon Speech, *supra* note 179.

programs at WSRSL would be kept intact. Individuals would have numerous electives to choose from, some of which could be credited toward a certificate in a specialized field.

Who benefits from the bar examination? Bar preparation businesses benefit from the money that bar applicants pay for prep courses. Many suits have alleged that these bar courses have created a monopoly in violation of the Sherman Antitrust Law.[210] For example, in *Rodriguez v. West Publishing Corp.*, the disputing parties reached a settlement, with $49 million dollars placed in a fund for the class action plaintiffs.[211]

What are the benefits of reform? The judiciary would save money by not having to administer the bar examination for a large number of students. The reform would raise the standards and quality of the HSBA, raise the quality of legal education in Hawai'i, and create closer relationships among other legal institutions in the state. The reform would allow law students to practice upon graduation and save graduates stress and money. The reform, more importantly, would eliminate the bar examination and the barrier that it has become for many minority students, thus effectively opening the profession to more underrepresented communities and groups.

VI. CONCLUSION

The time is ripe to mend the splintered pieces of the legal profession and paddle forward as a unified community in Hawai'i. The antiquated use of the bar examination has been an unnecessary regulatory roadblock for many qualified individuals. The use of the diploma privilege, combined with mandatory continuing legal education courses and pro bono services provide, a persuasive substitute to the monotony that is the bar examination.

Mending these pieces of the profession will not, in and of itself, eliminate exclusion from the profession, but it will be a large step toward a new beginning. Of all professions, the legal profession should not be one of exclusion. Only with vigilant adhesion to sincere principles of equality and acceptance, and continued collaboration between the bar, the courts, and the community at large, will the legal profession flourish as a bastion of liberty and justice for all.

E lauhoe mai nā wa'a; i ke kā, i ka hoe; i ka hoe, i ke kā; pae aku i ka 'āina.[212]

---

[210] *See, e.g.*, Rodriguez v. West Publ'g Corp., 563 F.3d 948 (9th Cir. 2009).

[211] *Id.* at 957.

[212] MARY KAWENA PUKUʻI, ʻŌLELO NOʻEAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 40 (1993).

Everyone paddle the canoes together, bail and paddle; paddle and bail; and the shore is reached.[213]

[213] *Id.*

Appendix A: HSBA Members' Ethnicities

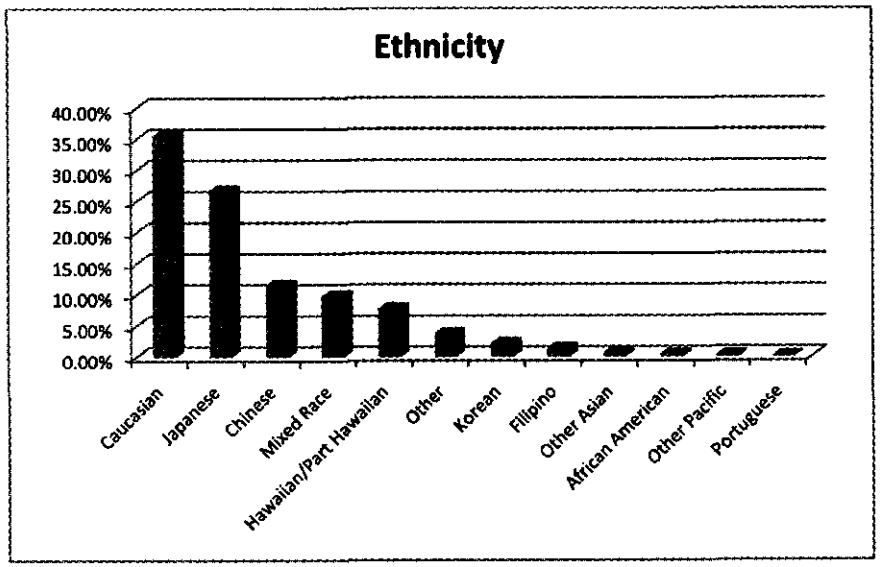
The following worksheet synthesizes the HSBA statistics of ethnicities among bar members in 2010. The worksheet numerically demonstrates the underrepresentation of certain ethnic groups within the HSBA.

	Afro American		Caucasian		Chinese		Filipino		Hawaiian, Part Haw'n		Other Pacific Islander		Korean		Japanese		No Answer		Others		Total		Total
	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Members
Active	5	13	374	944	116	227	37	52	71	104	6	9	32	65	228	464	167	365	92	179	1,128	2,422	3,550
Active - Emeritus			8	60	1	19	1	2	1	8				1		25	1	12		4	12	131	143
Government		5	100	141	42	44	15	20	47	30		1	8	13	105	104	80	54	36	35	433	447	880
Government Emeritus				3				2						1		1		1			0	8	8
Judge			7	22	2	4		6	1	6		3		2	7	10	7	7	2		26	60	86
Judge Emeritus				1						1											0	2	2
Inactive Emeritus			15	72		13	1	1		7			1	3		40	4	15		7	21	158	179
Inactive Voluntary	8	9	418	664	106	74	33	18	85	55	12	15	31	19	159	159	162	250	79	69	1,093	1,332	2,425
Inactive Pro Bono				2	1																1	2	3
Total	13	27	922	1,909	268	381	87	101	205	211	18	28	72	104	499	803	421	704	209	294	2,714	4,562	7,276

	Afro American	Caucasian	Chinese	Filipino	Hawaiian, Part Haw'n	Other Pacific Islander	Korean	Japanese	No Answer	Others	Total
Active	18	1,386	363	92	184	15	98	717	545	275	3,693
Government	5	244	86	37	77	1	22	210	135	71	888
Judge		30	6	6	8	3	2	17	14	2	88
Inactive	17	1,171	194	53	147	27	54	358	431	155	2,607
Total	40	2,831	649	188	416	46	176	1,302	1,125	503	7,276

HAW. STATE BAR ASS'N, 2010 BAR STATISTICS 4 (2010), *available at* http://www.hsba.org/resources/1/About%20HSBA/2010%20Statistics.pdf. This worksheet is reproduced with permission from Lyn Flanigan, Executive Director of the HSBA.

The following graph is a visual representation of the self-reported ethnicities of HSBA members in 2008. The graph shows the ethnicities of members along the horizontal axis and the percentage of those specific ethnic groups in the HSBA along the vertical axis.



HAW. STATE BAR ASS'N, 2008 HSBA MEMBER SURVEY 24 (2008), *available at* http://www.hsba.org/resources/1/Survey%20Results/2008%20HSBA%20Member%20Survey%20-%20Report%20NO%20COMMENTS.pdf. This graph is reproduced with permission from Lyn Flanigan, Executive Director of the HSBA.

Appendix B: Course Requirements

The following chart is a comparison of the required courses at the William S. Richardson School of Law (WSRSL), the University of Wisconsin Law School (UWLS), and Marquette University Law School (MULS). The strict curriculum of UWLS and MULS is regulated by the state judiciary, the state bar association, and the state legal institutions to ensure that Wisconsin law is being taught.

WSRSL Required (2010)	UWLS Required (2012)	MULS Required (2010)
Civil Procedure	Civil Procedure I	Civil Procedure
Constitutional Law		Constitutional Law
Contracts	Contracts I	Contracts
Criminal Law	Criminal Law	Criminal Law
Legal Practice	Legal Research & Writing	Legal Writing & Research
Property	Property	Property
Torts	Torts	Torts
		Evidence
Professional Responsibility		Law and Ethics of Lawyering
		Trusts & Estates
		Perspective Elective*
		Process Elective**
		Public Law Elective***
Second Year Seminar		Advanced Legal Research
Clinical Experience		Workshop
		Seminar
	Criminal Procedure	
60 Pro Bono Hours		
	One elective chosen from: Civil Procedure II, Constitutional Law I, Contracts II, or Legal Process	* Perspectives courses include American Constitutional History, American Legal History, Comparative Law, Comparative Transitional Justice, Federal Indian Law, The Global Workplace, Law and Popular Culture, Jurisprudence, Law & Economics, Law & Religion, Law & the Social Sciences: Parent, Child & State, Military Law, and Quantitative Methods. Not all courses are offered every year.
	60 more credit hours chosen from courses specified by the Registrar in a particular year.	** Process elective courses include Administrative Law, Advanced Civil Procedure, Alternative Dispute Resolution, Criminal Process, Family Law and ADR, and Legislation. Not all

		courses are offered every year.
		*** Public Law electives include The Constitution & Criminal Investigations, Constitutional Law 2: Speech & Equality, Education Law, Federal Courts, Law of Privacy and Local Government Law. Not all courses are offered every year.

From Sea to Rising Sea: How Climate Change Challenges Coastal Land Use Laws

E. Britt Bailey*

"With climate change there will be an unprecedented landward movement of water causing defensive property responses with an intensity never seen before. We simply cannot apply the old rules and have them make sense."

- Joseph L. Sax[1]

I. INTRODUCTION

The United States' 12,400 miles of ocean coastline is projected to become increasingly unpredictable as the effects of climate change alter sea levels, increase storm frequency and strength, and intensify erosive activity. Tasked with undertaking the profound and intricate mission of saving our coastlines in the midst of significant climate-related changes, coastal state governments are developing and implementing management strategies to ensure the long-term viability of the nation's coastlines. These strategies include not only restoring and rebuilding eroding beaches, but also simply yielding to naturally migrating shores. The efforts of the states present a conflict between private property rights[2] and the public interest. The tug-of-war between private rights and the public interest has been engaged repeatedly in the context of coastal protection measures within the United States. In light of climate change and its impending impacts to the coastline, the legal disputes are bound to become more intense and complex.

It is within this vibrant coastal setting—where the land meets the sea—that these two important legal interests, public and private, will continue to collide

---

* J.D. Candidate, December 2011, University of Hawai'i William S. Richardson School of Law. I thank the following people whose valuable guidance and direction helped shape this paper: Denise Antolini, Lynda Arakawa, Matthew Barbee, Michael Blumm, David Callies, Calvert Chipchase, Jamila Jarmon, Alison Kato, Jill Ramsfield, Joseph Sax, and Dean Avi Soifer. In addition, I thank my family for their endless support and patience.

[1] Telephone Interview with Joseph L. Sax, James H. House & Hiram H. Hurd Professor of Envtl. Regulation, Emeritus, Univ. of Cal. at Berkeley (Feb. 18, 2010).

[2] Harvey M. Jacobs, *Introduction: Is All that is Solid Melting into Air*, *in* PRIVATE PROPERTY IN THE 21ST CENTURY 12 n.2 (Harvey M. Jacobs ed., 2004). In the United States, land is conceptualized as a bundle of rights. *Id.* When one owns land, ownership does not only mean possession of the physical soil, but also rights to use, sell, trade, or bequeath. *Id.* It includes water rights (the water sitting under the parcel), the right to control access, the right to harvest, and the right to develop. *Id.*

with momentous and increasing fervor. At the heart of this coastal collision are common law doctrines. Developed to protect the rights of the public as well as the rights of private coastal landowners, common law doctrines act as a guide in the event of legal uncertainty. The doctrines include the rights of the public to access and use the shoreline (public trust doctrine), and the rights of adjacent or upland private landowners to access and use the shoreline (doctrine of littoral rights, which includes the doctrine of erosion and accretion). In the face of the unprecedented and extraordinary effects of climate change, the combination of climate-related coastal management (and its likely restraints on coastal property) and the increasing defense of private property rights calls into question whether these common law doctrines continue to make sense for these changed circumstances.

Saddled with both the threat and reality of constitutional takings challenges, states are explicitly recognizing common law-based "background principles of law" as the basis for statutes outlining climate-related management strategies. Although consistent with Supreme Court precedent, utilizing common law doctrines as "background principles" fails to accommodate the transforming nature of law in response to climate change. Not only are the doctrines themselves becoming distorted by this application, but they are also contradicting their flexible nature and becoming static at a time when they arguably need to adapt and shift the most. The complexities of climate change may require that the common law evolve in response to changing conditions. Allowing the common law to shift under the new circumstances may not yield satisfactory solutions for all parties involved; however, halting its evolution in light of the impending threats associated with climate change will invariably become an obstacle to progress.

This comment begins by examining the effects of climate change on the ocean coastline of the United States. Part II provides an overview of state adaptation strategies in response to climate change as well as the common law doctrines that govern coastal property law at the crux of the legal tension. Part III examines the challenges climate change presents to the common law doctrines that guide legal disputes and court decisions. With a particular emphasis on legal challenges in both Texas (*Brannan v. Texas*[3] and *Severance v. Patterson*[4]) and Florida (*Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*[5]), this analysis specifically focuses on assessing whether the common law doctrine of littoral rights can flex to accommodate changing circumstances. In seeking equitable solutions to the increasing legal tension at the water's edge, states may need to update and align

---

[3] No. 01-08-00179-CV, 2010 Tex. App. LEXIS 799 (Feb. 4, 2010).

[4] 566 F.3d 490 (5th Cir. 2009).

[5] 130 S. Ct. 2592 (2010).

the common law doctrines in response to the unprecedented conditions brought on by climate change. Part IV concludes with a look at future needs. Rather than misrepresent or distort common law doctrines that underpin adaptation responses, courts should embrace the changing nature of common law in response to climate change.

II. BACKGROUND

As owners and trustees of the nation's beaches,[6] twenty-three state governments are tasked with the complex mission of saving America's coastlines in response to approaching climate-related changes. Some coastal states have been proactively preparing for the effects of climate-related changes by developing state-based comprehensive strategies to reduce vulnerabilities[7] and implementing science-based setbacks at the county planning level.[8] Others are still drafting planning documents and policies in preparation of the anticipated changes.[9]

Whether states are at the implementation or drafting phase, they are likely to encounter litigation as private owners defend their property rights. Although coastal areas have historically been a source of legal tension, rising sea levels and the landward movement of coastal waters will likely generate legal conflict with an intensity never seen before.[10]

A. The Effects of Climate Change on the Coastal Lands

According to the Intergovernmental Panel on Climate Change (IPCC), there is an international scientific consensus that anthropogenic sources of carbon dioxide will continue to cause climate change.[11] Although recognizing that many factors influence climate, scientists have determined that human activities

---

[6] *See* Port of Seattle v. Or. & Wash. R.R. Co., 255 U.S. 56 (1921); United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 286 (1943) (Jackson, J., dissenting); Phillips Petroleum v. Mississippi, 484 U.S. 469, 475 (1988).

[7] *See, e.g.*, Maryland Comm'n on Climate Change, Climate Action Plan (Aug. 27, 2008), http://www.mdclimatechange.us/.

[8] *See, e.g.*, Kaua'i County, Haw., Ordinance 863 (Jan. 25, 2008). Kaua'i County, Hawai'i adopted the most aggressive shoreline building setback law in the nation, protecting coastal structures against 70 to 100 years of erosion. Surfrider Foundation, State of the Beach, Hawaii Erosion Response, http://www.surfrider.org/stateofthebeach (last visited Nov. 21, 2010).

[9] *See generally* Pamela Rubinoff et al., *Summary of Coastal Program Initiatives that Address Sea Level Rise as a Result of Global Climate Change* (2008), *available at* http://seagrant.gso.uri.edu/z_downloads/coast_haz_slr.pdf.

[10] Sax, *supra* note 1.

[11] Intergovernmental Panel on Climate Change, *Summary for Policymakers*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 2-3 (2007) [hereinafter IPCC].

that increase the concentration of greenhouse gas emissions are responsible for most of the atmospheric warming observed over the past fifty years.[12] Even if human-related emissions levels stabilized, the accumulated concentration of greenhouse gas emissions would continue to cause warming well into the next century, inducing many changes in the global climate system during the twenty-first century that will likely be larger than those observed during the twentieth century.[13] Based on the modeling of six possible emission scenarios, the IPCC projects that temperatures will increase between 1.8 and 4.0 degrees Celsius, or a change of about four degrees Fahrenheit, by 2099, causing sea level rise, erratic weather patterns, and coastal erosion.[14]

1. Sea level rise

Most of the world's sandy shorelines retreated during the past century, and sea level rise is an underlying cause.[15] With projected increases in average global temperatures over the next century, shorelines are bound to continue their retreat. Current estimates project a global 0.6-meter (1.97 feet) rise in sea levels by the year 2100.[16] A one-meter rise in sea level would submerge 25,000 square miles of American coastal lands.[17] With Eastern and Gulf coasts projected to be hardest hit, some states, such as Texas and Florida, could experience water inundation several miles inland.[18]

2. Coastal erosion

Coasts are dynamic systems, undergoing continuous physical adjustments through erosion, accretion, and avulsion.[19] "Erosion" is the gradual washing

---

[12] Hervé Le Treut et al., *Historical Overview of Climate Change Science, in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, *supra* note 11, at 105.

[13] Gerald A. Meehl et al., *Global Climate Projections, in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, *supra* note 11, at 824-25. Twenty percent of emitted carbon dioxide is projected to remain in the atmosphere for many millennia, while more than half will remain for less than 100 years. *Id.*

[14] IPCC, *supra* note 11, at 13.

[15] *See* S.P. Leatherman, *Social and Economic Costs of Sea-Level Rise, in* SEA LEVEL RISE, HISTORY AND CONSEQUENCES 181-223 (Bruce C. Douglas et al. eds., 2001).

[16] Robert J. Nicholls et al., *Coastal Systems and Low-Lying Areas, in* CLIMATE CHANGE 2007: IMPACTS, ADAPTATION, AND VULNERABILITY (2007).

[17] Seth Borenstein, *Rising Seas Will Reshape the U.S.*, L.A. TIMES, Sept. 23, 2007, at A16.

[18] *Id.*; James G. Titus et al., *Greenhouse Effect and Sea Level Rise: The Cost of Holding Back the Sea*, 19 COASTAL MGMT. 171, 189-92, 200 (1991).

[19] Erosion and accretion are opposing terms describing the often imperceptible decreasing or broadening of sands along a shoreline. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 42 (2d ed. 2002). Avulsion refers to a sudden and perceptible loss of land abutting water generally caused by a storm-like surge along the shoreline. *Id.*

away of land bordering on a stream or body of water by the action of the water.[20] In contrast, "accretion" is a gradual and imperceptible process in which additions of sand, soil, or sediment creates new land that was previously submerged in water.[21] Accretion and erosion are distinct from "avulsion," in which the action of water causes a "sudden and perceptible" loss of coastal or riparian land.[22] Although these physical adjustments are part of a natural system, rising seas and increased storm activity associated with climate change will intensify the natural process leading to dramatically increased erosion and avulsive events in many states without a counterbalancing increase in accretion.[23]

Due to their geological features, the Atlantic and Gulf coasts are particularly susceptible to erosion. The low-lying shores and vast coastal plains of Florida, Alabama, Louisiana, Mississippi, and Texas determine the trends and rates of shoreline movement in the region.[24] The Gulf Coast of Texas and Florida currently represent worst-case scenarios in terms of climate-related change.[25] Florida's Gulf coastline is eroding at an average of 0.8 meters per year (2.6 feet), and Texas' Gulf shores are eroding by an average of 1.8 meters per year (5.9 feet).[26]

Unlike the Gulf Coast, the Pacific coast is interspersed with sandy beaches and prominent headlands or cliffs.[27] Weaker rocks erode more quickly, forming coastal sediment, while the harder rocks remain as headlands or cliffs with a relatively high resistance to erosion.[28] In this environment, increased precipitation associated with climate change and higher groundwater levels may amplify cliff failure and retreat rather than rising sea levels.[29] The long-term

---

[20] *See* Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52, 57 (Tex. App. 1993).

[21] Donna R. Christie, *Of Beaches, Boundaries and Sobs*, 25 J. LAND USE & ENVTL. L. 19, 29-30 (2009).

[22] *See* Cox v. F-S Prestress, Inc., 797 So. 2d 839, 843 (Miss. 2001).

[23] The Heinz Center, *Evaluation of Erosion Hazards: Report Brief*, at 2 (2000), http://www.heinzctr.org/publications/PDF/rprtbrf.pdf.

[24] Robert A. Miller et al., *National Assessment Of Shoreline Change: Part 1 Historical Shoreline Changes And Associated Coastal Land Loss Along The U.S. Gulf Of Mexico*, U.S. Geological Survey Open-file Report 2004-1043, at 14 (2004), *available at* http://pubs.usgs.gov/of/2004/1043/.

[25] Interview with Matthew Barbee, Univ. of Haw. Coastal Geology Grp., in Honolulu, Haw. (Mar. 15, 2010).

[26] Miller et al., *supra* note 24, at 14.

[27] C.J. Hapke, *Estimation of Regional Material Yield from Coastal Landslides Based on Historical Digital Terrain Modelling*, 30 EARTH SURFACE PROCESSES & LANDFORMS 679, 679-97 (2005).

[28] Guillaume Pierre & Philippe Lahousse, *The Role of Groundwater in Cliff Instability: An Example at Cape Blanc-Nez (Pas-de-Calais, France)*, 31 EARTH SURFACE PROCESSES & LANDFORMS 31, 31-45 (2006).

[29] *Id.*

shoreline erosion rate for northern and central California is 0.3 meters per year (0.9 feet), and the projected erosion rate for southern California is 0.2 meters per year (0.7 feet).[30] The erosion of beaches and coastal cliffs in this region will likely occur in large bursts during storm events as a result of increased wave height and storm intensity.[31] Because of these large events, erosion may outpace sea level rise.[32]

Coastal communities are expected to experience more frequent and destructive flooding, compromised water supplies, and decreases in the size and number of beaches due to climate-related changes.[33] Over the next sixty years, erosion alone may claim one in four homes within 500 feet of a U.S. coastline.[34] Without adequate planning, engineering, and development of policies and laws incorporating effective response strategies, the coast and its beaches, homes, businesses, and infrastructure will be increasingly vulnerable to the effects of impending climate change.

B. Overview of State Adaptation Strategies in Response to Climate Change

As of 2006, nearly two-thirds of the coastal states reported to the U.S. National Oceanic and Atmospheric Association (NOAA) that "coastal hazards" in light of impending climate changes are a high priority.[35] Recognizing the significance of climate change, these states have developed, or are in the process of developing, five-year strategies to address the challenges of flooding, shoreline erosion, and coastal storms.[36] The research and management community has termed this preparation for climate change impacts "adaptation."[37] In developing adaptation strategies, most coastal programs have focused on creating policy responses that account for the potential social,

---

[30] C.J. Hapke, D. Reid, B.M. Ruggiero, & J. List, *National Assessment of Shoreline Change: Part 3: Historical Shoreline Changes and Associated Coastal Land Loss Along the Sandy Shorelines of the California Coast*, U.S. Geological Survey Open-file Report 2006-1219, 12 (2006), *available at* http://pubs.usgs.gov/of/2006/1219/.

[31] *Id.* at 25.

[32] Heinz, *supra* note 23, at 2.

[33] Andrew Bakun, *Global Climate Change and Intensification of Coastal Ocean Upwelling*, SCI. MAG., Jan. 12, 1990, at 198-201.

[34] *Id.*

[35] NOAA Office of Ocean & Coastal Resource Mgmt., *Coastal Zone Management Program-Enhancement Grant Assessment and Strategies: Coastal Hazards* (Sept. 2006), http://coastalmanagement.noaa.gov/issues/docs/hazards_summary.pdf.

[36] *Id.*

[37] Adaptation refers to "the adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities." INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION, AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE IPCC 6 (2007).

environmental, and economic impacts of accelerated sea level rise and resulting shoreline changes.[38] Although adaptations vary, states are primarily using some variation of rolling easements and beach nourishment to address the loss of coastal lands from erosion.

1. Rolling easements

Recognizing that large amounts of beaches and coastal wetlands are being lost to erosion and may increasingly disappear as sea levels rise, a few states have implemented what are called "rolling easements."[39] Rolling easements recognize the natural processes of coastal erosion by allowing property owners to develop near the shore on condition that they vacate the structures if and when they become threatened by an advancing shoreline.[40]

Several states recognize rolling easements in a variety of ways. Texas judicially recognized rolling easements as early as 1944.[41] More recently, California identified rolling easements as a viable adaptation in response to climate change in 2009.[42] Yet Texas and California are not alone in their application of rolling easements.[43] South Carolina, for example, also recognizes rolling easements.[44] In 1988, in response to the risks of a one-foot rise in sea level, South Carolina passed the Beachfront Management Act, which requires significant setbacks along the coast.[45] In the aftermath of a legal challenge to the Act in *Lucas v. South Carolina Coastal Council*,[46] the legislature modified the statute with a rolling easement policy that allows

---

[38] Coastal States Org., *The Role of Coastal Zone Management Programs in Adaptation to Climate Change* (2007), *reprinted in* Coastal States Org., *The Role of Coastal Zone Management Programs in Adaptation to Climate Change: Second Annual Report* app. B at 9 (2008), *available at* http://www.coastalstates.org/wp-content/uploads/2010/07/CSO-2008-Climate-Change-Report2.pdf.

[39] *See* James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279, 1313 (1998); Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 ECOLOGY L.Q. 533, 574 (2007) (explaining that the term "rolling easement" is derived from the common law of Texas describing a broad collection of arrangements whereby human activities yield to naturally migrating shorelines).

[40] Titus, *supra* note 39, at 1313.

[41] State v. Balli, 190 S.W.2d 71 (Tex. 1944).

[42] CAL. NATURAL RES. AGENCY, 2009 CALIFORNIA CLIMATE ADAPTATION STRATEGY 77 (2009), *available at* http://www.climatechange.ca.gov/adaptation (follow link to report).

[43] California, Maine, North Carolina, South Carolina, and Rhode Island also expressly use the rolling easement policy to manage their shoreline. Caldwell & Segall, *supra* note 39, at 571.

[44] S.C. CODE ANN. § 48-39-290(D)(1) (2008).

[45] *Id.* §§ 48-39-10 to 360.

[46] 505 U.S. 1003 (1992).

development while requiring landowners to remove structures should they become situated on an active beach.[47]

State policies allowing beaches to erode and give way to natural processes present a Faustian bargain for upland private property owners at risk of losing their proprietary investment. From a government standpoint, rolling easement policies present a feasible and efficient way of managing a retreating coastline. The adaptation costs little to nothing to employ while it preserves the shoreline for the public.[48]

Such easements are arguably fundamentally rooted in principles of property law such as the public trust doctrine and the doctrine of littoral rights.[49] Most states that recognize rolling easements, however, do so via statute or constitutional amendment.[50] Even with express authorization, instituting a policy of rolling easements will likely prompt legal disputes, as indicated by recent Texas litigation challenging the State's order to remove homes encroaching on an eroding public beach.[51]

2. Beach nourishment

At an estimated cost of one million dollars per mile,[52] beach nourishment projects restore eroding beaches by directly engineering and adding sand to the shoreline.[53] This artificial restoration rebuilds beaches while providing a buffer against increasing coastal erosion. It is the only management adaptation tool that serves the dual purpose of protecting coastal lands and preserving beach resources.[54]

Beach nourishment is designed to mimic nature by responding to changes in wave activity and current conditions.[55] Ideally, states design beach

---

[47] S.C. CODE ANN. § 48-39-290(D)(1) (West, Westlaw through 2010 Sess.). The term "active beach" is defined as "the area seaward of the escarpment or the first line of stable vegetation, whichever first occurs, measured from the ocean." *Id.* § 48-39-270(13).

[48] Titus, *supra* note 39, at 1327.

[49] Caldwell & Segall, *supra* note 39, at 574.

[50] *See, e.g.*, TEX. NAT. RES. CODE ANN. §§ 61.001-.254 (Vernon 2006); Matthew Tresaugue, *A Constitutional Right to Hit the Beaches? Voters Get to Decide on Public Access Measure*, HOUSTON CHRON., May 29, 2009, at B3.

[51] *See* Brannan v. State, No. 01-08-00179, 2010 Tex. App. LEXIS 799 (Feb. 4, 2010); Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009).

[52] U.S. Geological Survey, *Coastal and Marine Geology Program: Limited Sand Resources for Eroding Beaches*, http://coastal.er.usgs.gov/wfla/factsheet (last updated Nov. 21, 2010).

[53] Caldwell & Segall, *supra* note 39, at 551.

[54] Titus, *supra* note 39, at 1313.

[55] CALIFORNIA DEP'T OF BOATING & WATERWAYS & STATE COASTAL CONSERVANCY, CALIFORNIA BEACH RESTORATION STUDY (2002), http://www.dbw.ca.gov/PDF/Reports/BeachReport/Full.pdf.

nourishment projects so that the range of seasonal shoreline fluctuation remains within acceptable limits during the project's life.[56] Whereas structural beach retention measures such as sea walls were more common thirty to fifty years ago, beach nourishment has become a recognized adaptation for managing the loss of sandy beaches in recent decades.[57]

C. The Collision at the Water's Edge: This Land is Your Land, This Land is My Land

Efforts to preserve natural coastlines have repeatedly incurred resistance from upland private property owners seeking to maintain personal uses of their beachfront land.[58] The resistance is steeped in firmly held beliefs about constitutional property protections and common law doctrines.

1. The takings clause

Although it is well settled that state courts have broad authority over state property law,[59] the takings clause of the Fifth Amendment of the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation."[60] The Fourteenth Amendment applies this prohibition to the states.[61]

As applied to coastal states, the takings clause acts as a limitation on a government's ability to manage and protect the coastline and its beaches from the changes wrought by the dynamic natural processes of erosion, accretion, and avulsion. A "taking" occurs when the government directly appropriates or physically invades property.[62] In addition, government *regulation* of private property may constitute a taking if "[*it*] *goes too far*,"[63] such that the regulation becomes the equivalent of a "direct appropriation or ouster."[64] Although

---

[56] *Id.*

[57] *Id.*

[58] Regina McMahon, *The Lucas Dissenters Saw Katrina Coming: Why Environmental Regulation of Coastal Development Should Not Be Categorized as a "Taking,"* 15 PENN. ST. ENVTL. L. REV. 373, 384 (2007).

[59] *See* Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378-79 (1977); Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 n.8 (1930); Fox River Paper Co. v. R.R. Comm'n of Wis., 274 U.S. 651, 657 (1927).

[60] U.S. CONST. amend. V. *See also* Michael A. Hiatt, *Come Hell or High Water: Re-Examining the Takings Clause in a Climate Changed Future*, 18 DUKE ENVTL. L. & POL'Y F. 371, 380 (2008).

[61] U.S. CONST. amend. XIV, § 1.

[62] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536-37 (2005).

[63] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (emphasis added).

[64] *Lingle*, 544 U.S. at 537.

determining whether a regulation "goes too far" is generally a factual matter, when a regulation deprives a property owner of all economically beneficial uses of property, it constitutes a *per se* or categorical taking.[65] Such was the case involving David Lucas, whose challenge to South Carolina's Beachfront Management Act went all the way to the Supreme Court and has become a seminal coastal land use case.[66]

South Carolina's Beachfront Management Act (BMA) authorized the South Carolina Coastal Council to establish an erosion baseline for land seaward of the newly mapped erosion setback line as "critical area."[67] Land within the critical area is subject to additional permits by the Coastal Council.[68]

In 1986, David Lucas purchased two residential lots in the Wild Dune development on the Isle of Palms, a barrier island east of Charleston, South Carolina.[69] As part owner of the Wild Dune development, Lucas intended to construct a single-family home on each coastal lot.[70] The land, located seaward of the erosion setback line, was known to be unstable and subject to flooding and a shifting shoreline.[71] Upon seeking additional permits for construction in the critical area, the Coastal Council barred Lucas from building any permanent structures on the property.[72] The Coastal Council based its decision on the instability of the land within the critical area created through the passage of the BMA.[73] Lucas filed suit against the Coastal Council, alleging a constitutional taking without just compensation.[74] The state trial court held in favor of Lucas, finding that the BMA, as applied, rendered a taking of the complete value of his lots.[75] The court awarded Lucas $1.2 million.[76]

The U.S. Supreme Court ultimately agreed with the state trial court's decision that the application of the BMA created a taking of Lucas' property.[77] Writing for the majority, Justice Scalia wrote that Lucas must be compensated

---

[65] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1046 (1992).

[66] *Id.* at 1006-07.

[67] *Id.* at 1008-09 (citing S.C. CODE ANN. § 48-39-280(A)(2)) (West, Westlaw through 2010 Sess.).

[68] S.C. CODE ANN. § 48-39-130.

[69] *Lucas*, 505 U.S. at 1006. Lucas purchased the lots for $975,000. *Id.*

[70] *Id.*

[71] Dana Beach & Kim Diana Connolly, *A Retrospective on Lucas v. South Carolina Coastal Council: Public Policy Implications for the 21st Century*, 12 SOUTHEASTERN ENVTL. L.J. 1, 3 (2003).

[72] *Lucas*, 505 U.S. at 1007.

[73] *Id.* at 1008.

[74] *Id.* at 1009.

[75] Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991).

[76] *Id.*

[77] *Lucas*, 505 U.S. at 1033.

because the BMA deprived him of "economically productive or beneficial use of his land . . . and compensation must be paid to sustain it."[78]

Although advocates of private property rights celebrated the decision in *Lucas*, the scope of the decision proved to be fairly narrow.[79] Moreover, Scalia's opinion left a doorway open for states to assert protections from compensable takings through its discussion of "background principles of the [s]tate law of property."[80]

2. Defining background principles of state property law

In *Lucas*, Justice Scalia pointed out that a state's defense against a taking may be grounded in "background principles of state law,"[81] but he provided little guidance as to this new[82] term's meaning. In essence, Justice Scalia opened the door but did not tell states what was on the other side. Nearly ten years later, in the 2001 *Palazzolo v. Rhode Island*[83] decision, the U.S. Supreme Court offered some guidance on what "background principles of state law" encompassed.

Anthony Palazzolo was president of Shore Gardens, Inc. (SGI). In 1951, SGI acquired a parcel of land in the Misquamicut section of the town of Westerly, Rhode Island.[84] Located on the inland side of a barrier beach, between the crest of the beach and the shore of a 460-acre saltwater coastal estuary called Winnapaug Pond, SGI sold off eleven individual subdivided house-lots to various purchasers between 1959 and 1960.[85] After this series of transactions, SGI retained title to a twenty-acre remnant, eighteen acres of which were occupied by marshland and subject to daily tidal inundation.[86]

From 1965 through 1977, Rhode Island's regulations governing alterations to coastal wetlands grew more stringent, evolving into a virtual development prohibition as of 1977.[87] In 1978, the Rhode Island Secretary of State revoked

---

[78] *Id.* at 1030.

[79] *See* Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 325 n.26 (2005).

[80] *Lucas*, 505 U.S. at 1029.

[81] *Id.*

[82] Prior to Justice Scalia's writing of the *Lucas* opinion, "background principles of property law" was an unknown legal term. Sax, *supra* note 1; Michael C. Blumm & J.B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Reply to Professor Huffman*, 37 ECOL. L.Q. 805, 820 (2010).

[83] 533 U.S. 606 (2001).

[84] Palazzolo v. State, 746 A.2d 707, 709 (R.I. 2000).

[85] *Id.* at 709-710.

[86] *Id.* at 711.

[87] *Id.*

SGI's corporate charter, and Palazzolo, the sole shareholder, became the automatic successor to SGI's previously owned property.[88]

Charged with protecting the State's coastal properties, the Rhode Island Coastal Resources Management Council (CRMC) was responsible for administering coastal development under the Coastal Resources Management Program (CRMP).[89] In March 1983, Palazzolo filed an application with the CRMC, seeking approval to fill the full eighteen acres of salt marsh.[90] The CRMC rejected the application.[91] In January 1985, Palazzolo filed another application to fill the wetlands on the property so he could create a recreational beach facility.[92] CRMC again denied the application.[93] Palazzolo subsequently sued the State of Rhode Island, asserting that the State's wetlands regulations, as applied by the CRMC, had taken his property without compensation in violation of the Fifth and Fourteenth Amendments.[94] He sought $3,150,000 in damages, based on the value he claimed the land would have been worth after filling the wetlands and developing the property as seventy-four lots for single-family homes.[95]

Both the Rhode Island Superior Court and the Rhode Island Supreme Court found that the denial of Palazzolo's application was not a taking for which compensation was owed.[96] The Rhode Island Supreme Court held that Palazzolo had no right to challenge regulations predating 1978, when he obtained legal ownership of the property.[97] Although much of the Supreme Court's decision is focused upon the issue of ripeness, one of the more interesting and pertinent aspects of the case involves the discussion of notice.[98] In support of the lower court's argument, the Rhode Island Supreme Court relied on its interpretation of background principles of law, finding that a purchaser or a successive title holder with notice of an earlier-enacted regulation is barred from claiming that it constitutes a taking.[99]

The U.S. Supreme Court disagreed with the Rhode Island Supreme Court's reasoning and rejected the Rhode Island Supreme Court's holding based on prior notice.[100] Writing for the majority, Justice Kennedy stated: "Were we to

---

[88] *Id.* at 715.
[89] *Id.* at 710.
[90] *Id.* at 711.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 709.
[97] *Id.*
[98] Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001).
[99] *Id.* at 626-627.
[100] *Id.* at 627.

accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."[101] He further stated, "It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."[102] The Supreme Court remanded the case to determine due compensation.[103]

On remand, the Rhode Island Superior Court began its analysis by considering the "background legal principles which bear on the extent of plaintiff's property interest" as a way to prevent takings compensation.[104] Relying on the *Lucas* decision,[105] the court identified a common law background principle as sufficient to bar Palazzolo's takings claim.[106] Succinctly stated, the court maintained that because of the public trust doctrine, Palazzolo could not have expected to develop his subdivision absent the consent of the State.[107] Therefore, the government did not need to compensate the property owner since the regulated or prohibited use was "not part of his title to begin with."[108]

Palazzolo signaled to states and the courts the importance of utilizing traditional or historical common law doctrines as the cornerstone of both regulations and regulatory decisions for the purposes of resolving cases at the early stages of litigation and limiting successful takings claims.[109]

3. *Common law doctrines as background principles of state property law*

Since the 1992 *Lucas* decision, numerous courts have used background principles of common law as a defense to uphold government regulations

---

[101] *Id.*

[102] *Id.* at 629-30.

[103] *Id.* at 633. The Court directed the state court to determine whether compensation was due under the factors established in *Penn Central Transp. Co. v. City of New York*. *Id.* at 616. The *Penn Central* case governs partial regulatory takings and provides a balancing test whereby several factors must be examined in determining whether a private landowner must be compensated. 438 U.S. 104 (1978). The factors include assessing the character of the government action, the economic impact of the regulation, and the extent to which the regulation has interfered with investment-backed expectations. *Id.* at 124.

[104] Palazzolo v. State, No. WM99-0297, 2005 WL 1645974, at *15 (R.I. Super. Ct. July 5, 2005).

[105] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[106] *Palazzolo*, 2005 WL 1645974, at *15 (finding the common law-based public trust doctrine sufficient to bar a takings claim).

[107] *Id.* at *24 (quoting *Lucas*, 505 U.S. at 1027).

[108] *Id.*

[109] Blumm & Ritchie, *supra* note 79, at 326.

challenged by constitutional violations of property rights.[110] In nearly all of the instances, the regulations expressly prohibit conduct that most likely would have been prohibited by common law doctrines.[111] This use is consistent with Justice Scalia's emphasis in *Lucas* on common law doctrines as the basis for background principles.[112]

The sheer historical importance of the nation's coastline, both from an economic and an environmental standpoint, has given rise to common law doctrines ensuring access to and use of the shoreline for the public as well as adjacent private landowners. The common law doctrines include the "public trust doctrine" and the "doctrine of littoral rights," which includes the doctrine of erosion and accretion.[113]

a. The public trust doctrine

Unlike legislatively imposed restrictions that may or may not be considered pre-existing principles of property law, there is little dispute that the public trust doctrine, derived from ancient common law, constitutes a background principle of property law.[114] The doctrine creates the foundation for public rights along the shore and may place limitations on a coastal property owner's title.[115] The doctrine derives from two bedrock tenets: Roman law and English law. Dating from the sixth century A.D.,[116] the Roman Emperor Justinian declared "[t]he things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore."[117] William the Conqueror brought this concept, held within Rome's civil code, to the British Isles.[118] When placed into English common law, the doctrine provided that title to the shoreline rested with the King in trust for the benefit of the people.[119] As such, the enumerated resources of the

---

[110] Blumm & Ruhl, *supra* note 82, at 806.

[111] *Id.* at 818.

[112] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992).

[113] *See generally*, JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS (1994); BRUCE S. FLUSHMAN, WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS (2002).

[114] Blumm & Ritchie, *supra* note 79, at 342 (discussing McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119-20 (S.C. 2003); Coastal Petroleum v. Chiles, 701 So. 2d 619, 624 (Fla. Dist. Ct. App. 1997); Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 987 (9th Cir. 2002); R.W. Docks & Slips v. State, 628 N.W.2d 781, 987 (Wis. 2001); Wilson v. State, 583 N.E.2d 894, 901 (Mass. App.), *aff'd*, 597 N.E.2d 43 (Mass. 1992)).

[115] *Lucas*, 505 U.S. at 1028-29.

[116] *See generally* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006) (providing an overview of states incorporating the public trust doctrine).

[117] JUSTINIAN'S INSTITUTES 55 (P. Birks & G. McLeod trans., 1987).

[118] Hiller v. English, 35 S.C.L. (4 Strob.) 486, 522 (1848).

[119] Sean T. Morris, *Taking Stock in the Public Trust Doctrine: Can States Provide for*

shores could not be reduced to private ownership but remained within the realm of the public.

Thirteen centuries later, the U.S. Supreme Court first articulated the public trust doctrine.[120] In 1821, a New Jersey landowner brought a claim of trespass against an individual for harvesting oysters in an area along the Raritan River that the landowner believed was his tidal waters.[121] The Court rejected the landowner's claim, stating that a riparian owner did not have an unqualified right to the resources within the tidal waters.[122] Nearly twenty years later, the Court solidified the law regarding public ownership of the shoreline when it found the original thirteen colonies succeeded to the English crown the ownership of submerged lands under tidal waters and that after independence, the newly formed state governments held title to such lands.[123]

Since the mid-1850s, the U.S. Supreme Court has played a major role in defining the geographic scope, content, and legal effect of the public trust doctrine. A seminal application of the public trust doctrine came in the 1894 case of *Shively v. Bowlby*.[124] At issue in *Shively* was whether the State of Oregon owned the soil below the high-water mark near the mouth of the Columbia River in Astoria. Although the Supreme Court of Oregon concluded that "when the State of Oregon was admitted to the Union, the tide lands became its property, and subject to its jurisdiction and disposal,"[125] the U.S. Supreme Court opinion is significant for its review of relevant caselaw.[126] The Court held that Oregon's tide lands were owned by the State and that "the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several States, subject . . . to the rights granted to the United States by the Constitution."[127] Nearly a century later, in the 1988 case of *Phillips Petroleum Co. v. Mississippi*, the U.S. Supreme Court again recognized that "the individual states have the authority to define the limits of the lands held in public trust."[128]

In defining the boundaries of the public trust, states have interpreted the doctrine in diverse ways. For example, Mississippi recognizes that "lands under waters subject to the ebb and flow of the tide, regardless of whether the

---

Public Beach Access Without Running Afoul of Regulatory Takings Jurisprudence?, 52 CATH. U. L. REV. 1015, 1019 (2003).

120 Arnold v. Mundy, 6 N.J.L. 1, 50 (N.J. 1821).

121 *Id.* at 8.

122 *Id.* at 50.

123 Martin v. Waddell, 41 U.S. 367, 416-417 (1842).

124 152 U.S. 1 (1894).

125 Bowlby v. Shively, 30 P. 154, 160 (Or. 1892).

126 *See Shively*, 152 U.S. at 11-49.

127 *Id.* at 41.

128 484 U.S. 469, 475 (1988).

waters are navigable, are within the public trust."[129] California courts recognize the lands along the coast held in public trust as those shifting with the mean high tide line.[130] Florida claims title to "lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines . . . by virtue of its sovereignty, in trust for all the people."[131]

In 1968, Hawai'i adopted an expanded public trust doctrine establishing the boundary of the public trust shoreline according to the following terms: "along the upper [mauka] reaches of the wash of [the] waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves."[132] Five years later, in *County of Hawaii v. Sotomura*, the Hawai'i Supreme Court declared "public policy . . . favors extending to [the] public use and ownership as much of Hawaii's shoreline as is reasonably possible."[133] Therefore, in contemporary Hawai'i, the entire sandy beach extending to the edge of the defined shoreline is regarded as public domain. Although each coastal state autonomously characterizes its boundaries of shoreline trust lands, all states abutting an ocean hold and protect in title and trust some portion of our country's beaches for the benefit of the public.

b. Littoral rights and the doctrine of erosion and accretion

In addition to the public trust doctrine, other common law doctrines guide the use of the shores and the changing nature of the coast. Littoral rights guarantee that abutting private owners have special rights of access, wharfage, and use of the waters.[134] Within the littoral right to access coastal waters, property owners whose lands abut the shoreline have rights to maintain contact with the body of water and gain land through accretions.[135] As a separate common law doctrine within the bundle of littoral rights, the doctrine of accretion and erosion guides the shoreline ownership as nature shifts the property boundaries landward and seaward.[136]

---

[129] *Id.* at 476.

[130] Caldwell & Segall, *supra* note 39, at 553 (citing Lechuza Villas W. v. Calif. Coastal Comm'n, 70 Cal. Rptr. 2d 399, 399-404 (App. 1997)). The mean high-tide line is determined by averaging the reach of all high tides in a particular area over the course of a nineteen-year reference period. NOAA, TIDE AND CURRENT GLOSSARY 15 (2000), *available at* http://tidesandcurrents.noaa.gov/publications/glossary2.pdf.

[131] Krieter v. Chiles, 595 So. 2d 111 (Fla. Dist. Ct. App. 1992) (quoting FLA. CONST. art. X, § 11).

[132] *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).

[133] 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973).

[134] KALO ET AL., *supra* note 19, at 42.

[135] *Id.*

[136] *Id.*

Because the public trust doctrine provides coastal states with title to the shoreline for the public, littoral rights ensure access and usage for private landowners abutting an ocean, sea, or lake.[137] The adjacency to waterways provides these coastal owners with certain additional rights above and beyond those provided to the general public.[138] As with other real property rights, states determine the extent of littoral rights.[139] Some states hold that littoral rights are not absolute.[140] Others hold that vested rights of a littoral owner may not be denied or destroyed, but that they may be qualified, subordinate, and subject to the paramount interest of the state.[141] Therefore, littoral rights may be subject to and limited by the public trust doctrine.[142] North Carolina is one such state where littoral rights are subordinate to public trust rights.[143]

Despite the deviations, most states agree that littoral rights do not constitute property rights per se, but are qualified rights.[144] Therefore, littoral rights are subject to reasonable regulation by the state in its exercise of the police power.[145] The rights of littoral property owners, however, may not be arbitrarily destroyed or impaired.[146] If the rights are destroyed, the littoral owner may seek compensation.[147] With the use of beach nourishment as an adaptation for restoring beaches lost to erosion, it is increasingly important that states clearly and reasonably account for alterations to the littoral owner's rights of use and access to the coast.

Within the littoral right of access is the doctrine of accretion and erosion.[148] The doctrine of accretion generally states that if the sand or soil naturally builds or accretes along a shoreline, the private landowner benefits by taking title to the additional land.[149] Courts have repeatedly affirmed this rule.[150] As explained by the Supreme Court in 1874 and again in 1890, "alluvial soil added

---

[137] *Id.* The term riparian is sometimes inaccurately used as relating to the shore of the sea or other tidal water, or of a lake or other considerable body of water not having the character of a watercourse. *See* BLACK'S LAW DICTIONARY 1327 (6th ed. 1990). The proper word to be employed in such connections is "littoral." *See id.*

[138] Lakeside Lodge, Inc. v. Town of New London, 960 A.2d 1268 (N.H. 2008).

[139] Fed. Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 252 (1954).

[140] *See* Gustafson v. City of Lake Angelus, 76 F.3d 778 (6th Cir. 1996) (applying Michigan law).

[141] *See* R.W. Docks & Slips v. State, 628 N.W.2d 781 (Wis. 2001).

[142] *Id.*

[143] *See* Slavin v. Town of Oak Island, 584 S.E.2d 100 (N.C. Ct. App. 2002).

[144] *Gustafson*, 76 F.3d at 790.

[145] *See* New Jersey v. Delaware, 552 U.S. 597 (2008).

[146] *See* Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885).

[147] *See* Yates v. City of Milwaukee, 77 U.S. 497 (1870).

[148] KALO ET AL., *supra* note 19, at 42-43.

[149] *See, e.g.*, United States v. Harvey, 661 F.2d 767 (9th Cir. 1981); Smith v. United States, 593 F.2d 982 (10th Cir. 1979); Brainard v. State, 12 S.W.3d 6 (Tex. 1999).

[150] *See, e.g.*, Georgia v. South Carolina, 497 U.S. 376 (1990).

. . . to your land becomes yours by the law of nations . . . [It] is an imperceptible increase added so gradually no one can perceive how much is added at any moment in time."[151]

In contrast to the doctrine of accretion, the doctrine of erosion states that when sand or soils gradually and imperceptibly erode through natural forces, the upland private owner loses property.[152] Therefore, it seems only fair to allow coastal owners the benefits of accretion if they can just as easily lose title to land through erosion.[153] Applied jointly, the doctrine of accretion and erosion acts to balance and offset a coastal property owner's loss from erosion and gains from accretion. Sea level rise and associated increases in coastal erosion threaten to upset the equitable nature of the reciprocal doctrine of erosion and accretion. On a broad scale, climate change and its coastal impacts may upend common law-based littoral rights in novel and potentially disturbing ways.

III. ANALYSIS

As states scramble to protect and preserve coastlines from the effects of sea level rise and related increases in erosion, adjacent private property owners are preparing to defend their property and rights from the outcome of state-selected adaptation tools. Courts, particularly those seeking equitable solutions to legal disputes concerning potential shoreline rights violations, should be aware of the unprecedented challenges that climate change poses to coastal land use laws and underlying common law doctrines. In addition, states, undoubtedly motivated to insulate the use of climate-related adaptations from legal takings challenges, should recognize and resolve areas of legal vulnerability as best as possible.

Given the unparalleled rate at which the Gulf Coasts of both Texas and Florida are eroding, there is little wonder why courts in those states have the difficult task of resolving takings challenges in response to climate-related adaptations and coastal management strategies. As mentioned, Texas and Florida's Gulf coastlines represent the nation's worst-case climate-related scenario.[154] Acknowledging the challenges awaiting both individual owners of lands adjacent to these rapidly eroding shores and the states as managing owners of the shoreline, Texas and Florida are the canaries in the legal mine.

---

[151] County of St. Clair v. Lovingston, 90 U.S. 46, 66 (1874) (quoting the Justinian Institutes). *See also* Jefferis v. E. Omaha Land Co., 134 U.S. 178 (1890).

[152] KALO ET AL., *supra* note 19, at 43.

[153] *Id.*

[154] Barbee, *supra* note 25.

The Texas cases of *Brannan v. Texas*[155] and *Severance v. Patterson*[156] as well as Florida's *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*[157] portend the legal complexity stemming from challenges to statutorily-based adaptation strategies, provide lessons for coastal states seeking to strengthen their legal posture against such challenges, and signal important legal questions for coastal land use law in the context of climate change.

In both Texas and Florida, the cases expose the shortcomings of the common law doctrines as applied to the scope and scale of climate change effects. Although state legislatures are not explicitly claiming that the statutes being challenged codify common law doctrines, courts are reaching these conclusions. In light of Justice Scalia's emphasis on common law derived background principles of state law,[158] it seems essential that the courts invoke traditional common law doctrines as a basis for overcoming a compensable takings claim. The consequences, however, are equally significant.

A. How Climate Change Challenges Common Law Doctrines

As the latest collection of contentious coastal land use cases depict, it is worth asking whether the doctrines being applied and debated, particularly the common law doctrines associated with a private coastal owner's littoral rights, provide balanced and sustainable legal solutions in the face of climate-related land use impacts. The Texas cases of *Brannan* and *Severance* reveal the lack of equilibrium in an otherwise proportional doctrine of erosion and accretion. Florida's *Stop the Beach Renourishment* case, decided by the U.S. Supreme Court in 2010,[159] challenges aspects of littoral rights in a wholly different way. In *Stop the Beach Renourishment,* six private property owners asserted that the State violated the Fifth Amendment by taking the rights to future accretions and destroying the right to have contact with the water when the state nourished and restored a beach severely impaired by erosion.

1. How rolling easements test the doctrine of erosion and accretion: A look into Texas' Brannan *and* Severance *cases*

In *Brannan* and *Severance,* the use of the common law doctrine of erosion and accretion as the underpinning to the rolling easement policy brings to light the doctrine's shortcomings as applied to the scope and scale of coastal climate

---

[155] No. 01-08-00179, 2010 Tex. App. LEXIS 799 (Feb. 4, 2010).

[156] 566 F.3d 490 (5th Cir. 2009).

[157] 130 S. Ct. 2592 (2010).

[158] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[159] *Stop the Beach Renourishment, Inc.,* 130 S. Ct. at 2595.

change impacts. Texas statutory and common law have long recognized the public right of access to and use of public beaches. The Texas Open Beaches Act, passed in 1959, declared that it was state public policy to allow the public an unrestricted right of access to state-owned beaches.[160] If the public acquires an easement or right of use by prescription, dedication, or custom to the dry sand above the mean high-tide line, the Act provides a means of enforcing the public's rights by recognizing a "rolling beach easement" that expands and contracts landward and seaward, creating dynamic natural boundaries of the beach.[161] As defined by the seaward boundary of the beach up to the vegetation line, the public's beach easement rights are superior to the property rights of beachfront landowners should coastal erosion cause a private home to be located on the public beach.[162]

Although Texas courts have upheld the rolling easement doctrine by finding it proper under the Texas Open Beaches Act and common law principles,[163] *Brannon* and *Severance* respectively challenged the Act in 2001 and again in 2006. The *Brannan* case, initially filed in 2001 and ultimately decided by the Texas Court of Appeals in February 2010, challenged the State's protection of the public beach after it sought removal of beachfront homes within the Village of Surfside Beach seaward of the vegetation line.[164] *Severance*, filed in 2006, challenges the State's enforcement of the rolling easement policy after severe erosion caused Carol Severance's homes to be located seaward of the natural vegetation line, thus on the public beach.[165]

In 2001, Angela Mae Brannan, as executrix of the estate of Bob Brannan, and other affected owners of the Village of Surfside Beach, sued the State of Texas for taking action to remove houses that had become encroachments on the public beach in violation of the Texas Open Beaches Act and its rolling easement policy.[166] After Tropical Storm Frances hit the Gulf in 1998, the beach severely eroded; as a result, the homes stood between the water's edge and the new vegetation line.[167] The plaintiff's main contention was that "because the houses were built outside of the easement before the line of vegetation moved landward[,] the public's use of the beach [should] co-exist with the houses."[168]

---

[160] TEX. NAT. RES. CODE ANN. § 61.011(a) (West, Westlaw through 2009 Sess.).

[161] *Id.*; *see also* Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009); Brannan v. Texas, No. 01-08-00179-CV, 2010 Tex. App. LEXIS 799 (Feb. 4, 2010).

[162] *Severance*, 566 F.3d at 494.

[163] *See, e.g.*, Feinman v. State, 717 S.W.2d 106, 111 (Tex. App. 1986).

[164] *Brannan*, 2010 Tex. App. LEXIS 799, at *4.

[165] *See Severance*, 566 F.3d at 494.

[166] *Brannan*, 2010 Tex. App. LEXIS 799, at *3.

[167] *Id.* at *5.

[168] *Id.* at *3.

The court upheld the State's rolling easement policy as embodied in the Open Beaches Act, finding the policy proper under both the Act as well as common law principles.[169] The court recognized the State's rolling easement as grounded in the common law.[170] The court held that once the rolling easement is established, "it is implied that the easement moves up or back" to shift with the natural movements of the beach.[171]

In the dramatic 2007 *Severance* case, a private property owner challenged the State of Texas' enforcement of its rolling beach easement policy as a violation of the Fifth Amendment's takings clause.[172]

In April 2005, Carol Severance purchased two beachfront properties on West Galveston Island.[173] She improved the two properties, each containing a single-family home, and began renting them to raise income.[174] In September 2005, Hurricane Rita struck the Gulf Coast, causing significant erosion.[175] Due to the storm-based erosion, the vegetation line shifted landward, and the homes were subsequently located on a public beach.[176] Enforcing its rolling easement policy, the State of Texas requested that Carol Severance move her homes to the upland portion of her property landward of the relocated vegetation line.[177]

Although the case challenged the Texas Open Beaches Act,[178] the U.S. District Court recognized a rolling beach easement moving with the natural boundaries of the shoreline as rooted in Texas common law.[179] In distinguishing its holding from the *Lucas* and *Palazzolo* decisions, the court held that the "public's rolling beach easement was established long before Severance ever purchased her rental properties, and the easement is one of the 'background principles' of Texas littoral property law."[180]

In both *Brannan* and *Severance*, the use of the common law doctrine of erosion and accretion as the underpinning to Texas' rolling easement policy exposes the lack of balance to an otherwise proportional doctrine. A significant basis of the doctrine of erosion and accretion involves a rough proportionality

---

169 *Id.*

170 *Id.* at *6.

171 *Id.* at *39.

172 Severance v. Patterson, 485 F. Supp. 2d 793, 797 (S.D. Tex. 2007). Severance also alleged the Texas Open Beaches Act effected an illegal seizure under the Fourth Amendment. *Id.* at 798.

173 *Id.*

174 *Id.*

175 Severance v. Patterson, 566 F.3d 490, 494 (5th Cir. 2009).

176 *Id.*

177 *Id.*

178 *Id.* at 492.

179 *Severance*, 485 F. Supp. at 804.

180 *Id.*

such that a property owner knows she may gain or lose land over time. At its core, the doctrine is one of equity.

In light of projected climate change impacts, it is fair to say that in most circumstances, a coastal property owner will not have much, if anything, to gain. When used to support challenges to adaptations meant to manage sea level rise and resulting erosion, the doctrine will "consistently work to the detriment of private property owners [such that] there is no longer any implicit fairness or symmetry."[181]

As courts continue to resolve cases involving the use of rolling easements, they may be guided by a lopsided common law doctrine. Because property owners will have nothing to gain by a state's use of rolling easements, its application will continue to be fiercely challenged. These challenges, based on the complete loss of citizens' homes and investments, warrant a deeper look into the practical nature of the policies and may indicate a need for the common law doctrine to shift to accommodate the transforming nature of climate-related impacts.

2. *How beach nourishment projects may upend common law based littoral rights: An assessment of* Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection

Based on common law doctrine, littoral rights can make sense for the modern day challenges of climate change if adjusted accordingly. For states buttressing their shorelines by restoring and nourishing eroding beaches, the challenges stemming from *Stop the Beach Renourishment* should signal the need to closely examine and, where necessary, clarify state-based littoral laws.

Initially filed in July 2005, the case involves Stop the Beach Renourishment, Inc., a non-profit association consisting of six Florida property owners, which contended that the State of Florida violated its constitutional rights by taking private property for public use without just compensation when it restored 6.9 miles of eroded beach pursuant to statutory law.[182] Following the 2008 Florida Supreme Court's holding that the State's beach nourishment project did *not* constitute a taking of private property, the Supreme Court of the United States granted certiorari in 2009 to review the case.[183]

In 1961, the Florida legislature enacted the Beach and Shore Preservation Act.[184] According to the Act, the Florida Department of Environmental Protection must conduct a survey to determine the mean high tide line

---

[181] Hiatt, *supra* note 60, at 384.

[182] Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1106 (Fla. 2008).

[183] *Id.*, *cert. granted*, 129 S. Ct. 2792 (2009) (No. 08-1151).

[184] FLA. STAT. ANN. §§ 161.011-.45 (2006).

(MHTL)[185] for the area upon commencement of a beach nourishment project.[186] After the MHTL is established, an erosion control line (ECL), guided by the line of mean high water, becomes the new *fixed* property boundary between public lands and upland property owners.[187] As specified by the Act, "once the [ECL] . . . is established . . . the common law no longer operate[s] to increase or decrease the proportions of any upland property lying landward of such line."[188]

One of the most significant issues in *Stop the Beach Renourishment* involved the upland property owners' claims that the State of Florida violated their common law littoral rights.[189] Stop the Beach Renourishment, Inc. asserted that the State's Beach and Shore Preservation Act unconstitutionally violated the upland owners' common law littoral rights by fixing the otherwise dynamic shoreline, thereby severing their contact with the water and divesting them of their right to receive accretions.[190]

Florida courts have held that littoral rights are constitutionally protected private rights, but the exact nature of these rights has rarely been described in detail.[191] Such vagueness led the trial court to find that the State's beach nourishment project was a taking of the property owners' littoral rights.[192] On appeal, having never before "addressed whether littoral rights are unconstitutionally taken based solely upon an upland owner's direct contact with the water,"[193] the Supreme Court of Florida reversed the lower court's decision.[194] Holding that the upland owners have no independent right of contact with the water, the court declared that contact with the water is ancillary to the littoral right of access to the water.[195] The court reasoned that nothing was lost because the property owners explicitly retained access to the ocean.[196]

---

[185] NOAA, *supra* note 130, at 15.

[186] FLA. STAT. ANN. § 161.141 (West, Westlaw through 2010 Act 282).

[187] *Id.* § 161.191(1) (emphasis added).

[188] *Id.* § 161.191(2).

[189] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2595 (2010). Although state interpretations of common law littoral rights vary widely, Florida's common law littoral rights doctrine includes the rights of access, use, and view. Bd. of Trs. of the Internal Improvement Tr. Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934, 936 (Fla. 1987). Within the right to access is the right of contact with the water. KALO ET AL., *supra* note 19, at 42. In addition, Florida recognizes a right to accretion as a distinct, contingent, and future littoral right. *See* Brisknell v. Trammel, 82 So. 221 (Fla. 1919).

[190] Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1107 (Fla. 2008).

[191] Webb v. Giddens, 82 So. 2d 743, 745 (Fla. 1955).

[192] Save our Beaches v. Fla. Dep't of Envtl. Prot., 27 So. 3d 48, 56 (Fla. Dist. Ct. App. 2006).

[193] *Stop the Beach Renourishment, Inc.*, 998 So. 2d at 1119.

[194] *Id.* at 1120.

[195] *Id.*

[196] *Id.* at 1119.

The Florida Supreme Court sidestepped the facial claim that the Beach and Shore Preservation Act divested the owners of future rights to accretion by applying the common law doctrine of avulsion.[197] The court held that under Florida common law, hurricanes, such as 1995's Hurricane Opal that led to the erosion of the beach in question, are considered avulsive events.[198] Under the doctrine of avulsion, the owner of the lost land (in this instance, the State of Florida) may reclaim a sudden loss of land without a change in title.[199] By allowing the state to reclaim its storm-damaged shoreline by adding sand to submerged lands, the Florida Supreme Court determined the Act not only followed common law, but it also remained facially constitutional.[200]

In its June 2010 decision, the U.S. Supreme Court agreed that the beach nourishment project fell under Florida's doctrine of avulsion.[201] The U.S. Supreme Court held that the Florida Supreme Court did not eliminate a right of accretion established under Florida law.[202] Given the changeable nature of applicable doctrines as they relate to beach nourishment adaptations, coastal states may want to begin addressing the implications of those projects and their impact on the littoral rights of upland owners.

B. Seeking Equitable Solutions While Limiting Legal Conflict: Lessons Learned from the Gulf Coast

In seeking equitable solutions in the face of climate-related effects, both coastal private property owners and states need to acknowledge that "equitable" may mean both parties are equally unhappy. Not only are states struggling with how best to manage, protect, and preserve rapidly eroding coastlines, but private beachfront owners are left to intensely defend their disappearing properties and associated rights. Both parties to the coastal land use conflict are bearing losses and facing unprecedented changes.

In the inevitable event of a coastal property dispute, courts are left to sort out how best to functionally and equitably respond to the unique conditions along the shoreline. In the Texas and Florida cases outlined above, the courts relied on background principles of common law to uphold the states' statutory-based adaptation strategies. As applied to the scope and scale of climate change effects, the cases revealed the shortcomings of the common law-based

---

[197] *Id.* at 1116.

[198] *Id.*; *see also* Georgia v. South Carolina, 497 U.S. 376, 404 (1990) (stating where avulsion has occurred, the boundary line remains the same regardless of the change in shoreline).

[199] *Stop the Beach Renourishment, Inc.*, 998 So. 2d at 1117.

[200] *Id.*

[201] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2613 (2010).

[202] *Id.* at 2612.

doctrines. In upholding Texas' rolling easement policy, the *Brannan* and *Severance* cases exposed the lack of equilibrium to the otherwise proportional doctrine of erosion and accretion. In supporting the Beach and Shore Preservation Act in *Stop the Beach Renourishment,* both the Florida Supreme Court and the U.S. Supreme Court revealed the importance of addressing just how beach nourishment as a climate change adaptation affects the littoral rights of private landowners as well as those of the state.[203]

The inadequacies of background common law doctrines in relation to climate change adaptations present challenges for state-based coastal land use laws. States may be reluctant to enact or amend legislation that aligns common law doctrines with the changing circumstances arising from climate change. If the common law doctrines shift too much in relation to new climate conditions, states run the risk of obviating a statutory background principles defense. In light of *Lucas* and *Palazzolo,* just how much laws can flex to accommodate the impacts from climate change will be an increasingly thorny matter.

In spite of the ambiguous boundaries of background principles of law, states should address the transforming nature of climate change to law itself. States, through legislative action, may be able to make minor adjustments that reduce legal challenges and allow agencies to steadily continue to protect the shoreline in the midst of rising seas. It is more likely, however, that climate change and its immense impacts will necessitate the evolution of common law to best balance the public and private interests in the ever-changing shoreline.

1. Can common law doctrines flex to accommodate the changing circumstances created by climate-related conditions?

Using common law doctrines to sort out coastal land use challenges may require acknowledging climate change's transforming nature to law itself. As the Texas and Florida cases demonstrate, excessive erosion of the shoreline is creating unparalleled tension for not only landowners, but also the law. Given the challenges arising for coastal land use law, the question becomes whether the common law doctrines underlying coastal land use law can adapt to the new circumstances, and if so, whether they should.

Perhaps the greatest strength of the common law is "its flexibility and ability to achieve justice and fairness in individual cases."[204] Inherent in its very nature, "common law can evolve to provide remedies for injuries not imagined

---

[203] *Stop the Beach Renourishment, Inc.*, 998 So. 2d at 1117; *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2612.

[204] Michael D. Axline, *The Limits of Statutory Law and the Wisdom of Common Law, in* CREATIVE COMMON STRATEGIES FOR PROTECTING THE ENVIRONMENT 53, 71 (Clifford Rechtschaffen & Denise Antolini eds., 2007).

a century or even a decade ago."[205] Oliver Wendell Holmes, one of America's most influential commentators on the common law, argued that the common law "is to be conceived of as an organic growth responsive to necessities and ideas evolving over time . . . always reaching for—but never achieving—consistency."[206]

Guided in large part by state common law, private property has been subject to different interpretations by state legislatures and state courts over time.[207] Legislatures and courts have consistently adjusted property arrangements to better serve the needs of the community and its changing conditions.[208] The mere grant of legislative power in a constitution implies the right of the legislature to take the lead in changing common law if necessary.[209] The court's role is to interpret statutes, apply regulations, and, where necessary, fine-tune common law rules.[210] The resulting laws defining the rights and responsibilities for landowners "have been changing ever since private property was introduced."[211]

Longstanding case law demonstrates that the nature of littoral rights and the effect of erosion and accretion on riparian lands are primarily issues of state law.[212] Although climate change and its impending impacts may provide the optimal basis for shifting the common law to be better aligned with present-day needs, states may be reluctant to modify the doctrines. With the opinions and decisions of both *Lucas* and *Palazzolo* coloring the recent past, states may be especially hesitant to modify the common law doctrines out of concern that they will no longer be considered background principles of state property law.

As a result, state courts are drawing upon unrevised common law doctrines to defend against takings challenges to state legislation aimed at protecting the coast, even as the courts struggle to ground the conditions in background principles of law. For example, in the 2010 *Brannan* decision, the Texas Court of Appeals denied compensation to the landowner's estate when her homes became subject to the sea and declared that the actions at issue were "not an act

---

[205] James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After Lucas*, 35 ECOLOGY L.Q. 1, 24 (2008).

[206] Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, *in* HOLMES AND THE COMMON LAW: A CENTURY LATER 1-2 (Benjamin Kaplan ed., 1981).

[207] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 6 (1992).

[208] Dill v. State, 332 A.2d 690, 702 (Md. Ct. Spec. App. 1975).

[209] *Id.*

[210] ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 261 (2003).

[211] *Id.* at 120-21.

[212] *See, e.g.*, City of St. Louis v. Rutz, 138 U.S. 226, 249-50 (1891) (asserting that rights with respect to accretion or reliction are governed by the law of the state).

of the government."[213] Yet, even as the court acknowledged the situation was beyond the control of the government and therefore beyond compensation, it grounded its approval of the Texas Open Beaches Act and its rolling easement policy in the common law doctrine of erosion and accretion, thereby exposing the disproportionate nature of an otherwise balanced doctrine.[214]

In Florida's *Stop the Beach Renourishment*, the Florida Supreme Court acknowledged that the "common law has never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of the upland owners."[215] Nonetheless, both the state supreme court and the U.S. Supreme Court upheld the Beach and Shore Preservation Act, finding that the Act, based on Florida common law, achieves a reasonable balance between public and private interests in the shore.[216]

Texas and Florida are not alone in their coastal struggles. Other state courts adjudicating takings challenges are referencing common law doctrines in their decisions to not compensate private landowners. For example, as noted above, the superior court of Rhode Island in re-examining the *Palazzolo* decision found a common law doctrine sufficient as a background principle to bar compensation to Mr. Palazzolo.[217] In 2009, the Hawai'i Intermediate Court of Appeals upheld a state statute[218] that eliminated oceanfront landowners' rights to future accretions.[219] Even as the Hawai'i statute radically departed from the general doctrine of accretion whereby adjacent private landowners gain title to gradually accreting lands, the court drew upon the common law-based public trust doctrine as a fundamental principle of Hawai'i constitutional law.[220] The court held that the statute did not effectuate a takings violation because the existence of the common law doctrine diminished any expectations that oceanfront owners may have in future accretions.[221] It may very well be that in both Rhode Island and Hawai'i, the common law-based public trust doctrine adequately served to resolve the legal conflicts between the parties. These examples serve more to demonstrate the court's seeming reluctance to simply

---

[213] Brannan v. Texas, No. 01-08-00179-CV, 2010 Tex. App. LEXIS 799, at *65 (Feb. 4, 2010).

[214] *Id.*

[215] Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1114 (Fla. 2008).

[216] *Id.* at 1120; Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2612 (2010).

[217] Palazzolo v. State, No. WM99-0297, 2005 WL 1645974, at *15 (R.I. Super. Ct. July 5, 2005).

[218] HAW. REV. STAT. § 669-1(e) (2008).

[219] Maunalua Bay Beach Ohana v. State, 122 Haw. 34, 50, 222 P.3d 441, 457 (App. 2009).

[220] *Id.* at 54, 222 P.3d at 461.

[221] *Id.*

defer to the legislature and any newly decreed laws without substantiation from settled common law.

Where common law doctrines no longer adequately resolve coastal land disputes, they may need to evolve to better fit the changing conditions. The *Lucas* and *Palazzolo* decisions may, however, act to create a static property regime. By requiring courts to identify a background principle of state property law to overcome a takings challenge, such a regime may inevitably become an anachronism and an obstacle to progress.[222] If the common law should become crystallized, it would cease to be the common law of history and would be an inelastic and arbitrary code.[223]

In light of the urgency of climate change and its impacts, the common law's adaptability to new situations may prove crucial.[224]

2. *If freed from the constraints of* Lucas *and* Palazzolo, *how could states update and align the common law doctrine of littoral rights to better suit the unique challenge of large-scale sea level rise?*

Large-scale sea level rise due to climate change may be beyond the scope of common law-based littoral rights. Simply put, the littoral rights doctrine could not have anticipated the sheer unprecedented enormity of the projected loss of coastal land due to climate change. The doctrine of littoral rights should either evolve to adapt itself to new circumstances, or the courts should recognize that the doctrine might not be applicable to the anthropogenically-derived changes to the shoreline. Although there is nothing inherently wrong with the Texas and Florida courts using common law as a basis for statutes and policies designed to protect and preserve the coastline, modifying the common law for current circumstances may yield benefits. For example, clearly delineated common law doctrines provide transparency and openness, leading to balanced, or at least better understood, outcomes for private landowners.[225] In addition, by better aligning common law doctrines, the public may be able to more accurately measure the effects of newly devised climate-related statutes on private owners.[226]

If the Texas courts revise the littoral rights doctrine, or simply do not use it as a basis for its rolling easement policy, the courts, at a minimum, would not be guided by a disproportional doctrine. As a basis for its policy, littoral rights,

---

[222] FREYFOGLE, *supra* note 210, at 259.

[223] *In re* Hood River, 227 P. 1065, 1086-87 (Or. 1924).

[224] Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 78 (2009).

[225] FREYFOGLE, *supra* note 210, at 263.

[226] *Id.*

in particular the doctrine of erosion and accretion, should be one of balance and fairness. Continuing to reference unrevised common law doctrines in the face of climate change may simply intensify the fierce challenges facing the courts.

In Florida's *Stop the Beach Renourishment* case, the Florida Supreme Court utilized the common law doctrine of avulsion as its legal basis for addressing the challenges arising from the State's beach nourishment project.[227] In referring to the action as an avulsion,[228] the court was either signaling a change in the preexisting understandings of avulsion, or was pointing to a lack of an adequate doctrinal foundation to the State's project.[229] On review by the U.S. Supreme Court, Justice Scalia, writing the plurality opinion, agreed with the Florida Supreme Court's application of the doctrine of avulsion to the beach nourishment project in question.[230] Justice Scalia recognized that the Florida Supreme Court's opinion "described beach restoration as the reclamation by the State of the public's land," and stated that therefore it sufficed that its characterization of the littoral right to accretion is consistent with relevant principles of Florida law.[231]

Although Florida law treats hurricanes as avulsive events,[232] methodically planned beach nourishment projects may be better grounded under the lesser-recognized doctrine of "artificial accretion." States like California and Texas recognize the doctrine of artificial accretion.[233] The doctrine states that accretion arising from artificial means, such as the erection of a structure below the mean high tide line, becomes the possession of the state.[234] Additionally, when accretion is caused by the construction of artificial works, the upland boundary no longer moves but becomes fixed at the ordinary high-water mark at the time the artificial influence is introduced.[235]

Under an artificial accretion label, the public would have better recognized the parameters of ownership within the beach nourishment context. Likewise,

---

[227] Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1116 (Fla. 2008).

[228] Surfrider Foundation's Amicus to the U.S. Supreme Court added to the avulsion muddle by advocating the beach nourishment project as an "artificial avulsion"—a term unknown until now. Brief for Surfrider Foundation as Amicus Curiae Supporting Respondents at 20, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010) (No. 08-1151).

[229] *Stop the Beach Renourishment, Inc.*, 998 So. 2d at 1114.

[230] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2611 (2010).

[231] *Id.* at 2612.

[232] Bryant v. Peppe, 238 So. 2d 836, 838 (Fla. 1970).

[233] *See, e.g.*, City of Los Angeles v. Anderson, 275 P. 789 (Cal. 1929); Dalton & Sons Co. v. Oakland, 143 P. 721 (Cal. 1914); Lorino v. Crawford Packing Co., 175 S.W.2d 410 (Tex. 1943).

[234] *See City of Los Angeles*, 275 P. at 791; *Dalton*, 143 P. 721.

[235] California *ex rel.* State Lands Comm'n v. United States, 457 U.S. 273, 277 (1982).

by better defining public and private property rights associated with climate-related adaptations, courts may more readily resolve future takings challenges.

IV. CONCLUSION

In a changing world it is impossible that it should be otherwise.

- Justice Sutherland[236]

As states struggle to manage and protect their coastlines from the impacts of climate change, they must also safeguard against takings challenges by invoking background principles of common law currently held static by the decisions of *Lucas* and *Palazzolo*. As noted by Joseph Sax, it is worth recognizing that in other periods of uncontrollable change, property rules have flexed:[237] "Rather than compensate all the owners disadvantaged by the industrial revolution . . . property rules changed to promote and encourage development."[238] For example, both the industrial and environmental eras left "uncompensated victims in their wake."[239] Background principles of property law could not "explain the failure to compensate" owners of affected land.[240] Recognizing the social changes underway, courts encouraged adaptive behavior through noncompensation.

Climate change and its impacts epitomize yet another era of social and legal transformation. Its unprecedented scope presents unique challenges to American property law. Its harms are serious and the severity of the associated injuries will only increase over the course of the next century.[241] By stifling the common law under the aegis of the *Lucas* and *Palazzolo* background principles requirement, states and courts are unable to adequately shift the law in response to the challenges of climate change. However unsettling a shifting common law may be, allowing the law to flex creates better alignment with present day needs.[242] As Justice Kennedy stated in his concurring opinion in *Stop the Beach Renourishment*, "State courts generally operate under a common-law tradition that allows for incremental modifications to property law."[243]

---

[236] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

[237] Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1449 (1993).

[238] *Id.* at 1450.

[239] *Id.* at 1499.

[240] *Id.*

[241] Massachusetts v. EPA, 549 U.S. 497, 523-24 (2007).

[242] FREYFOGLE, *supra* note 210, at 261.

[243] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2615 (2010) (Kennedy, J., concurring).

Climate change is beginning to transform life on Earth. Rising seas threaten to inundate low-lying areas and islands, erode shorelines, damage property, destroy ecosystems, and jeopardize dense coastal populations.[244] Climate change impacts may present even greater justifications for state-based legal evolution than did products liability in tort law, which generated repeated reliance upon, and justification for, state common law development.[245] After all, federalism permits states "to perform their separate functions in their separate ways."[246]

State-based legal evolution is sensible for two primary reasons. First, the impacts of climate change are often intensely local, affecting local ecologies, values, and customs.[247] Second, no one is quite sure how to approach the specifics of climate change and necessary adaptations yet, suggesting that this field of law may benefit from the oft-cited "laboratory of the states"[248] aspects of common law.[249]

Instead of misrepresenting or distorting common law doctrines underpinning adaptation responses, courts need to embrace the changing nature of common law in response to climate change. As Justice Sutherland pointed out in 1933,

> The final question to which we are thus brought is not that of the power of the . . . courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts . . . to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.[250]

In essence, the old legal rules must shift to make sense in a rapidly changing world. As messy, complex, and disconcerting as changing common law doctrines of property may be, to keep them from evolving along with

---

[244] Nicholls et al., *supra* note 16, at 319.

[245] Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE. L. REV. 475, 517-18 (2002).

[246] Younger v. Harris, 401 U.S. 37, 44 (1971).

[247] Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common Law Public Trust Doctrines*, 34 VT. L. REV. 781, 807 (2010) (pointing to scholars arguing for common law experimentation and/or local law dominance in the same vein as products liability cases).

[248] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.").

[249] Andrew Halkyard & Stephen Phua Lye Huat, *Common Law Heritage and Statutory Diversion—Taxation of Income in Singapore and Hong Kong*, 2007 SING. J. LEGAL STUD. 1, 24.

[250] Funk v. United States, 290 U.S. 371, 383 (1933).

contemporary needs is to turn property into something far different than it is—an organic, flexible institution capable of responding to diverse aims.[251]

[251] FREYFOGLE, *supra* note 210, at 259.

Ensuring Our Future by Protecting Our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection

Matthew Kekoa Keiley*

PROLOGUE

The sounds of the uwē[1] travel across the ocean on the brisk night wind. As family members assemble around the body, a grieving mother gently whispers the names of those entering the hale[2] into the unhearing ears of the young man.[3] Those gathered spend the night recalling tales of the young man's life;[4] the wailing continues to pierce the heavy night air. Both the night and the wailing slowly creep to a solemn close as those present perform oli,[5] mele,[6] and hula[7] to honor the memory of the deceased.[8]

The young man is pleased. Although his earthly form no longer exists, his 'uhane[9] lingers near his iwi.[10] He spends the night breathing in the stories and

---

* J.D. Candidate 2011, William S. Richardson School of Law, University of Hawai'i at Mānoa. I would like to thank Professor Susan Serrano for her guidance throughout the writing process.

[1] Uwē, also spelled uē, means "[t]o cry, weep, lament, [or] mourn." MARY KAWENA PŪKU'I & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 363 (rev. ed. 1986). When a loved one died, family members would uwē to mourn the loss. *See* Moses Haia & Erline Greer, *Iwi Kūpuna: Native Hawaiian Burial Rights, in* NATIVE HAWAIIAN RIGHTS HANDBOOK 16-5 (Melody MacKenzie, Susan Serrano & D. Kapua'ala Sproat eds., forthcoming 2011).

[2] "House, building, [or] lodge." PŪKU'I & ELBERT, *supra* note 1, at 52.

[3] After the person's death, people would gather to mourn the passing. A close relative would whisper the names of those people gathered into the ear of the deceased. *See* Haia & Greer, *supra* note 1, at 16-5.

[4] After the passing of a relative, surviving relatives would gather and recall the memories of the deceased. *See id.*

[5] "Chant that was not danced to, especially with prolonged phrases chanted in one breath, often with a trill ('i'i) at the end of each phrase." PŪKU'I & ELBERT, *supra* note 1, at 285.

[6] Song, anthem, or chant of any kind." *Id.* at 245.

[7] *See id.* at 88.

[8] After a person's death, relatives would gather and perform the favorite songs and dances of the deceased. *See* Haia & Greer, *supra* note 1, at 16-5.

[9] 'Uhane refers to one's soul or spirit. PŪKU'I & ELBERT, *supra* note 1, at 363.

[10] According to Pūku'i and Elbert, iwi means bones. PŪKU'I & ELBERT, *supra* note 1, at 104. "The bones of the dead, considered the most cherished possession, were hidden, and hence there are many figurative expressions" regarding iwi. *Id.* at 104. The terms "nā iwi kūpuna" and "iwi kūpuna," which loosely translate to "the ancestral bones," will be used

enjoying the company of his closest family members and friends. He watches solemnly as the ceremonies come to a close and the grieving guests file out of the hale.

Cloaked in the protection of the dark moonless night,[11] family members of the deceased silently work their way down the coastline carrying the fleshless[12] remains of the once lively youth. Soon after departing the home and silently navigating through the sand dunes, the caravan finds the decedent's final resting place in the sacred sands at Naue among the iwi of his ancestors.[13] Naue, a known leina a ke Akua, leina a ka 'uhane on the island of Kaua'i,[14] will serve as a leaping off point for the young man's 'uhane. From here, he will join his ancestors in eternity.

The iwi, interred deep under the protection of the shifting, golden sands,[15] impart the young man's mana to the ground,[16] further sanctifying the sacred area where he and his ancestors now lie. After cleansing themselves in the dark waters of the bay, the caravan retreats back to their homes before the first light of day kisses the shore.

Nā iwi kūpuna represent the immortality of our ancestors.[17] After the flesh decays, the bones remain.[18] The bones of our Native Hawaiian ancestors symbolize an important link between our past, present, and future.[19] The bones

---

throughout this paper to refer to ancient Hawaiian remains. *See id.* After death, a person's spirit would linger near his iwi. *See* Haia & Greer, *supra* note 1, at 16-4.

[11] To prevent enemies from finding the final resting spot of a decedent's remains, family members would inter the remains under the protection of the night. Haia & Greer, *supra* note 1, at 16-5.

[12] Native Hawaiians would steam and remove the flesh from bones in a process called pūholoholo. The flesh would then be deposited into the deepest part of the ocean. *See id.* at 16-6.

[13] Hawaiians buried their relatives near the home in order to provide for the safekeeping of the burial. Burial of bones in sand occurred often because sand aided in the secrecy of the burial site. *See id.* at 16-5.

[14] According to Native Hawaiian practices, iwi were often buried in areas known as leina a ke Akua, leina a ka 'uhane. Erline Greer, Remarks at Auwē in Naue: The Future of Hawai'i's Burial Laws, Maoli Thursday Forum at the William S. Richardson School of Law (Nov. 5, 2009) (video on file with author). These places were known as jumping off points into Pō (eternity). *Id.* These sacred places connected the earthly realm with the afterworld. *Id. See also* Diana Leone, *Kaua'i Home Construction Tests Burial Treatment Law*, HONOLULU ADVERTISER, July 9, 2009, at A1.

[15] The interment of bones in sand was preferred over interment in dirt because such burials left no evidence of ground movement. Haia & Greer, *supra* note 1, at 16-5.

[16] Iwi impart mana, or spiritual power, to the ground upon interment. *Id.* at 16-4. Native Hawaiians believe that this spiritual power sanctified the entire area surrounding a burial. *Id.*

[17] *See* Matthew J. Petrich, *Litigating NAGPRA in Hawai'i: Dignity or Debacle?*, 22 U. HAW. L. REV. 545, 549 (2000).

[18] *See* Haia & Greer, *supra* note 1, at 16-4.

[19] *See* Petrich, *supra* note 17, at 549.

possess mana,[20] or spiritual power, which upon burial is transferred to the ground, thus replenishing the earth from which all life springs.[21] This cyclical return of power to the land resembles the Western concept of earth to earth, ashes to ashes, dust to dust.

Once secreted away as a means to protect the remains of their kin, unmarked Native Hawaiian remains are today vulnerable to destruction. Although the common law has traditionally protected human remains,[22] ancient, unmarked Native Hawaiian burial sites have not historically received sufficient legal protection. Consequently, Native Hawaiians must still fight to protect the remains of their ancestors.[23] Today, turmoil has arisen across the state over the protection of these ancient remains. Desecration of Native Hawaiian burials, which began from the time foreigners first arrived in Hawai'i,[24] is currently driven by development and economic interests and has led to the severance of the important link between Native Hawaiians and nā iwi kūpuna.

I. INTRODUCTION

> *"Show me the manner in which a nation or a community cares for its dead, and I will measure with mathematical exactness the tender sympathies of its people, their respect for the laws of the land, and their loyalty to high ideals."*[25]

The importance of returning the deceased body to the earth is commemorated in Hawaiian history through the Kumulipo.[26] According to this creation chant, the interment of Hāloanaka[27] was the first burial in Hawai'i.[28] Hāloanaka was the stillborn child of Wākea (father sky)[29] and his daughter, Ho'ohōkūkalani.[30]

---

[20] Mana is a "[s]upernatural or divine power." PŪKU'I & ELBERT, *supra* note 1, at 235.

[21] Haia & Greer, *supra* note 1, at 16-4.

[22] *Id.* at 16-8 to -10.

[23] *See* Hui Mālama i Nā Kūpuna o Hawai'i Nei v. Wal-Mart, Inc., Civ. No. 03-1-0011-12 (Haw. 1st Cir. 2003) (holding Wal-Mart not liable for desecration of iwi which occurred during construction of a new store in Honolulu); Kaleikini v. Thielen, Civ. No. 07-1-067-01 (Haw. 1st Cir. 2007) (noting that developer, General Growth Properties, Inc., unearthed sixty-five burials at the site of a proposed Whole Foods supermarket in Kaka'ako); Order Granting in Part and Denying in Part Defendant Jeffrey T. Chandler's Motion for Preliminary Injunction, Brescia v. Edens-Huff, Civ. No. 08-1-0107 (Haw. 5th Cir. Oct. 2, 2008) (allowing landowner and luxury property developer, Joseph Brescia, to construct a home on top of seven sets of remains).

[24] Petrich, *supra* note 17, at 546.

[25] Haia & Greer, *supra* note 1, at 16-2 (quoting British Prime Minister William Ewart Gladstone).

[26] Kumulipo is the name of the Hawaiian creation chant and means "[o]rigin, genesis, source of life, [or] mystery." PŪKU'I & ELBERT, *supra* note 1, at 182.

[27] Hāloanaka literally translates to "quivering long stalk." Haia & Greer, *supra* note 1, at 16-2.

[28] *Id.*

[29] Wākea is "[t]he mythical ancestor of all Hawaiians" also known as "father sky." *See*

From this burial site sprouted Hawai'i's first kalo[31] plant. In a subsequent mating between Wākea and Ho'ohōkūkalani, another child, Hāloa,[32] was born who is believed to be the younger sibling of Hāloanaka and the progenitor of the Hawaiian race.[33]

This creation story "establishes the interconnection, the interdependent relationship between the gods, the land and the people. The burial of iwi results in physical growth of plants and the spiritual growth of mana (life force)."[34] The Native Hawaiian people gain sustenance from these plants and are thus nourished and receive the rewards of this spiritual growth through the proper care of nā iwi kūpuna, completing the circle.[35] Because Native Hawaiians have an interconnected relationship with nā iwi kūpuna, desecration of the bones results in direct cultural and physical harm to the people;[36] the desecration of bones leads to a depletion of mana as well as spiritual and social decay.[37]

Because of the important implications tied to desecration of nā iwi kūpuna, ancient Hawaiians took much pride in protecting the iwi of their deceased family members.[38] Death did not sever the tie between the dead and the living;[39] according to Native Hawaiian beliefs, the 'uhane traveled with the iwi even after death.[40] After death, the 'uhane took one of three different paths: it "could join the 'aumākua (gods)[41] in Pō (eternity),[42] it might stay in the burial

---

PUKU'I & ELBERT, *supra* note 1, at 381; *see also* Haia & Greer, *supra* note 1, at 16-2.

[30] Ho'ohōkūkalani translates to "star-of-heaven." Haia & Greer, *supra* note 1, at 16-2.

[31] Kalo is the Hawaiian word for taro. "In Hawai'i, taro has been the staple [food] from earliest times to the present, and here its culture developed greatly including more than 300 forms. All parts of the plant are eaten[.]" PUKU'I & ELBERT, *supra* note 1, at 123.

[32] Hāloa literally translates to "far-reaching" or "long." *Id.* at 54.

[33] Haia & Greer, *supra* note 1, at 16-2.

[34] *Id.* (quoting Kunani Nihipali, *Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 36-37 (2002)).

[35] *See id.* at 16-2 to -3.

[36] *See* Petrich, *supra* note 17, at 546.

[37] Edward Halealoha Ayau, *Restoring the Ancestral Foundation of Native Hawaiians: Implementation of the Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 193, 216 (1992).

[38] *See* Haia & Greer, *supra* note 1, at 16-4.

[39] Petrich, *supra* note 17, at 549.

[40] Haia & Greer, *supra* note 1, at 16-4.

[41] 'Aumākua are "[f]amily or personal gods, deified ancestors who might assume the shape of sharks, owls, hawks, mudhens, octopuses, eels, mice, rats, dogs, caterpillars, rocks, cowries, clouds, or plants. A symbiotic relationship existed; mortals did not harm or eat 'aumakua, and 'aumakua warned and reprimanded mortals in dreams, visions, and calls." PUKU'I & ELBERT, *supra* note 1, at 32.

[42] Here, Pō is defined as eternity, but literally, pō translates to "[n]ight, darkness, [or] obscurity; the realm of the gods; pertaining to or of the gods, chaos, or hell; dark, obscure, [or] benighted." *Id.* at 333.

area and depart for the Milu (the underworld),[43] or a ritual known as 'unihipili[44] might keep the 'uhane alive in n[ā] iwi to serve its kahu[45] (keeper)."[46]

Desecration or destruction of the iwi would insult or force the 'uhane to leave the bones.[47] Desecration historically took many forms such as: (1) leaving bones uncovered or exposed to sunlight, (2) fashioning bones into fishhooks or other tools, and even (3) using the "skull as a spittoon or as a container for discarded food."[48] Total destruction of the iwi through the burning of the bones was considered the ultimate desecration, for this act would prevent the 'uhane from reaching its final resting place.[49] Traditionally, the bones of the first fallen enemy in battle would be burned as a sacrifice symbolizing defeat of the enemy.[50] According to Native Hawaiian beliefs, desecration of nā iwi was an act considered to be worse than murder; while murder may end a person's life on earth, desecration of nā iwi interferes with a person's afterlife, which lasts much longer than life on earth.[51]

Native Hawaiians have a kuleana,[52] or responsibility, to care for and protect nā iwi kūpuna.[53] "In turn our ancestors respond by protecting us on the spiritual side. Hence, one side cannot completely exist without the other."[54] In order to protect nā iwi kūpuna, Hawaiians would conceal graves so that enemies could not desecrate the remains of their loved ones.[55] Burial practices included hiding iwi in caves, lava tubes, and sand dunes where evidence of earth-moving activities could easily be erased.[56]

---

[43] *Id.* at 247.

[44] 'Unihipili refers to the "[s]pirit of a dead person, sometimes believed present in bones or hair of the deceased and kept lovingly. 'Unihipili bones were prayed to for help, and sometimes sent to destroy an enemy." *Id.* at 372.

[45] A kahu is an "honored attendant, guardian, nurse, keeper of 'unihipili bones, regent, keeper, administrator, warden, caretaker, master [or] mistress; pastor, minister, reverend, or preacher of a church." *Id.* at 113.

[46] Craig W. Jerome, *Balancing Authority and Responsibility: The Forbes Cave Collection, NAGPRA, Hawai'i*, 29 U. HAW. L. REV. 163, 173 (2006).

[47] Haia & Greer, *supra* note 1, at 16-4.

[48] *Id.*

[49] *Id.*

[50] HAWAII STATE AUDITOR, INVESTIGATION OF THE DEPARTMENT OF LAND AND NATURAL RESOURCES' PROCESS FOR DEVELOPING RECOMMENDED CANDIDATE LISTS FOR APPOINTMENT TO THE ISLAND BURIAL COUNCILS, REP. NO. 04-15, at 21 (2004) [hereinafter AUDITOR REPORT].

[51] *See* Hui Mālama i Nā Kūpuna o Hawai'i Nei, http://huimalama.tripod.com/ (last visited Oct. 3, 2010) [hereinafter Hui Mālama].

[52] Kuleana can also refer to one's right, privilege, or tenure. PŪKU'I & ELBERT, *supra* note 1, at 179.

[53] Hui Mālama, *supra* note 51.

[54] *Id.*

[55] Haia & Greer, *supra* note 1, at 16-4.

[56] Jerome, *supra* note 46, at 173.

The physical well-being of today's Native Hawaiian population is directly tied to our cultural well-being;[57] "[d]esecration [of nā iwi kūpuna] result[s] in injury and spiritual trauma to the living descendants of the deceased."[58] The "moving, desecration or disturbance of iwi can produce real harm in living descendants in the form of 'eha (hurt, pain or suffering),[59] kaumaha (feeling burdened, sorrowful),[60] and manewanewa[61] (grief, sorrow, and mourning)."[62] Thus, it must follow that the desecration of Native Hawaiian burial sites directly injures all current-day and future Native Hawaiians;[63] "[f]or Native Hawaiians, protection of their ancestors' bones is a cultural imperative."[64]

Chapter 6E of the Hawai'i Revised Statutes protects burials containing ancient Native Hawaiian remains.[65] This law, however, does not provide culturally meaningful protection for these remains when challenged by powerful developers with one goal—to turn land into profit regardless of the adverse cultural or physical impact development may have on the Native Hawaiian community.[66] Despite the legislature's beneficent intent, many Native Hawaiians view this statute as an illusory attempt to placate the community after a tragedy of momentous proportion—the removal and desecration of the remains of over a thousand iwi kūpuna at Honokahua, Maui.[67] Because the language of chapter 6E does not properly protect culturally significant Native Hawaiian remains, the statute should be revised to place the power in the hands of the indigenous people of Hawai'i—Native Hawaiians. The State, currently committed to reconciliation with Native Hawaiians for the harms caused by colonization,[68] should amend this law to better meet this commitment.

---

[57] *Id.*

[58] Haia & Greer, *supra* note 1, at 16-4.

[59] "Hurt, in pain, painful, aching [or] sore[.]" PŪKU'I & ELBERT, *supra* note 1, at 37.

[60] Kaumaha refers to a burden or heavy weight on someone. *See id.* at 137. It also refers to a sad, wretched, dismal, dreary, downcast, troubled, or depressed disposition. *Id.*

[61] Mānewanewa is a form of great grieving or mourning. As a part of this exaggerated form of grief, Native Hawaiians would go to such lengths as "knocking out [their own] teeth, cutting the hair in strange patterns, eating of filth, tattooing the tongue, [or] removing the malo [(loin cloth)] and wearing it about the neck." *Id.* at 238.

[62] Diana Leone, *Kauai Judge to Rule in Burials Dispute*, HONOLULU ADVERTISER, Sept. 9, 2008, at A1 (quoting Kaiana Markell, Dir. of Native Rights, Land and Culture, Office of Hawaiian Affairs).

[63] *See* Haia & Greer, *supra* note 1, at 16-4.

[64] Petrich, *supra* note 17, at 550.

[65] *See generally* HAW. REV. STAT. ch. 6E (2009).

[66] *See supra* note 23 and accompanying text.

[67] *See* Haia & Greer, *supra* note 1, at 16-10.

[68] For a detailed discussion of the State's commitment to reconciliation with Native Hawaiians, *see infra* Part IV.A.

This law, viewed as a measure of reconciliation, will be the topic of discussion in this article. Part II discusses the inadequate protection provided to unmarked Native Hawaiian burials under the common law and the subsequent enactment of Hawai'i's burial protection law. Part III will introduce a current controversy over unmarked Native Hawaiian burials on the island of Kaua'i, the case of *Brescia v. Edens-Huff*.[69] Part IV will describe Professor Eric Yamamoto's[70] "Social Healing Through Justice" theory,[71] which will serve as the relevant analytical framework for this article. This framework draws on various disciplines to assess reconciliation efforts between groups using four points of inquiry: recognition, responsibility, reconstruction, and reparations (the 4Rs). Using Professor Yamamoto's Social Healing Through Justice framework as modified to address indigenous injustices, Part IV will then shed light on the failure of chapter 6E at providing culturally meaningful protection for Native Hawaiian burials as specifically evidenced by the controversy introduced in Part III.

Finally, guided by the Social Healing Through Justice framework, Part V proposes three possible amendments to the current law. To further reconciliation efforts and grant Native Hawaiians greater self-determination, the law must demand the participation of Native Hawaiians in the disposition of *all*[72] Native Hawaiian remains and grant them with primary decision-making

---

[69] Civ. No. 08-1-0107 (Haw. 5th Cir. Oct. 2, 2008).

[70] "Eric K. Yamamoto is a professor of law at the William S. Richardson School of Law, University of Hawai'i at Mānoa, and is a graduate of the Boalt Hall School of Law, University of California at Berkeley. He is an award-winning teacher and writes in the areas of civil litigation procedure and racial justice. In the mid-1980's, prior to law teaching, Professor Yamamoto served as co-counsel to Fred Korematsu in the *coram nobis* litigation successfully reopening the infamous World War II Japanese American internment case *Korematsu v. U.S.* Much of his current civil rights and community law work and writing build on that experience." ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 330 (1999).

[71] The Social Justice Through Healing framework utilizes four praxis dimensions that can be used by conflicting groups to "conceptualize, ruminate on, and act on grievances underlying present-day tensions." *Id.* at 10. These four dimensions, the 4Rs, are "interactive parts of a larger 'complex process of unlocking painful bondage, of mutual liberation'–mutual liberation that 'frees the future from the haunting legacies of the [distant and recent] past.'" *Id.* at 12 (quoting GEIKO MUELLER-FAHRENHOLZ, THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION 5, 25 (1997)). This framework links healing and reconciliation through the reconstruction of healthy, productive relationships between conflicting groups. *Id.* For a detailed discussion of Yamamoto's framework, *see infra* Part IV.B.

[72] As currently written, Hawai'i's burial protection law grants the IBCs with decision making power over those Native Hawaiian burials that are "previously identified." HAW. REV. STAT. § 6E-43.5(f) (2009). Jurisdiction over Native Hawaiian burials that are "inadvertently discovered" is reserved to the State Historic Preservation Division (SHPD). *Id.* § 6E-43.6.

power rather than mere advisory powers.[73] Furthermore, in order to prevent abuse, this article will call for tangible guidelines to hold the State Historic Preservation Division (SHPD) accountable for its actions and decisions. This article concludes by advocating for further recognition of the importance of these burials by the governmental branches charged with protecting these burial sites as well as by the developers who may place economic development desires above the immeasurable value of nā iwi kūpuna to the Native Hawaiian community.

II. UNMARKED NATIVE HAWAIIAN BURIALS NEED SPECIAL PROTECTIONS UNDER THE LAW

It is disheartening not knowing who will care for my iwi (bones) when it is my time, because the next generations have moved away. We hope that some of the next generations will stay and that they will be dedicated to sharing the knowledge and conviction of caring for our ancestors. We must protect and perpetuate that kuleana, that responsibility, that we have to mālama i nā kūpuna, to take care of our ancestors, and the future generations.[74]

A. Unmarked Native Hawaiian Burial Sites Have Not Historically Received Sufficient Legal Protection

Care and reverence for the deceased has been universally recognized around the world and throughout history.[75] This universal reverence has become deeply rooted within the American culture; "many [Americans] presuppose the law will protect the remains of their loved ones from disturbance."[76] Then why is the sanctity of our iwi kūpuna challenged whenever economic development requires their removal?

The common law rule that classifies dead bodies as *res nullius*, things that belong to no one, arose out of Roman law.[77] According to Roman law, human corpses could not be owned.[78] Roman law recognized interment of a human

---

[73] After deciding whether "previously identified" Native Hawaiian remains should be preserved in place or reinterred in a different location, the IBCs' role becomes discretionary. The IBCs may only "make recommendations regarding appropriate management, treatment, and protection of [N]ative Hawaiian burial sites." *See id.* §§ 6E-43.5 to -43.6.

[74] Kunani Nihipali, *Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 33 (2002).

[75] Haia & Greer, *supra* note 1, at 16-2.

[76] Jennifer L. Williams, *Grave Disturbances: Been Digging Lately?*, 38 MCGEORGE L. REV. 299, 299-300 (2007).

[77] Haia & Greer, *supra* note 1, at 16-8.

[78] *See id.*

body as consecrating the area, thus dedicating the site "in perpetuity to the gods and decedent who dwelled below."[79] Adopting the Roman law, early English common law generally accepted the rule against holding proprietary interests in human remains.[80]

Although English common law treated human remains as belonging to no one, English real property law "recognized that one could hold a proprietary interest in the *land* that contained the human remains."[81] Because the remains become part of the land upon interment, landowners could bring a claim of trespass against those who disturb or disinter remains.[82] As discussed below, however, Native Hawaiians, through colonization, have been dispossessed of much of their lands.[83] If Native Hawaiians have been dispossessed of their own lands,[84] then who will protect their iwi kūpuna?

American common law traditionally protects the sanctity of the dead.[85] The next of kin were granted rights under the common law to provide for a decent burial and to ensure that the remains were not disturbed;[86] "the next of kin, while not in the full proprietary sense 'owning' the body of the deceased, have property rights in the body which will be protected."[87] This quasi-property interest in dead bodies denies to the kin of the deceased the entire "bundle of sticks" that property owners are usually granted.[88] Absent this bundle of sticks or appropriate protective laws, unmarked Native Hawaiian burials are extremely vulnerable to abuse because "[t]he unique circumstances surrounding Native Hawaiian burial practices, such as secreting burial site identification and utilizing communal areas such as sand dunes, can make claims on lineal descent very difficult to establish."[89]

Since the first foreigners landed on the shores of Kealakekua on the island of Hawai'i over two hundred years ago, the remains of our ancestors have been in constant peril.[90] The bones and cultural objects of our ancestors have since been disinterred on a "massive scale."[91] Before the passage of Act 306 in

---

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 16-9.

[83] *See infra* Part IV.B.

[84] *See* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994).

[85] Williams, *supra* note 76, at 300.

[86] *Id.*

[87] O'Donnell v. Slack, 55 P. 906, 907 (Cal. 1899).

[88] Haia & Greer, *supra* note 1, at 16-9.

[89] Jerome, *supra* note 46, at 194 (quoting Ronald Mun, Deputy Adm'r, Office of Hawaiian Affairs).

[90] *See* Petrich, *supra* note 17, at 546.

[91] *Id.*

1990,[92] "prehistoric, unmarked burials, in other words, burials that don't have any markers or fences around them, did not enjoy protection under the law. State laws dealt [only] with known graveyards and cemeteries."[93]

This "massive scale" desecration of nā iwi kūpuna leaves many Native Hawaiians asking the same question: "Na wai e ho'ōla i nā iwi? (Who will save the bones?)"[94]

B. Honokahua: The Foundation[95] for Hawai'i's Current Burial Protection Law

In 1988, the development of the Ritz Carlton in Honokahua, Maui unearthed approximately 1100 sets of Native Hawaiian remains dating back to 850 A.D.[96] With no legal recourse, Native Hawaiians watched powerlessly as their iwi kūpuna were exhumed.[97] One by one, the remains of men, women, children and infants were removed from the sand dunes overlooking Honokahua Bay—the place intended to be their final resting place.[98] Tensions rose with every subsequent disinterment until Native Hawaiians from across the state took a stand against the desecration.

The tragedy of Honokahua was a turning point for Native Hawaiians.[99] In response to this event, they demanded that the legislature take action to protect Native Hawaiian burials.[100] During a twenty-four hour vigil at the State Capitol, Native Hawaiians offered chants and cultural prayers for their iwi kūpuna.[101] This tragedy not only led state lawmakers to revise the State's Historic Preservation Law, but it also "resulted in a deeper consciousness among Native Hawaiians regarding their cultural and moral obligation to protect and care for nā iwi kūpuna."[102] In response to this heartbreaking event,

---

[92] *See* discussion *infra* Part II.B-C.

[93] Loren R. Dyck, *Honokahua: Evolutionary Moments of Transformative Cooperation* (2003) (unpublished manuscript) (on file with author).

[94] Haia & Greer, *supra* note 1, at 16-22.

[95] Honokahua literally translates to "foundation." Ken Miller, *Burial Ground Fuss Opens Up New Activism*, HONOLULU STAR-BULLETIN, Jan. 12, 1989, at A3 (quoting Pālikapu Dedman, Hawaiian activist).

[96] Melissa Tanji, *On the Shoulders of Their Ancestors*, MAUI NEWS, *available at* http://www.angelfire.com/hi2/hawaiiansovereignty/nagpramokapuhonokahua.html (last visited Oct. 21, 2010).

[97] *See* Haia & Greer, *supra* note 1, at 16-9.

[98] Hawai'i State Historic Preservation Division, *Nā Iwi Kūpuna: The Bones of Our Ancestors*, http://hawaii.gov/dlnr/hpd/naiwikupuna.htm (last visited Oct. 5, 2010) [hereinafter SHPD].

[99] Haia & Greer, *supra* note 1, at 16-10.

[100] Nihipali, *supra* note 74, at 34.

[101] *Id.*

[102] Haia & Greer, *supra* note 1, at 16-10.

Native Hawaiians demanded to be part of deciding the treatment and disposition of Native Hawaiian remains.[103]

Two months after the reinterment of the remains at Honokahua, Governor John Waihe'e[104] signed Act 306[105] into law. With his signature, Governor Waihe'e provided procedures for the proper protection and care of ancient Native Hawaiian burial sites on state and private lands.[106] More importantly, Act 306 created Island Burial Councils (IBCs). As discussed below, IBCs provided Native Hawaiians with a voice in the decision-making process for the protection of iwi kūpuna. Before this groundbreaking amendment, Native Hawaiians had no legal recourse for, or protection against, the desecration of nā iwi kūpuna.[107] As a result of the community's concerted response to the Honokahua tragedy, Native Hawaiian burials were finally granted the protection that their non-Native Hawaiian counterparts had always received.[108] However, although Act 306 was much celebrated at the time of its passing, it is insufficient to prevent current controversies over the disposition of nā iwi kūpuna—controversies this law was intended to prevent.[109]

---

[103] *Id.*

[104] Governor Waihe'e served as Hawai'i's governor from 1986 to 1994. He was the State's first elected governor of Hawaiian ancestry. *See* Nat'l Governors Ass'n, http://www.nga.org/portal/site/nga/menuitem.216dbea7c618ef3f8a27811050101 0a0/ (follow "Hawai'i" hyperlink; then follow "Gov. John Waihee" hyperlink) (last visited Oct. 3, 2010).

[105] Act of July 3, 1990, No. 306, 1990 Haw. Sess. Laws 955-65 (codified at HAW. REV. STAT. ch. 6E (2009)).

[106] CONF. COMM. REP. NO. 51, 15th Leg., Reg. Sess. (Haw. 1990), *reprinted in* 1990 HAW. SEN. J. 778. Hawai'i's burial laws pertain to State and private development. *See* HAW. REV. STAT. ch. 6E (2009). Under federal law, the Native American Graves Protection and Repatriation Act (NAGPRA) provides comprehensive requirements for the treatment of Native Hawaiian graves on federal and tribal lands. Most notably, this law provides for the repatriation, disposition, and protection of these items. *See* Native American Graves Protection & Repatriation Act, 25 U.S.C. §§ 3001-13 (2006). For a notable case discussing NAGPRA and the disinterment of over 1500 Native Hawaiian remains, *see* Na Iwi o Na Kupuna o Mokapu v. Dalton, 894 F. Supp. 1397, 1407 (D. Haw. 1995).

[107] Dyck, *supra* note 93.

[108] *See* Haia & Greer, *supra* note 1, at 16-8 to -10.

[109] After Honokahua and the enactment of Act 306, people certainly believed the law would prevent situations like that currently occurring on Kaua'i, where a property owner has essentially built a house on top of a burial ground. Joan Conrow, *Cut to the Bones: The State's Handling of Burial Sites Comes Under Fire*, HONOLULU WEEKLY, Apr. 7, 2010, at 6.

C. Act 306 Grants Native Hawaiians Only a Limited Voice in the Disposition of Native Hawaiian Remains through the Formation of IBCs

Act 306 created SHPD within the Department of Land and Natural Resources (DLNR).[110] SHPD is central to the enforcement of Hawai'i's burial regulations. Remains believed to be of Native Hawaiian descent may not be so much as photographed without prior approval from SHPD.[111] Furthermore, "[b]efore any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect . . . a burial site, the agency or office shall advise [SHPD] and prior to any approval allow [SHPD] an opportunity for review and comment on the effect of the proposed project."[112]

For Native Hawaiians, one of the most important provisions of Act 306 created the five IBCs.[113] Each IBC must have members representing each geographic region of the island(s) represented by the council.[114] The councils must also have members representing "development and large property . . . interests."[115] The members of each IBC are selected by the governor[116] from a list created by the DLNR, in consultation with "appropriate Native Hawaiian organizations,"[117] provided that at least twenty percent of the regional members are selected from a list submitted by the Office of Hawaiian Affairs (OHA).[118]

The IBCs' "primary responsibility" is "determin[ing] the preservation or relocation of previously identified [N]ative Hawaiian burial sites."[119] The IBCs must also assist the DLNR in identifying and inventorying Native Hawaiian burial sites.[120] To this end, the councils hold regular public meetings where

---

[110] Act of July 3, 1990, No. 306, 1990 Haw. Sess. Laws 955-65 (codified at HAW. REV. STAT. ch. 6E (2009)).

[111] HAW. CODE R. § 13-300-32 (1996).

[112] HAW. REV. STAT. § 6E-42(a) (2009).

[113] There are five island burial councils. The councils represent Hawai'i, Maui/Lana'i, Moloka'i, O'ahu, and Kaua'i/Ni'ihau. *Id.* § 6E-43.5.

[114] *Id.* § 6E-43.5(b).

[115] *Id.*

[116] *Id.*

[117] An "[a]ppropriate Hawaiian organization" is "a group recognized by the council that is comprised of majority of Hawaiians and has a general understanding of Hawaiian culture, in particular, beliefs, customs, and practices relating to the care of ancestral Native Hawaiian skeletal remains, burial goods, and burial sites." HAW. CODE R. § 13-300-2 (1996).

[118] OHA must submit a list including at least nine candidates. HAW. REV. STAT. § 6E-43.5(b) (2009).

[119] *Id.* § 6E-43.5(f)(1).

[120] *Id.* § 6E-43.5(f)(2)-(3).

they may collect information from Hawaiians; this information serves to "previously identify" burial sites.[121]

Under Act 306, jurisdiction is limited to "any site, other than a known, maintained, actively used cemetery where human skeletal remains are discovered or are known to be buried and appear to be over fifty years old."[122] The IBCs' jurisdiction is even more limited than this: they may only decide the disposition of "previously identified" Native Hawaiian burial sites.[123] If the burials are "inadvertently discovered" or are of non-Native Hawaiian ancestry, IBCs have no jurisdiction.[124] Thus, the distinction between "previously identified" and "inadvertently discovered" burials becomes very important to the decision-making power of Native Hawaiians in this process.

"Previously identified" burial sites are those "containing human skeletal remains and any burial goods identified during archaeological inventory survey and data recovery of possible burial sites, or known through oral or written testimony."[125] When dealing with "previously identified" burials, the IBCs may determine whether the remains shall be preserved in place or relocated.[126] The councils are more likely to recommend preservation in place for the following burials: "areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals or events, [or areas] that are within a context of historic properties, or have known lineal descendants."[127]

If the IBC determines that the burial site should be preserved in place, the applicant must then develop a preservation plan providing for both short- and long-term preservation of the burial site.[128] When the IBC decides to relocate the burial site, the landowner must complete an archaeological data recovery plan outlining the reasons for relocation, the methods for disinterment, and the location and manner of reinterment.[129] Approval of these plans by SHPD must be done within ninety days; however, before approving these plans, SHPD must first consult with the applicant, any known lineal descendants, the IBC, and any appropriate Hawaiian organizations.[130] It is important to note that

---

[121] HAW. CODE R. § 13-300-31(a) (1996).

[122] HAW. REV. STAT. § 6E-43(a) (2009).

[123] *See id.* § 6E-43.5(f) (granting IBCs jurisdiction over Native Hawaiian burials that are "previously identified").

[124] *See id.* §§ 6E-43.6 (granting SHPD, but not IBCs, jurisdiction over inadvertently discovered burials), 6E-43(e) (granting SHPD, but not IBCs, jurisdiction over burials that are of non-Native Hawaiian ancestry).

[125] HAW. CODE R. § 13-300-2 (1996).

[126] HAW. REV. STAT. § 6E-43.5(f)(1) (2009).

[127] HAW. CODE R. § 13-300-1 (1996).

[128] *Id.* § 13-300-38(e).

[129] *Id.* § 13-300-38(f).

[130] *Id.* § 13-300-38(e)-(f).

while an IBC's decision concerning the disposition of the remains (to preserve in place or relocate) is mandatory upon the applicant,[131] any further role of the IBC in this process is merely advisory.[132] SHPD need only consult the IBC when approving or denying burial treatment plans.[133] It is also important to note that preservation measures are not defined in either the statute or applicable regulations.[134] Thus, SHPD, not the IBCs, has the ultimate decision over what constitutes sufficient preservation measures.

On the other hand, an "inadvertent discovery" is "the unanticipated finding of human skeletal remains and any burial goods resulting from unintentional disturbance, erosion, or other ground disturbing activity."[135] SHPD has jurisdiction over all "inadvertently discovered" remains, Native Hawaiian and non-Native Hawaiian alike.[136] If the remains are of Native Hawaiian ancestry, the "DLNR [need only] give notice of the discovery to the IBC member who represents the geographic region where the remains are [found], as well as give notice to [OHA]."[137] After providing notice to the regional representative, the DLNR must consult with the "appropriate council members, the landowner, and any known lineal or cultural descendants" when determining the disposition of the remains.[138] Once again, the IBCs' role in protecting Native Hawaiian remains is restricted to no more than a mere advisory power.

Controversy over the preservation of nā iwi kūpuna has arisen due to the weak advisory powers of the IBCs.[139] In a current controversy on Kaua'i, the Kaua'i/Ni'ihau IBC voted to preserve thirty sets of iwi in place.[140] The Kaua'i/Ni'ihau IBC rejected numerous burial treatment plans submitted to it by the owner because the council members believed the plans did not offer proper preservation measures for the remains.[141] While the IBC had the power to

---

[131] Hawai'i Revised Statutes section 6E-43 allows applicants to administratively appeal the IBC's decision to preserve remains in place. These appeals are heard in front of a panel composed of three members of the Board of Land and Natural Resources and three of the IBC's burial council chairpersons. HAW. REV. STAT. § 6E-43(e) (2009); *see also* HAW. CODE R. § 13-300-55 (1996).

[132] *See* HAW. REV. STAT. § 6E-43.5(f) (2009).

[133] *Id.*

[134] *See generally id.* ch. 6E; *see also* HAW. CODE R. § 13-300 (1996).

[135] HAW. CODE R. § 13-300-2 (1996).

[136] HAW. REV. STAT. §§ 6E-43(e), 6E-43.6 (2009); *see also* HAW. CODE R. § 13-300-40(a) (1996).

[137] Haia & Greer, *supra* note 1, at 16-13.

[138] HAW. CODE R. § 13-300-40(e) (1996).

[139] Order Granting in Part and Denying in Part Defendant Jeffrey T. Chandler's Motion for Preliminary Injunction, *supra* note 23.

[140] *Id.*; *see also infra* Part III.

[141] Paul Curtis, *Burial Plan No. 16 Rejected*, GARDEN ISLAND, Feb. 11, 2010, http://thegardenisland.com/news/local/article_02ffd09a-17b8-11df-baf3-001cc4c002e0.html.

require preservation of the remains in place,[142] the IBC did not have the power to ensure measures were taken to provide *proper* preservation.[143] This absence of power to enforce proper preservation measures for nā iwi kūpuna became apparent when SHPD approved the owner's sixteenth revised burial treatment plan over the objections of the Kaua'i/Ni'ihau IBC.[144] This controversy will be used to expose the weaknesses in the current burial protection laws.

III. *BRESCIA V. EDENS-HUFF*[145] EVIDENCES THE WEAKNESSES IN HAWAI'I'S CURRENT BURIAL PROTECTION LAWS

Nearly 20 years ago, the State Historic Preservation Division was created to guard Hawai'i's heritage in the face of rapid development. Today, blue-glass towers stripe the skyline in Kaka'ako,[146] *luxury resorts sprawl the Big Island's Kona coast and new multimillion-dollar developments are announced nearly every month. As Hawai'i moves forward, many people rely on SHPD to ensure that the state brings enough of the past with it.*[147]

In February of 2000, Joseph Brescia, a wealthy, private land developer from California, purchased a half-acre ocean front parcel in the Wainiha Subdivision II at Naue, Kaua'i for approximately $900,000.[148] Little did he know that the purchase of this property and subsequent proposal to construct a home on the lot would entangle him in one of the most controversial iwi disputes since Honokahua.

On December 11, 2007, the Kaua'i County Planning Commission granted Brescia conditional approval to construct a 3600-square-foot, single-family, four-bedroom, three-and-a-half-bathroom home.[149] According to Condition 5

---

[142] *See* HAW. REV. STAT. § 6E-43.5(f)(1) (2009) (granting the councils with the power to "determine the preservation or relocation of previously identified [N]ative Hawaiian burial sites"); *see also* HAW. CODE R. § 13-300-33(a) (1996) ("The council shall have jurisdiction over all requests to preserve or relocate previously identified Native Hawaiian burial sites.").

[143] *See* HAW. REV. STAT. § 6E-43.5(f)(3) (2009) (the councils may only "make recommendations regarding appropriate management, treatment, and protection of [N]ative Hawaiian burial sites").

[144] *See* Michael Levine, *Naue Burial Plan No. 16 Approved*, GARDEN ISLAND, Mar. 11, 2010, http://thegardenisland.com/news/local/article_4b763dfe-2db2-11df-a53c-001cc4c002e0.html.

[145] Civ. No. 08-1-0107 (Haw. 5th Cir. Oct. 2, 2008).

[146] *See* Kaleikini v. Thielen, Civ. No. 07-1-0067-01 (Haw. 1st Cir. 2007) (describing how General Growth Properties, Inc. unearthed sixty-five iwi kūpuna in Kaka'ako during ground-disturbing activities at the Victoria Ward Shops).

[147] Ronna Bolante, *Bones of Contention*, HONOLULU, Nov. 2007, *available at* http://www.honolulumagazine.com/Honolulu-Magazine/November-2007/Bones-of-Contention/.

[148] Greer, *supra* note 14.

[149] Lester Chang, *Planning Commission to Visit Beachfront Ha'ena Homesite*, GARDEN ISLAND, Feb. 27, 2003, http://thegardenisland.com/news/article_85b216db-e5d3-5861-b4c2-26369146fe1b.html.

of the approval, "[n]o building permit shall be issued until requirements of the State Historic Preservation Division and the Burial Council have been met."[150] In complying with the Commission's conditional approval for construction, Brescia hired Scientific Consultant Services, Inc. (SCS) in March of 2007 to complete an archaeological inventory survey (AIS) of the property in order to identify any potential Native Hawaiian burials.[151] After completing two initial phases of the AIS, SCS discovered twenty-eight iwi kūpuna.[152] Further excavation discovered only two additional iwi kūpuna.[153]

After completing all phases of the AIS, which uncovered a total of thirty sets of Native Hawaiian remains on the half-acre lot, SHPD required the landowner to create a burial treatment plan addressing a plan of action for protecting the remains.[154] The landowner's burial treatment plan proposed preservation in place of twenty-four sets of remains that would not be impacted by the construction and on-site relocation of the six other sets of remains that would be under the footprint of the proposed house.[155]

Upon receiving the burial treatment plan, however, the Kaua'i/Ni'ihau IBC decided that all thirty sets of remains and those that may be found on the property in the future should be preserved in place.[156] Accordingly, the landowner revised the burial treatment plan, proposing preservation of all thirty remains in place while still allowing for construction of the multimillion dollar home[157] by capping the graves with cement blocks and adding vertical buffers as a means of preservation.[158]

On April 24, 2008, contrary to legal requirements, SHPD Deputy Director Nancy McMahon approved the revised burial treatment plan without first presenting it to the Kaua'i/Ni'ihau IBC for review.[159] Although the IBCs have

---

[150] Order Granting in Part and Denying in Part Jeffrey T. Chandler's Motion for Preliminary Injunction, *supra* note 23, at 2.

[151] Greer, *supra* note 14.

[152] *Id.*

[153] *Id.*

[154] Order Granting in Part and Denying in Part Jeffrey T. Chandler's Motion for Preliminary Injunction, *supra* note 23, at 2-3.

[155] *Id.* at 3.

[156] *Id.*

[157] Lester Chang, *Commission Turns Down Permit Change*, GARDEN ISLAND, June 11, 2003, http://thegardenisland.com/news/article_d674c184-030d-5912-9ce5-967ad0804a40.html.

[158] Order Granting in Part and Denying in Part Jeffrey T. Chandler's Motion for Preliminary Injunction, *supra* note 23, at 2.

[159] *See* HAW. CODE R. § 13-300-38(a)(1), (5) (1996). "When determining appropriate treatment of a previously identified Native Hawaiian burial site, the council shall: (1) [f]ully consider all provisions of the burial treatment plan . . . and (5) render a determination to preserve in place or relocate and make any related recommendations." *Id.* Here the revised burial treatment plan was never given to the IBC for review. Native Hawaiian Legal Corp., *Latest Naue Update—Great News!*, http://www.nhlchi.org/highlights7.htm (last visited Mar. 1,

the authority to determine the preservation or relocation of previously identified Native Hawaiian burials, the councils may make recommendations regarding the appropriate management, treatment, and protection of the Native Hawaiian burial sites only after making their initial determination.[160] However, in this case, the Kaua'i/Ni'ihau IBC was not given the opportunity to make recommendations on the revised burial treatment plan before SHPD approved the vertical buffers and concrete caps as a means of preservation.[161] Based on SHPD's approval of the burial treatment plan, the Kaua'i Planning Commission granted Brescia a building permit for his home in June of 2008.[162]

To enjoin the construction of Brescia's home, Jeffrey Chandler, a Wainiha resident who claims ancestral ties to the land, filed a motion for a preliminary injunction in the Fifth Circuit Court of the State of Hawai'i as a counter-claim to a suit that Brescia filed against Chandler for trespass.[163] On October 2, 2008, Judge Kathleen Watanabe granted in part and denied in part Chandler's motion for preliminary injunction.[164] Judge Watanabe concluded that "SHPD failed to comply with [a] crucial procedural step by failing to consult with the Kaua'i/Ni'ihau Island Burial Council and proper Native Hawaiian organizations prior to SHPD's April 24, 2008 approval of the revised burial treatment plan."[165] While Judge Watanabe acknowledged the important role that the IBCs must play in disposition of Native Hawaiian remains, she allowed Brescia to continue the construction of his home "provided that the construction does not in any way further demolish, alter, or prevent access" to the burials.[166] After this order, SHPD consulted with the Kaua'i/Ni'ihau IBC and appropriate Native Hawaiian organizations and individuals.[167] No burial treatment plan was approved, yet in accordance with Judge Watanabe's order, Brescia restarted construction in May of 2009.[168]

2010).

[160] HAW. REV. STAT. § 6E-43.5(f) (2009).

[161] Indigenous Mapping Network, *Kānaka Maoli Scholars Against Desecration—Second Statement on Naue*, Apr. 2, 2009, http://indigenousmapping.net/newitem.html?start=25.

[162] Greer, *supra* note 14.

[163] Chandler was arrested for trespassing on Brescia's property after he and other cultural practitioners staged a protest on Brescia's property to stop the development and destruction of iwi kūpuna. *See* Paul Curtis, *Kauaians could be Liable for $362K in Damages*, GARDEN ISLAND, May 7, 2009, http://thegardenisland.com/news/local/article_c81200e0-ba0a-5a4d-a2ad-d6779323fe0a.html; Order Granting in Part and Denying in Part Jeffrey T. Chandler's Motion for Preliminary Injunction, *supra* note 23.

[164] Order Granting in Part and Denying in Part Jeffrey T. Chandler's Motion for Preliminary Injunction, *supra* note 23.

[165] *Id.* at 2.

[166] *Id.*

[167] *See* Curtis, *supra* note 141.

[168] Paul Curtis, *Judge: Brescia Obeying Order with Construction*, GARDEN ISLAND, July 22, 2009, http://thegardenisland.com/news/local/article_b39af2ed-3919-5186-befd-

On February 11, 2010, after hours of testimony, the Kaua'i/Ni'ihau IBC voted unanimously to reject Brescia's sixteenth draft burial treatment plan.[169] The IBC cited several concerns about the burial treatment plan:

- The lack of opportunities for gaining access to all the iwi kūpuna (seven iwi lie under the house structure).
- The unauthorized concrete caps placed over the iwi.
- The existence of a septic system, which would leak sewage effluent.
- The use of vertical buffers.
- The omission of landscaping.
- Most importantly, the current house built over the burials.[170]

SHPD subsequently approved this burial treatment plan over the Kaua'i/Ni'ihau IBC's unanimous rejection.[171] This controversy, capped by the SHPD's approval of Brescia's burial treatment plan, shows that "there is a disconnect between the people and the government."[172] Despite the legislature's noble attempt to protect nā iwi kūpuna, the recent disputes and on-going desecration of burial sites across the State[173] provide evidence of the inadequacy of the law to properly address the problems unearthed by the Honokahua controversy. In reviewing the Brescia case, even Judge Watanabe, who denied a temporary restraining order that would have required Brescia to cease construction on his home, noted that "[t]he biggest problem is the law does not go far enough to protect these burials . . . . Perhaps the best thing that will come out of this case will be some changes in the law."[174]

This article recommends some of those changes. In doing so, it introduces Professor Eric Yamamoto's Social Healing Through Justice framework in the next section and employs this framework to provide the necessary framing of

---

ef9e6d7c8a68.html.

[169] Native Hawaiian Legal Corp., *supra* note 159; *see also* Curtis, *supra* note 141.

[170] Curtis, *supra* note 141.

[171] Levine, *supra* note 144.

[172] Kimberly Alderman, *Ola Nā Oiwi: Naue Burials Lawsuit Highlights Systematic Problems at the State Historic Preservation Department*, THE CULTURAL & ARCHEOLOGY LAW BLOG (Sept. 7, 2008), http://culturalpropertylaw.wordpress.com/2008/09/07/ola-na-iwi-naue-burials-lawsuit-highlights-systemic-problems-at-the-state-historic-preservation-division/.

[173] *See* Kelly v. 1250 Oceanside Partners, 111 Haw. 205, 140 P.3d 985 (2006) (holding that the public trust duties imposed on the State of Hawai'i are also applicable to the counties); Hui Mālama i Nā Kūpuna o Hawai'i Nei v. Wal-Mart, Inc., Civ. No. 03-1-0011-12 (Haw. 1st Cir. 2003) (holding that Wal-Mart was not liable for any wrong-doing or alleged violations of State burial laws during the construction where the site of the store had been previously developed); Kaleikini v. Thielin, Civ. No. 07-1-067-01 (Haw. 1st Cir. 2007) (noting that sixty-five burials were found in Kaka'ako at the site of a proposed Whole Foods supermarket); Order Granting in Part and Denying in Part Jeffrey T. Chandler's Motion for Preliminary Injunction, *supra* note 23.

[174] Alderman, *supra* note 172.

the dispute and to guide the development of proposed changes to the law—changes in the vein of Judge Watanabe's call.

IV. USING THE SOCIAL HEALING THROUGH JUSTICE FRAMEWORK TO CRITIQUE ACT 306'S EFFECTIVENESS AS A RECONCILIATORY MEASURE

> *[W]e inherit a cultural heritage scarred by abuse perpetrated by foreign powers. This abuse—physical, mental, and spiritual—has manifested itself in our personal, social, economic and political selves. Kūpuna*[175] *and mākua*[176] *alike, with the same symptoms of the same "disease"—loss of liberties to be who we are meant to be and live aloha 'āina*[177] *as kanaka Hawai'i maoli.*[178]

A. The State Has Committed Itself to Reconciliation with Native Hawaiians

The State has specifically recognized the need for reconciliation with Native Hawaiians and has committed itself to establishing and furthering a reconciliation process.[179] In 1978, Hawai'i's citizens first recognized the need for reconciliation with Native Hawaiians when they ratified an amendment to the Hawai'i State Constitution creating OHA.[180] Delegates of the Constitutional Convention specifically recognized the obligation that the State owed to the Native Hawaiian people to "address the modern-day problems of Hawaiians which are rooted in as dark and sad a history as will ever mark the annals of time."[181] OHA was created as a "semi-autonomous government

---

[175] "[G]randparent, ancestor, relative or close friend of the grandparent's generation." PŪKU'I & ELBERT, *supra* note 1, at 186.

[176] "[P]arent, any relative of the parents' generation, as uncle, aunt, cousin; progenitor." *Id.* at 230.

[177] Aloha 'āina refers to the Hawaiian value of having a deep love and respect for the land. *See id.* at 21.

[178] Posting of Michael Locey to hawaii-nation@yahoogroups.com (Feb. 25, 2002), *available at* http://groups.yahoo.com/group/hawaii-nation/message/333. Kanaka Hawai'i Maoli loosely translates to a person or people of Hawaiian ancestry. *See* PŪKU'I & ELBERT, *supra* note 1, at 127.

[179] *See* HAW. CONST. art. XII, §§ 5-6 (creating OHA as a "semi-autonomous" government agency responsible for administering ceded lands trust resources for the betterment of indigenous Hawaiian life). *See also* Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 117 Haw. 174, 217-18, 177 P.3d 884, 927-28 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009) (finding that the State breached its trust relationship with Native Hawaiians and enjoined the State from selling any ceded lands until the State resolved any "unrelinquished claims" that Native Hawaiians may have to these ceded lands).

[180] Brief for Equal Justice Soc'y & Japanese Am. Citizens League as Amici Curiae in Support of Respondents at 7, Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009) (No. 07-1372).

[181] DEBATES IN COMM. OF THE WHOLE ON HAWAIIAN AFFAIRS, COMM. PROPOSAL NO. 13, *in* 2

agency" in charge of administering resources of the ceded lands trust[182] for the betterment of the Native Hawaiian people.[183] The creation of OHA thus "provide[d] for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base."[184]

After the constitution was amended to create OHA, the Hawai'i State Legislature supported this commitment to reconciling with the Native Hawaiian people for past harms. Act 196 reaffirmed the State's "solemn trust obligation and responsibility to [N]ative Hawaiians"[185] by implementing the 1978 Constitutional amendment that created OHA and specifically identifying OHA "as a receptacle for reparations"[186] for past injustices. Beyond this first implementation statute, the State Legislature subsequently continued to recognize its support for reconciliation with Native Hawaiians. In Act 329, the State Legislature specifically acknowledged the State's move toward "permanent reconciliation" with Native Hawaiians:

> [T]he people of Hawaii, through amendments of their state constitution, the acts of their legislature, and other means, have moved substantially toward this permanent reconciliation. . . . The overriding purpose of this Act is to continue this momentum, through further executive and legislative action in conjunction with the people of Hawaii, toward a comprehensive, just, and lasting resolution.[187]

PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 458 (1980) (statement of Delegate De Soto). *See also* Brief for Equal Justice Soc'y & Japanese Am. Citizens League, *supra* note 183, at 9.

[182] The United States recognized the Kingdom of Hawai'i as an independent government starting in 1826. Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). However, on January 17, 1893, the United States overthrew the government of the Kingdom of Hawai'i. *Id.* As a result of this overthrow, "the Republic of Hawai'i also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawai'i, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." *Id.* Upon admission to the Union, the State agreed to hold these lands in trust "(1) for the support of the public schools and (2) other public educational institutions, (3) *for the betterment of the condition of [N]ative Hawaiians* . . . (4) for the development of farm and home ownership on as wide spread a basis as possible for the making of public improvements, and (5) for the provision of lands for public use." Admissions Act of March 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4 (1959) (emphasis added). These lands, taken by the United States from the Hawaiian government, have come to be known as the ceded lands.

[183] *See* HAW. CONST. art. XII, §§ 5-6; HAW. REV. STAT. § 10-3(6) (2009). *See also* Brief for Equal Justice Soc'y & Japanese Am. Citizens League, *supra* note 183, at 9.

[184] STANDING COMM. REP. NO. 59, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 646 (1980). Brief for Equal Justice Soc'y & Japanese Am. Citizens League, *supra* note 183, at 9-10.

[185] Act of June 7, 1979, No. 196, § 2, 1979 Haw. Sess. Laws 399.

[186] HAW. REV. STAT. § 10-3(6) (2009).

[187] Act of June 30, 1997, No. 329, § 1, 1997 Haw. Sess. Laws 956 (codified at HAW. REV.

Hawai'i's executive branch has also recognized the need for and committed to reconciliation with Native Hawaiians. Hawai'i's then-governor, Linda Lingle,[188] acknowledged in her 2003 State of the State address that she would work toward a resolution of the debate between Native Hawaiians and the State over the controversial ceded lands.[189] In addition, Lingle's administration also supported a form of Hawaiian self-governance and control over Hawaiian lands and cultural resources.[190]

Finally, in 2008, the Hawai'i Supreme Court gave formal recognition to the State's reconciliation initiative. In *Office of Hawaiian Affairs v. Housing & Community Development Corp. of Hawai'i*, the court recognized that "the state legislature itself has announced that future reconciliation between the State and [N]ative Hawaiians *will* occur."[191] The court also acknowledged that the State had a fiduciary duty to Native Hawaiians "until such time as the unrelinquished claims of the [N]ative Hawaiians [over the ceded lands] have been resolved."[192]

Thus, in other contexts, the people of Hawai'i, through constitutional amendment as well as all three branches of the state government, have shown support for and commitment to reconciliation with Native Hawaiians. While the State has shown this commitment in other areas such as ceded lands, the State's reconciliation effort should also include providing proper protection for Native Hawaiian cultural resources, such as nā iwi kūpuna. While return of the ceded lands to Native Hawaiians will effectuate a return of a land base to Hawaiians, land was not the only thing taken from the Native Hawaiians as a result of colonization.[193] The cultural identity and well-being that was taken from Native Hawaiians should also be restored.

Although Act 306 has never been explicitly identified as an attempt by the State to reconcile with Native Hawaiians, it can be viewed as part of the State's longstanding commitment to reconciliation. When it enacted Act 306, the legislature took the first step in repairing the harms of past desecration of iwi

---

STAT. § 10-13 (2009)).

[188] Linda Lingle was elected Governor of the State of Hawai'i in 2002. Nat'l Governors Ass'n, http://www.nga.org/portal/site/nga/menuitem.216dbea7c618ef3f8a278110501010a0/ (follow "Hawai'i" hyperlink; then follow "Gov. Linda Lingle" hyperlink) (last visited Apr. 23, 2010). She is the first Republican to lead the State in over forty years. *Id.* She is also the first woman to ever hold the position. *See id.*

[189] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 117 Haw. 174, 213, 177 P.3d 884, 923 (2008) (quoting Linda Lingle, Governor, State of Haw., *State of the State Address: An Outline of the Governor's Agenda* (Jan. 21, 2003)).

[190] *See id.*

[191] *Id.* at 213, 177 P.3d at 923 (emphasis added).

[192] *Id.* at 195, 177 P.3d at 905.

[193] *See generally* HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I (1993); *see also* JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI (2002).

kūpuna. The legislature noted in section 1 that "the full recognition and protection of the unique cultural values of the multi-ethnic peoples of Hawaii are directly affected by historic preservation decisions" and "[o]f particular sensitivity to each group is the impact and response of governmental decisions on the cultural values related to the treatment and protection of burials."[194] Furthermore, the legislature specifically identified Native Hawaiian traditional burials as being "especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance."[195] Finally, the legislature specifically provided "additional protection for [N]ative Hawaiian burial sites of high preservation value."[196] Accordingly, the State acknowledged that: (1) it needed to recognize the effect that historic preservation decisions had on the people of the State; (2) the protection of burials is important to the people of the State; and (3) Native Hawaiian burials need special protections.[197] This acknowledgment is important as a demonstration of the State's recognition of the vulnerability and importance of Native Hawaiian burials. By enacting Act 306, the State also demonstrated to the community that it took responsibility for protecting these burials through its historic preservation decisions.

Professor Yamamoto's framework, however, illuminates the ineffectiveness of Act 306 as a method for reconciling with Native Hawaiians. As discussed below, and as the Social Healing Through Justice framework suggests, the State should further this reconciliation effort by: (1) truly recognizing the harms inflicted on Native Hawaiians as an indigenous people through the desecration of nā iwi kūpuna; (2) taking responsibility for the lasting effects of these harms; (3) acknowledging and working toward a legal framework that grants Native Hawaiians greater self-determination authority over the disposition and care of nā iwi kūpuna; and (4) providing Native Hawaiians with meaningful reparation such as educational programs to help retell the story of Native Hawaiians and the importance of their cultural identity as tied to iwi kūpuna.

B. The "Social Healing Through Justice" Framework Illuminates Act 306's Inefficiency at Repairing the Harms of Colonization Suffered by Native Hawaiians

As discussed in Part II, protection of Native Hawaiian burials is deeply rooted within Native Hawaiian culture. Addressing such a culturally sensitive issue cannot be done without first gaining a deeper consciousness of the

---

[194] Act of July 3, 1990, No. 306, § 1, 1990 Haw. Sess. Laws 955-56 (codified at HAW. REV. STAT. ch. 6E (2009)).

[195] *Id.*

[196] *Id.*

[197] *See generally* YAMAMOTO, *supra* note 70.

indigenous culture and the previous social, psychological, and cultural harms inflicted on Native Hawaiians. In his book *Interracial Justice*,[198] Professor Yamamoto presents a framework that can be used as a tool to critique the current social injustices inflicted on Native Hawaiians and to guide future social healing efforts.[199] This article uses that framework to shed light on the current ineffectiveness of Hawai'i's burial protection law as a measure of reconciliation with Native Hawaiians and to guide the future development of amendments to this law to better meet the State's commitment to reconciliation.[200]

Professor Yamamoto's theory of "[i]nterracial justice . . . is integral to peaceable and productive intergroup relations."[201] It bridges the gap between harms inflicted upon one group and a healthy relationship between the injured and inflicting groups. Professor Yamamoto suggests that this framework may be used to offer "conflicting . . . groups a way to conceptualize, ruminate on, and act on grievances underlying present-day tensions."[202]

Professor Yamamoto's framework advances the use of "four praxis dimensions of combined inquiry and action," the 4Rs (Recognition, Responsibility, Reconstruction, and Reparations).[203] While effective reconciliation efforts will ultimately differ in each situation, Yamamoto presents the 4Rs as a tool to assess the efficacy of reparations efforts and to guide attempts to repair deep-rooted and systemic harms to injured racial communities.[204] The 4Rs approach allows for "[reconstruction of] group relationships and [the repair of] lasting damage to group members and to society itself."[205]

In order for groups to move forward from past harms and produce productive working relationships, these groups must first examine the past harms and work toward healing the resulting wounds.[206] "Individuals, communities, and governments all have a stake in social healing."[207] Central to the future of civil society is the redressing and healing of wounds caused by past injustice.[208] By

---

198 *Id.*

199 *See id.*

200 *See* Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5 (2009).

201 YAMAMOTO, *supra* note 70, at 151.

202 *Id.* at 10.

203 *Id.*

204 Yamamoto & Obrey, *supra* note 200, at 31.

205 *Id.* at 32.

206 *See* YAMAMOTO, *supra* note 70, at 10-12.

207 Yamamoto & Obrey, *supra* note 200, at 7.

208 *Id.*

redressing these past harms, healthy group relations are fostered.[209] The redressing of these harms has become critical to a government's ability to allow its communities to "live peaceably and work productively in the future[.]"[210]

Because the American law system itself does not directly address the healing of past harms,[211] Professor Yamamoto developed the Social Healing Through Justice framework by combining "[a]spects of . . . theology, social psychology, sociolegal studies, political theory (peace studies), economics, and indigenous healing practices [which] coalesce with liberal legal theory's notions of equality and fairness."[212] The framework takes from the field of theology concepts of intergroup healing such as "freedom from bondage, care for the abandoned, and compassion for the outcast and . . . biblical notions of love, peace, and justice."[213] Social psychology guides the framework by offering catharsis as a means for confrontation of "externally induced emotional trauma as a means for releasing it."[214] Where theology offers the offender and the harmed party an opportunity to reunite through justice, psychology offers reunification by guiding those harmed through the stages of healing: denial, anger, self-blame, guilt, acceptance, and forgiveness.[215] Political theory offers a method of repairing social harms and restoring the injured party by lifting the barriers to liberty and equality in "education, housing, medical care, employment, cultural preservation, [and] political participation."[216] Professor Yamamoto also looks to indigenous healing practices such as the Native Hawaiian practice of Ho'oponopono[217] to inform his framework.[218] This practice, a therapeutic process, uncovers the root of past conflict in order to remove the resulting current-day tensions.[219] In creating the four dimensions of reconciliation, Professor Yamamoto combines different aspects from each of these disciplines and acknowledges the commonalities among them.[220]

Professor Yamamoto and other scholars have used this framework, "an approach for inquiring into and acting on intergroup tensions marked both by

---

209 *Id.*

210 *Id.*

211 YAMAMOTO, *supra* note 70, at 154.

212 Yamamoto & Obrey, *supra* note 200, at 31-32.

213 YAMAMOTO, *supra* note 70, at 159.

214 *Id.*

215 *Id.*

216 *Id.* at 203.

217 Ho'oponopono is a process used to make things right; "to put in order or shape, correct, revise, adjust, amend, regulate, arrange, rectify[;]" it also refers to a conference where familial relations were repaired. PŪKU'I & ELBERT, *supra* note 1, at 341.

218 YAMAMOTO, *supra* note 70, at 166.

219 *Id.*

220 *Id.* at 167.

conflict and distrust and by a desire for peaceable and productive relations,"[221] to assess and guide reconciliation efforts between different racial groups as well as between racial groups and the government. To apply to the current failures of Hawai'i's burial protection laws, this framework must be expanded beyond racial group conflicts to address the unique conflicts involving governments and indigenous peoples.[222]

The conflicts arising between the government and indigenous people and the harms inflicted on these peoples as a result of colonization differ from the harms inflicted upon other racial groups. When foreigners invade a new land, indigenous people are marginalized and become strangers in their own homes.[223] Indigenous people suffer through the destruction of their culture, language, lands, and abolition of their self-governance.[224] Indigenous identity is essentially erased and indigenous peoples are forced to assimilate or perish.[225]

As an indigenous people subject to colonization by foreign powers, Native Hawaiians have suffered irreparable cultural, physical, and economic harms.[226] After the first foreigners "discovered" Hawai'i in 1778 and subsequent foreign powers set up a territorial government in Hawai'i, traditional, customary, and cultural practices were suppressed, Native Hawaiians were assimilated into the American culture, and Native Hawaiian lands fell prey to American Manifest Destiny.[227] Stripped of their land and cultural identity, the indigenous people were forced into the urban areas, "[becoming] members of the 'floating population crowding into the congested tenement districts of the larger towns and cities of the Territory' under conditions which many believed would 'inevitably result in the extermination of the race.'"[228]

In her book, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i*, Haunani-Kay Trask, a professor of Hawaiian Studies at the University

---

[221] *Id.* at 174.

[222] *See* Ashley Obrey, *I Ka Nānā No a 'Ike (By Observing, One Learns): Indigenous Ainu-Japan Reconciliation and Insights into Native Hawaiian-United States Social Healing* 11-12 (May 1, 2008) (unpublished J.D. thesis, University of Hawai'i) (on file with author). *See also* Yamamoto & Obrey, *supra* note 200 (expanding the Social Justice Through Healing framework from strictly racial groups to indigenous groups).

[223] *See* Anaya, *supra* note 84.

[224] *See* Eric K. Yamamoto, *"Social Healing Through Justice": A Framework for Indigenous Ainu Reconciliation with the Governments and People of Japan* 14 (2008) (unpublished manuscript) (on file with author).

[225] Anaya, *supra* note 84.

[226] *See id.*

[227] *Id.* at 315.

[228] *Id.* (quoting S. Cong. Rec. 2, 10th Leg., Territory of Hawai'i, *reprinted in* 1919 Haw. S. Journal 25-26).

of Hawai'i at Mānoa, eloquently paints a picture of the harsh reality Native Hawaiians face today as a result of Western colonization:

> On the ancient burial grounds of our ancestors, glass and steel shopping malls with layered parking lots stretch over what were once the most ingeniously irrigated taro lands, lands that fed millions of our people over thousands of years. Large bays, delicately ringed long ago with well-stocked fishponds, are now heavily silted and cluttered with jet skis, windsurfers, and sailboats. Multi-story hotels disgorge over six million tourists a year onto stunningly beautiful (and easily polluted) beaches, closing off access to locals. On the major islands of Hawai'i, Maui, O'ahu, and Kaua'i, meanwhile, military airfields, training camps, weapons storage facilities, and exclusive housing and beach areas remind the Native Hawaiian who owns Hawai'i: the foreign, colonizing country called the United States of America. . . . Economically, the statistic of thirty tourists for every Native means that land and water, public policy, law and the political attitude are shaped by the ebb and flow of tourist industry demands. For Hawaiians, the inundation of foreigners decrees marginalization in our own land. . . . For my people, this latest degradation is but another stage in the agony that began with the first foot fall of European explorers in 1778, shattering two millennia of Hawaiian civilization characterized by an indigenous way of caring for the land, called malama 'āina.[229]

Using his Social Healing Through Justice framework, Professor Yamamoto acknowledges the importance of restorative justice for indigenous groups.[230] Colonization by foreigners has essentially led to a loss of indigenous identity.[231] "Native Hawaiians are governed by Western-oriented institutions that, while essentially democratic, scarcely reflect Native Hawaiians' own distinctive values and traditions and are dominated by the majority settler population."[232] Because colonization has resulted in the erasure of indigenous self-governance and identity, reparations to Native Hawaiians must attempt to restore this indigenous culture and reconstruct some type of self-governance.[233]

---

[229] TRASK, *supra* note 193, at 2-4. For another view on the effects of colonization on Native Hawaiians, *see also* OSORIO, *supra* note 193, at 3.

> [This] is a story of how colonialism worked in Hawai'i not through the naked seizure of lands and governments but through a slow, insinuating invasion of people, ideas, and institutions. . . . But ultimately, this is a story of violence, in which that colonialism literally and figuratively dismembered the lāhui (the people) from their traditions, their lands, and ultimately their government. The mutilations were not physical only, but also psychological and spiritual. Death came not only through infection and disease, but through racial and legal discourse that crippled the will, confidence, and trust of the Kānaka Maoli as surely as leprosy and small pox claimed their limbs and lives.

Id.

[230] *See* YAMAMOTO, *supra* note 70.

[231] Anaya, *supra* note 84, at 316.

[232] *Id.* at 318.

[233] *See generally id.*

As a form of restorative justice,[234] "reconciliation for native groups must meet an indigenous standard of recognition and reconstruction."[235] Thus, the western legal frameworks that currently govern Native Hawaiians should be traded for a framework that acknowledges traditional indigenous knowledge as an integral part in the decision-making process.[236] "[F]acilitating repair by methods meaningful to the victims—in this case, indigenous peoples—further reveals the specific kinds of harms suffered by native peoples (recognition) and transforms the relationship (reconstruction) between the colonizer and the colonized, which will set the two groups on the right path toward true social healing."[237] This social healing is an important means of creating a healthy, productive relationship between the State and Native Hawaiians and will advance the State's interest in reconciling with Native Hawaiians.

1. Recognition & Responsibility

The first two Rs, recognition and responsibility, are closely linked.[238] In recognizing the harm inflicted on a victim group, the perpetrator may become more willing to take responsibility for inflicting the wounds and assisting in the healing process.[239] Thus, recognition of harm may be the first step in taking responsibility for healing those harms.

Recognition is akin to the first step in healing a persistent physical injury.[240] The person's pain must be recognized and the injury properly assessed before treatment can be administered.[241] But unlike healing a physical injury, this dimension requires an assessment of both social and psychological injuries.[242] The recognition dimension requires each group to acknowledge the wounds of the injured party and then "undertake critical interrogation to assess the specific circumstances and larger context of a conflict and to analyze justice grievances undergirding present-day intergroup tensions."[243]

Recognition thus looks to identify the ways in which individuals "continue to suffer 'pain, fear, shame and anger'" by considering the historical events and "cultural stereotypes that seemingly legitimize the injustice" (for instance, the labeling of Native cultures as heathen to justify the destruction of their

---

[234] That is, restoring to the indigenous people the self-governing power that was stripped from them as a result of colonization. *See* TRASK, *supra* note 193.

[235] Obrey, *supra* note 222, at 12.

[236] *See* Anaya, *supra* note 84, at 318-19.

[237] Obrey, *supra* note 222, at 10-11.

[238] YAMAMOTO, *supra* note 70, at 185.

[239] *Id.* at 184-85.

[240] *See id.* at 175.

[241] *Id.*

[242] *Id.*

[243] *Id.* at 176.

culturally significant properties, such as burial sites).[244] Recognition also looks to current-day institutions to illuminate the "organizational structures [that] embody discriminatory policies that deny fair access to resources or promote aggression."[245] Only by recognizing the harm done to a group may reconciliation begin.

Responsibility requires groups to "assess group agency and accept responsibility for . . . harms inflicted by each group."[246] This responsibility "requires affirmative steps toward racial healing and reconciliation by wielding its power in ways that lifts up the group it has subordinated."[247] The American law system is driven by the assignment of fault rather than by the voluntary acknowledgment of responsibility.[248] However, to facilitate reconciliation, groups must voluntarily and sincerely accept responsibility for past harms.[249] In accepting this responsibility, the aggressor group cannot be worried that accepting responsibility will ultimately lead to culpability and loss of power.[250] While the goal of the responsibility dimension is to shift this power from the aggressor group to the injured group, sincere acceptance of responsibility requires the aggressor group to become disarmed, to "put down the weapons [it] employed to dominate others [and] renounce the power . . . gained over others."[251]

Some governmental actors have recognized the harms to Native Hawaiians where desecration of burials has occurred. Responding to the events at Honokahua, Governor Waihe'e announced: "as far as the disinterment at Honokahua goes, there is no compromise. It must stop."[252] Furthermore, a sympathetic legislator stated that "we have almost no authority over what's happening. The state is almost helpless, and if we don't work now to stop this and identify historic areas, there will be nothing left."[253] Here, both Governor Waihe'e and the legislature explicitly recognized the need to stop desecration and offer protection to Native Hawaiian burials. As a consequence of this recognition, the legislature enacted Act 306 to address the desecration of nā iwi

---

[244] Yamamoto & Obrey, *supra* note 200, at 33 (internal citations omitted).

[245] *Id.*

[246] YAMAMOTO, *supra* note 70, at 185.

[247] Obrey, *supra* note 222, at 9.

[248] YAMAMOTO, *supra* note 70, at 189.

[249] *Id.* at 188.

[250] *See id.* at 188-89.

[251] *Id.* at 188 (internal citation omitted).

[252] Andy Yamaguchi, *Waihee: Maui Burial Excavation Must Stop*, HONOLULU ADVERTISER, Dec. 23, 1988, at A1.

[253] Jeanne Mariani, *Bills to Save Historic Sites Move Along in Legislature*, HONOLULU STAR-BULLETIN, Feb. 21, 1989, at A5 (quoting Rep. Virginia Isbell, Vice-Chair of the H. Water & Land Use Dev. Comm.).

kūpuna.[254] Act 306 itself includes language recognizing the "vulnerability" of Native Hawaiian remains and the need to provide these remains with additional "protections."[255] However, Yamamoto's recognition and responsibility dimensions require more; mere words do not lead to proper reconciliation.

Because the harms caused to Native Hawaiians are a result of colonization, the law must first recognize Native Hawaiians as an indigenous people with distinct cultural values and customs that do not fit within the traditional legal framework employed in protecting graves.[256] Native Hawaiian culture required secreting the remains of the deceased to protect against desecration. This action, once shielding remains from desecration, no longer offers Native Hawaiian remains the protections they deserve. Under the current common law framework, unmarked Native Hawaiian burials are vulnerable to desecration and are not offered the same protection as those within the boundaries of marked cemeteries.[257] In implementing Act 306, the State affirmatively recognized the unique vulnerability of these remains and offered them protection by providing a new framework for Native Hawaiian burial protection.[258]

Act 306 is the first positive step taken by the State to truly recognize the importance of protecting nā iwi kūpuna. The legislature, recognizing that Native Hawaiian burials were vulnerable to desecration and acknowledging the importance of these burials, enacted Act 306 to protect these graves.[259] However, recognition requires the State to truly empathize with the harms caused to Native Hawaiians and look critically at the intergroup tensions that persist today as a result of past injuries.[260] While the law initially recognizes

---

[254] Haia & Greer, *supra* note 1, at 16-11; *see also supra* notes 95-108 and accompanying text.

[255]

> The legislature finds that the full recognition and protection of the unique cultural values of the multi-ethnic peoples of Hawai'i are directly affected by historic preservation decisions. Of particular sensitivity to each group is the impact and response of governmental decisions on the cultural values related to the treatment and protection of burials. The legislature further finds that native Hawaiian traditional prehistoric and unmarked burials are especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance.

Act of July 3, 1990, No. 306, § 1, 1990 Haw. Sess. Laws 955-56 (codified at HAW. REV. STAT. ch. 6E (2009)).

[256] Obrey, *supra* note 222, at 11.

[257] Dyck, *supra* note 93.

[258] The legislature specifically identified Native Hawaiian traditional burials as being "especially vulnerable and often not afforded the protection of law which assures dignity and freedom from unnecessary disturbance." Act of July 3, 1990, No. 306, § 1, 1990 Haw. Sess. Laws 956 (codified at HAW. REV. STAT. ch. 6E (2009)).

[259] *Id.*

[260] YAMAMOTO, *supra* note 70, at 176.

the importance of these cultural resources, it does not accurately assess the harms caused to Native Hawaiians as a result of past colonization and loss of cultural identity.[261]

After acknowledging the incompatibility between Native Hawaiian cultural practices regarding burials and the common law framework used to protect these burials,[262] the State must also acknowledge the deeper social harms that resulted from colonization and destruction of the indigenous identity.[263] As discussed above, these social harms include the displacement of Native Hawaiians from their own lands, social subordination, and underrepresentation in the polity. As a form of restorative justice, the recognition dimension requires the State to go further to address these harms and truly rebuild its relationship with Native Hawaiians. Further actions include granting Native Hawaiians self-determination over these cultural resources and applying stricter rules to preserve culturally significant Native Hawaiian properties and objects such as burials.

While Act 306 is a first step at acknowledging the significance of Native Hawaiian burials to the Native Hawaiian culture, the State still fails to take appropriate responsibility to heal the deep wounds caused by the ongoing desecration of iwi. The State still demands a balancing of interests: the sanctity of Native Hawaiian burials balanced against the proprietary and economic interests of developers.[264] This balancing of interests communicates to Native Hawaiians that the unmarked burials of their ancestors lack the protection afforded remains in traditional cemeteries.[265]

The bifurcated jurisdiction over Native Hawaiian remains represents a decision by the legislature to balance Native Hawaiian cultural values against developers' interests.[266] By taking decision-making authority away from the

---

[261] This inaccurate assessment is evidenced by the SHPD's undermining activities discussed *infra* at Part V.B. By undermining the law and side-stepping its responsibility, SHPD displays an insincere attempt at taking responsibility for the past harms and lacks the proper empathy needed to truly recognize the injured group's suffering.

[262] Act 306 is evidence that the State recognized the incompatibility of Native Hawaiian cultural practices and the common law framework used to protect Native Hawaiian burials. Act 306 is not a codification of the common law, but rather a presentation of a new framework for protecting Native Hawaiian burials that specifically acknowledges the vulnerability of ancient, unmarked Native Hawaiian burial sites. *See* Act of July 3, 1990, No. 306, § 1, 1990 Haw. Sess. Laws 955-56 (codified at HAW. REV. STAT. ch. 6E (2009)).

[263] Obrey, *supra* note 222, at 11.

[264] Kehau Abad, Remarks at Auwē in Naue: The Future of Hawai'i's Burial Laws, Maoli Thursday Forum at the William S. Richardson School of Law (Nov. 5, 2009) (video on file with author).

[265] Alan Murakami, counsel for Joseph T. Chandler, said that "building a home over known Native Hawaiian burials is akin to allowing home construction to occur over known graves to [sic] the Mainland's Arlington National Cemetery." *See* Curtis, *supra* note 168.

[266] *See* Leone, *supra* note 14.

IBC in cases where bones are "inadvertently discovered," the legislature places a lesser burden on developers.[267] No longer do developers need to petition to the IBC,[268] a panel of Native Hawaiian volunteers dedicated to the protection of these burials.[269] Developers instead seek approval from SHPD. Taken together, these two facts create a strong inference that the legislature allows SHPD to balance the "vested interests"[270] of developers against the need to protect burials.

Furthermore, as evidenced by SHPD's decision to approve Brescia's burial treatment plan over the unanimous rejection of the IBC, the current law only grants Native Hawaiians an advisory role even in cases that involve "previously identified" remains. The discretion that SHPD holds in balancing these interests and making final decisions regarding the preservation of remains has generated much controversy in the disposition of these remains. By granting SHPD the power to balance these interests and then imposing the results upon Native Hawaiians, the law shows a half-hearted attempt at recognizing and taking responsibility for harms inflicted on Native Hawaiians.

To sincerely accept responsibility, the State must shift the power to Native Hawaiians by "putting down its weapons" and by "wielding its power in ways that lift up the group it has subordinated." [271] Allowing SHPD, alone, to balance the cultural values of Native Hawaiians with development and economic interests shows the State's interest in retaining the power to subordinate Native Hawaiian interests. Sincere acceptance of responsibility requires the reallocation of this group power.[272] Only by allowing Native Hawaiians to actively participate and possess legally enforceable decision-making authority can the State restore to Native Hawaiians the power of self-determination over these culturally significant resources. This shift in power will truly show the State's sincere commitment to taking responsibility for reconciling with Native Hawaiians.

---

[267] *See id.*

[268] *See* HAW. CODE R. §§ 13-300-2, -3 (1996).

[269] *Id.* § 13-300-22(h).

[270] "Brescia was acting in good faith when he began construction in summer 2008 and has spent considerable money in planning and construction and now has 'vested interests.'" Michael Levine, *Petition Rejected*, GARDEN ISLAND, Dec. 9, 2009, http://thegardenisland.com/news/local/article_b4e77067-23be-5ef0-910e-ae14be06b49a.html.

[271] YAMAMOTO, *supra* note 70, at 188.

[272] *Id.*

2. Reconstruction

"Once the perpetrator of an atrocity has apologized, it now has the burden of making its precious words believable."[273] Reconstruction looks at making these words believable by building a new, more productive relationship between the parties.[274] Acts of reconstruction may include "apologies and forgiveness (if appropriate); a re-framing of the history of interactions; and, most importantly, the reallocation of political and economic power."[275]

The first step in reconstruction requires the oppressor to apologize and the oppressed to forgive.[276] The State has begun reconstruction efforts by apologizing to Native Hawaiians for past harms and committing to reconciliation efforts.[277] Because individual sorrow is hard to measure when a group apologizes, this group apology must be followed by action.[278] A group apology must be more than empty words; it must be "tied to a commitment to make amends for past wrongs and to action on that commitment."[279] A group apology unaccompanied by such action is susceptible to insincerity[280] and slippage.[281]

Where iwi kūpuna are concerned, Act 306 is the State's first attempt at reconstructing the relationship between the State and Native Hawaiians. In order to reach complete reconstruction, the law must transform both the psychological and the socio-political-economic relationships of the parties.[282] Act 306, however, accomplishes neither. The ineffectiveness of Act 306 to offer meaningful reconstruction is highlighted by its failure to properly restore the indigenous identity through a grant of meaningful self-determination.

Although the law serves as a promotion of Native Hawaiian culture, it fails to positively transform the political-economic relationship between the State and private developers on one hand and Native Hawaiians on the other. As discussed earlier, Native Hawaiians have only a limited power to decide the

---

[273] ROY BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 155 (2004).

[274] Yamamoto & Obrey, *supra* note 200, at 34.

[275] *Id.*

[276] YAMAMOTO, *supra* note 70, at 191.

[277] *See supra* Part IV.A.

[278] YAMAMOTO, *supra* note 70, at 195.

[279] *Id.*

[280] Instead of serving as a means to reconciliation, the government may use these apologies as an end. Using apology as an end rather than a means leads to what Yamamoto refers to as "cheap reconciliation." *Id.*

[281] Without action, apologies will be susceptible to slippage—where "apologies [do] not change the relationship structure enough to bring about enduring forgiveness." *Id.*

[282] Obrey, *supra* note 222.

disposition and care of iwi kūpuna.[283] Rupert Rowe, a Kaua'i resident, commented regarding the Brescia case that "[w]hat hurts me is the lack of a strong voice in the process. . . . We have a process, but not a voice."[284]

The failure of the law to give Native Hawaiians a proper voice in the decision-making process appears more like an illusory attempt to placate Native Hawaiian concerns that surfaced as a result of the tragedy at Honokahua than a sincere commitment to reconciliation. The ongoing controversy surrounding iwi kūpuna leads to distrust of the State and its commitment to reconciling with Native Hawaiians. Without a proper reframing of the relationship between Native Hawaiians and the government, these apologies are insincere and ineffective in fostering lasting forgiveness.

To transform this relationship, the State must offer Native Hawaiians self-determination powers.[285] "A Hawaiian problem can only have a Hawaiian solution."[286] Thus, the State needs to support its apology and fulfill its commitment to reconciliation by granting Native Hawaiians legally binding decision-making power (rather than mere advisory powers) over issues dealing with nā iwi kūpuna. By granting Native Hawaiians power over these decisions, the State will effectively elevate Native Hawaiian interests and reconstruct the relationship between the State, developers, and Native Hawaiians.

Act 306 not only evidences the insincerity of the State's apology, it also introduces problems of slippage. In 2004, the legislature commissioned the Hawai'i State Auditor to investigate DLNR and, more specifically, its commitment to the IBCs.[287] After a thorough investigation, the Auditor concluded that "the State's historic preservation law is inadequate and does not advance the work of the burial councils."[288] The Auditor also expressed concern that the burial councils can be bypassed by classifying burial sites as

---

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

[284] Curtis, *supra* note 141.

[285]

> Indigenous peoples' human rights norms also broadly shape present-day understandings of reparatory justice. Like general human rights instruments, the recently-adopted United Nations Declaration of Rights of Indigenous Peoples embodies reparatory justice, calling for more than monetary compensation. The Declaration calls for affirmative acts to repair long-term damage to indigenous peoples from the theft of lands, destruction of culture and denial of self-governance. The remedies must be tailored to the harm. This is, when the injuries are long-term and systemic, so must the response. From this idea emerges specific remedial norms, particularly self-determination. Because systematic denial of self-determination is a basic harm to indigenous peoples, reparatory justice emphasizes self-determination over economics, culture, and governance.

Yamamoto & Obrey, *supra* note 200, at 38.

[286] Curtis, *supra* note 141 (quoting Nathan Kalama, Native Hawaiian and resident of Kaua'i).

[287] H. Comm. Rep. 165, SD1, 22d Leg., Reg. Sess. (Haw. 2004).

[288] AUDITOR REPORT, *supra* note 50, at ii.

"inadvertently discovered."[289] Finally, the Auditor "found [that] a lack of commitment to the burial councils and the burial sites program foreshadows a collapse of Hawaiian iwi (bones) preservation efforts."[290] This report manifests in stark reality the failure of Act 306. An ineffective law cannot lead to effective reconstruction of the group relationship between the State and Native Hawaiians.

Act 306 has not inspired forgiveness from the Native Hawaiian people. Lack of forgiveness hinders reconstruction.[291] In fact, Act 306 has done much to harm the State's relationship with Native Hawaiians by propagating distrust. This distrust resounds in the comments of Puanani Rogers, a long-time Hawaiian cultural practitioner, in response to SHPD's approval of Brescia's burial treatment plan: "SHPD is failing in their obligations and duties of what their jobs are [sic]. Totally, totally failing. An F-minus. It's outrageous that they are not doing their job. Everybody knows, except them, that they're not supposed to build on a graveyard."[292] This distrust is echoed by Charlie Maxwell, chairman of the Maui/Lāna'i IBC, who expressed the intent of the Maui/Lāna'i IBC to "write a letter of protest to the governor stating it has 'no confidence' in the ability of SHPD . . . 'to preserve and protect the cultural heritage of Hawai'i, especially the iwi.'"[293]

How can the Native Hawaiian people forgive past transgressions and offer their trust when they are forced to battle against the government and developers to protect iwi kūpuna? Reconstruction seeks to have these groups work together, yet the current controversies over nā iwi kūpuna provide evidence of further conflict and distrust rather than a healthy, working relationship. As Native Hawaiians remain an indigenous people suffering from the effects of colonization, reconstruction of the socio-political relationship between the State and Native Hawaiians is integral to the State's attempt at reconciliation.

---

[289] *Id.*; *see also* Erline Greer, *Keleikini v. Thielen: Deconstructing Hawai'i's Burial Laws to Look Beyond Removal and Reburial* (May 1, 2008) (unpublished J.D. thesis, University of Hawai'i) (on file with author) [hereinafter Greer, *Deconstructing Hawai'i's Burial Laws*].

> Archaeologists may be inclined to find less burials during archaeological survey as a way to circumvent the very public island burial council route in lieu of a more administrative inadvertent discovery route which has an abbreviated public decision making process, an expedited time frame for making decisions, and overall, a higher chance for decisions, to move the kūpuna due to finding them during construction when money is already spent on infrastructure and actual construction. Archaeologists also make more money in recovering inadvertent discoveries than just documenting intact burial sites. That may be an incentive.

Id. at 20 (quoting Kaiana Markell, Dir. of Native Rights, Land & Culture, OHA).

[290] AUDITOR REPORT, *supra* note 50, at ii.

[291] YAMAMOTO, *supra* note 70, at 196.

[292] Levine, *supra* note 144 (quoting Puanani Rogers, Hawaiian cultural practitioner).

[293] Conrow, *supra* note 109, at 6-7.

3. Reparation

Finally, reparation, as part of the Social Healing Through Justice framework, focuses not on monetary compensation, but rather on *repairing* "long-term damage to indigenous peoples from the theft of lands, destruction of culture and denial of self-governance."[294] To repair the harms caused by long-term and systemic injuries to indigenous people as a result of colonization, reparation to these groups must be transformative.[295] "Reparation is grounded in group, rather than individual, rights and responsibilities and provides tangible benefits to those wronged by those in power."[296] Reparation must change "the substantive barriers to liberty—education, housing, medical care, employment, cultural preservation, and political participation."[297] They should effect a change in "the material conditions of daily life by addressing the harms of colonization."[298] Without this material change, reparations may be more damaging than healing because they only offer "cheap grace."[299] Rather than trying to properly repair the wound, the government may try to merely cover it up by "throw[ing] money" at injured groups.[300] Instead of offering symbolic compensation, the government must effect a material change by offering efforts to repair the damaged conditions of the injured group.[301] In this way, reparation can be truly transformative because it symbolizes the condemnation of past exploitation and fosters the feeling of a more just society.[302]

As discussed above, Native Hawaiians continue to suffer deep and long-lasting wounds as a result of colonization. To repair these persistent wounds, Native Hawaiians must have

> not simply the right to equality, but the right to self-determination; not a right to monetary entitlements, but to reparations; not a right to special treatment, but to reconnect spiritually with their land and culture; not a right to participate in the U.S. polity, but a right to some form of governmental sovereignty.[303]

---

[294] Yamamoto & Obrey, *supra* note 200, at 38.

[295] YAMAMOTO, *supra* note 70, at 203.

[296] *Id.*

[297] *Id.*

[298] Obrey, *supra* note 222, at 24.

[299] YAMAMOTO, *supra* note 70, at 203.

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] Eric K. Yamamoto, *The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty—Again*, COLORLINES (Aug. 20, 2000), http://colorlines.com/archives/2000/08/the_colonizers_story_the_supreme_court_violates_native_hawaiian_sovereigntyagain.html.

Reparation for Native Hawaiians, however, cannot be productive until the first three Rs are fully realized. The well-being of Native Hawaiians is directly linked to their iwi kūpuna. Native Hawaiians continue to suffer deteriorating social and economic conditions caused by more than two hundred years of Western encroachment:

> As a group, Native Hawaiians comprise the most economically disadvantaged and otherwise ill-ridden sector of the Islands' population . . . . Native Hawaiians are overrepresented among the ranks of welfare recipients and prison inmates and are underrepresented among high school and college graduates, professionals, and political officials.[304]

Unable to fulfill their kuleana to nā iwi kūpuna and thus unable to receive their reciprocal protection, Native Hawaiian advancement is all but impossible. Reparations to Native Hawaiians must include the material change required to meet the first three Rs; the State must recognize the harm, take responsibility for the harm by taking meaningful action toward reconciliation, and reconstruct its relationship with Native Hawaiians by allowing Native Hawaiians the power of self-determination over iwi. Only then can the State further reparations through other means such as monetary compensation. Without addressing the first three Rs, this compensatory measure would amount to no more than "cheap grace."

V. THE STATE SHOULD AMEND CHAPTER 6E TO DEMONSTRATE ITS COMMITMENT TO RECONCILIATION WITH NATIVE HAWAIIANS

> *E homai ka 'ike, e homai ka ikaika, e homai ka akamai, e homai ka maopopo pono, e homai ka 'ike papalua, e homai ka mana.*[305]

The Social Healing Through Justice framework can also be used to guide future reconciliation efforts—efforts to which the State has already committed itself. Because reconciliation with Native Hawaiians is important in creating peaceable and workable relations between the State and Native Hawaiians, the issues with the current law should be addressed to bridge the gap "between currently felt . . . wounds and [these] workable intergroup relations."[306] Using Professor Yamamoto's framework, this section will recommend specific amendments to the law that (1) help fulfill the State's reconciliation commitment to Native Hawaiians; (2) promote restorative justice to Native Hawaiians; and (3) further the underlying Native Hawaiian values that are

---

[304] Anaya, *supra* note 84, at 317.

[305] "Grant us knowledge, grant us strength, grant us intelligence, grant us righteous understanding, grant us visions and avenues of communication, grant us spiritual power." Hui Mālama, *supra* note 51.

[306] YAMAMOTO, *supra* note 70, at 173.

illuminated above. These proposed amendments are not the only ways to change Hawai'i's burial protection law to further reconciliation efforts; rather, these proposed amendments should be an example of how the Social Healing Through Justice framework can guide future amendments to the burial protection law and other laws that currently hinder reconciliation efforts between the State and Native Hawaiians.

A. Native Hawaiians Should Be Granted the Power to Decide the Disposition of All Remains of Native Hawaiian Ancestry Regardless of When These Remains Were "Identified"

By differentiating between "previously identified" and "inadvertently discovered" remains, the State does not properly recognize the harms inflicted on Native Hawaiians as a result of the desecration of iwi kūpuna. Furthermore, the State short-circuits reconciliation attempts by not taking responsibility for these harms. By cultural mandate, Native Hawaiians buried their family members in secrecy, leaving graves unmarked and revealing the location of these graves to no one outside of the immediate family.[307] Once a protective blanket for the bones of loved ones, this cultural mandate is now being used by developers as authority to remove "inadvertently discovered" remains from construction sites.[308]

Remains classified as "inadvertently discovered" receive substantially different treatment from those remains classified as "previously identified."[309] While construction has been allowed to continue over "inadvertently discovered" remains, there have been no cases (before the current Brescia controversy) where development occurred over previously identified remains without prior agreements and negotiations between the IBC and developers.[310]

By treating iwi differently based on when they were discovered, the State does not fully recognize the cultural significance of these iwi and the current-day cultural, psychological, and physical impact that desecration has on Native Hawaiians. Culturally, no meaningful distinction exists between iwi kūpuna that are "previously identified" and those that are "inadvertently discovered." The distinction between these two "types" of iwi is based on a Western legal construct designed to account for developers' proprietary interests.

To further reconcile with Native Hawaiians, this Western legal construct must yield to an indigenous approach. Native Hawaiians need the authority to

---

[307] *See* Haia & Greer, *supra* note 1, at 16-5.

[308] *See* Lisa A. Bail et al., *Emerging Environmental and Land Use Issues*, HAW. B.J., June 2005, at 4, 14.

[309] Leone, *supra* note 14 (quoting Dana Naone Hall, former chairwoman of the Maui/Lāna'i IBC and active in iwi kūpuna protection since Honokahua).

[310] *Id.*

decide whether to relocate or preserve iwi in place in *all*[311] situations regardless of the classification of iwi as "previously identified" or "inadvertently discovered." Currently, the statute reads: "The councils shall [d]etermine the preservation or relocation of previously identified [N]ative Hawaiian burial sites[.]"[312] Rather, the councils should have the power to "determine the preservation of relocation of all remains that are determined to be of Native Hawaiian ancestry." Accordingly, SHPD would retain the power to determine the preservation or relocation of unmarked burials that are of unknown or non-Native Hawaiian ancestry. By granting Native Hawaiians the authority to decide the disposition of the remains of their ancestors, and thus allowing an indigenous approach to prevail, the State will facilitate reconciliation by recognizing the importance of these iwi, taking action to show that it is taking sincere responsibility for past harms and reconstructing the political relationship between the State and the Native Hawaiian community.

Furthermore, reconstruction can be facilitated by granting Native Hawaiians a stronger voice regarding the preservation of iwi kūpuna, not merely a process. The only legally binding decision-making power that Native Hawaiians currently hold is to decide whether to preserve remains in place or relocate "previously identified" burials.[313] After this initial decision, the IBCs' authority becomes only advisory in nature.[314] This is not sufficient, especially in light of the controversy arising from SHPD's decision to approve Brescia's "preservation measures" in the face of the Kaua'i/Ni'ihau IBC's unanimous rejection of his burial treatment plan. After deciding the disposition of our iwi kūpuna, Native Hawaiians should retain a meaningful, authoritative voice in the process.

As discussed above, Native Hawaiians' limited authority under chapter 6E has recently led to much controversy. The Kaua'i/Ni'ihau IBC required preservation in place of all thirty sets of iwi kūpuna on Brescia's property.[315] Then why do six of our kūpuna sit under cement caps under his multimillion dollar home? And why does yet another one of our kūpuna sit under his driveway? Is this preservation? While Brescia's latest burial treatment plan was rejected by the Kaua'i/Ni'ihau IBC, SHPD approved the plan in the face of the Council's unanimous rejection.[316] SHPD has the power to authorize cement caps as a proper preservation measure, which allows homes to be built on top of iwi with vertical buffers; this is valid under SHPD's definition of "preservation

---

[311] Currently IBCs only have jurisdiction over burials that are previously identified. HAW. REV. STAT. § 6E-43 (2009).

[312] *Id.* § 6E-43.5(f)(1).

[313] *Id.*

[314] *See id* § 6E-43.5(f)(2)-(3).

[315] *See* Levine, *supra* note 144.

[316] *Id.*

in place."[317] Pua Aiu, SHPD Administrator, specifically acknowledged that "both the [Burial Council] and members of the public . . . did not believe the placement of concrete caps over the burials was respectful and proper" preservation of the remains.[318] These are the types of decisions that Native Hawaiians should be making for themselves as a form of self-determination.

In a letter informing Mike Dega, principal investigator for SCS, that Brescia's burial treatment was approved by SHPD, Aiu stated: "The burial council has a mission to protect burials, and to look at burials, and that's all they have to do . . . I think [SHPD] had the difficult position of having to balance very different rights and responsibilities on this land."[319] This statement evidences the need to reframe the government's approach to preservation of Native Hawaiian burials. Aiu's words, "that's all they have to do," trivialize the role that the IBC plays in protecting these remains, while emphasizing the "difficult position" of SHPD. As currently framed, the roles of the IBCs and SHPD are at odds with the goals of reconciliation. The role of the IBC is being subordinated to the State's role. The relationship must be reconstructed by granting Native Hawaiians the power to make these "difficult" decisions. By so doing, the State will move toward more meaningful reconciliation by restoring a measure of power to Native Hawaiians over their culturally important customs.

Currently, the statute allows the IBCs to "[m]ake recommendations regarding appropriate management, treatment, and protection of [N]ative Hawaiian burial sites, and on any other matters relating to [N]ative Hawaiian burial sites."[320] However, as evidenced by SHPD's decision to approve Brescia's burial treatment plan over the Kaua'i/Ni'ihau IBC's unanimous rejection, these recommendations are not legally binding upon SHPD.[321] Accordingly, SHPD possesses great discretion in the "appropriate management, treatment, and protection of [N]ative Hawaiian burial sites."[322]

To grant Native Hawaiians greater decision-making power, the State should revise the law to limit SHPD's discretion in making these decisions. SHPD's decision-making power should be limited and shifted to the Native Hawaiian community by implementing rules and regulations that reflect traditional Hawaiian cultural values and are based on input from the Native Hawaiian community. While SHPD would still retain the ultimate decision to approve or deny a developer's burial treatment plan, this decision would be guided by rules and regulations developed by the Native Hawaiian community that SHPD

---

317 *See id.*

318 *Id.* (quoting Pua Aiu, SHPD Administrator).

319 *Id.* (quoting Pua Aiu, SHPD Administrator).

320 HAW. REV. STAT. § 6E-43.5(f)(3) (2009).

321 *See* Levine, *supra* note 144.

322 *See* HAW. REV. STAT. § 6E-43.5(f)(3) (2009).

must follow. By better defining "appropriate management, treatment, and protection" measures through rules and regulations informed by Hawaiian cultural values, the law will not only limit SHPD's discretion in making these important decisions but will also directly incorporate the voice of the Native Hawaiian community into the law. By adopting these rules and regulations, the indigenous voice will be reflected in the very law that protects their iwi kūpuna.

To further support Native Hawaiians' self-determination initiatives, the law should be further amended to allow the IBCs greater authority over the final approval or denial of a developer's burial treatment plan. The IBC, as a representative of the Native Hawaiian community, should be provided with a process to appeal SHPD's determinations of burial treatment plans. Currently, SHPD is free to approve or deny burial treatment plans despite the recommendations of the IBC;[323] however, the IBCs do not have any mechanisms to challenge SHPD decisions.[324] Without the power to challenge these decisions, the Native Hawaiian community, in cases like Brescia's, must watch as SHPD approves preservation measures that do not reflect Native Hawaiian cultural beliefs and construction continues in accordance with these culturally inadequate measures.

SHPD's decision to approve Brescia's burial treatment plan, despite overwhelming public opposition,[325] left the Native Hawaiian community feeling helpless,[326] a helplessness reminiscent of that felt during the disinterment at Honokahua.[327] To prevent this feeling of helplessness, the IBCs, through a unanimous vote, should be able to veto SHPD's decision and reopen the decision for reconsideration. By granting IBCs this veto power, the State allows Native Hawaiians another legal tool to voice their concerns. This legal recognition brings Native Hawaiians closer to self-determination and allows the State to further its efforts at reconstructing the power structure between itself and Native Hawaiians.

By granting Native Hawaiians a stronger voice over decisions concerning iwi, the legislature will take responsibility for the past harms inflicted upon Native Hawaiians. By amending the laws currently being used to subordinate Native Hawaiian interests, the State will show a sincere attempt at taking responsibility. Furthermore, the State will begin to move toward significant reconstruction. Transferring more of the power to determine the "appropriate

---

[323] *See* Levine, *supra* note 144.

[324] Conrow, *supra* note 109, at 7.

[325] Dana Naone Hall, former chairwoman of the Maui/Lāna'i IBC commented on SHPD's approval of Brescia's burial treatment plan: "When you have every individual and organization writing in against it, how can you turn around and approve it? We all know it was political." *Id.*

[326] *See id.* at 6.

[327] *Id.*

management, treatment, and protection"[328] of iwi kūpuna back into the hands of Native Hawaiians will work to shift the political relationship between the government, developers, and Native Hawaiians.

B. Tangible Rules That Guide the AIS Process Should Be Enacted to Facilitate a Trusting Relationship Between the State and Native Hawaiians

By undermining the AIS process, the State de-emphasizes the importance of iwi to Native Hawaiians and does not take sincere responsibility for the harms experienced by Native Hawaiians through past and present acts of desecration. The AIS process was designed to identify culturally significant properties prior to developers investing large amounts of resources in a project.[329] If these properties are not identified early in the process, SHPD (and the IBCs) is forced to make "tough decisions"[330] in balancing the developers' economic interests and the States' interest in preserving nā iwi kūpuna. When remains are "inadvertently discovered," or the developer has already spent substantial sums of money on infrastructure and actual construction, the likelihood that SHPD will decide to move the remains increases.[331] For the distinction between "previously identified" and "inadvertently discovered" remains to have any meaning, the statute should be amended to require an AIS for all groundbreaking projects. The rules should set strict guidelines for the AIS instead of using broad discretionary language that grants SHPD leeway to interpret the requirements of an AIS on a project-to-project basis.

As noted above, "inadvertently discovered" and "previously identified" remains receive different treatment based on their classification.[332] This distinction often raises concerns in the Hawaiian community because "developers may conduct cursory archaeological inventory surveys, claim that burials are 'inadvertently discovered,' and then attempt to force SHPD to agree to removal [or] relocation."[333] "Appropriate survey and inventory affects mitigation. Everything is dependent on the backbone of inventory and survey."[334] Without proper survey, remains are not identified and thus become "inadvertently discovered," giving jurisdiction to SHPD and removing any

---

[328] HAW. REV. STAT. § 6E-43.5 (2009).

[329] Camille Kalama, Remarks at Auwē in Naue: The Future of Hawai'i's Burial Laws, Maoli Thursday Forum at the William S. Richardson School of Law (Nov. 5, 2009) (video on file with author).

[330] *See id.* (quoting Pua Aiu, SHPD Administrator).

[331] Greer, *Deconstructing Hawai'i's Burial Laws*, *supra* note 289, at 20.

[332] *See infra* Part V.A.

[333] Bail et al., *supra* note 30.

[334] Conrow, *supra* note 109, at 7 (quoting Dana Naone Hall, former chairwoman of the Maui/Lāna'i IBC and active in iwi kūpuna protection since Honokahua).

power the IBC had to challenge the disposition of these remains.[335] Developers have used this differential treatment of remains to manipulate the law and produce desired results.[336] They are utilizing poor archaeological practices and procedures to circumvent the legal process.[337] Making matters worse, those responsible for enforcing these standards (namely, SHPD) are party to the failure.[338]

According to archaeologist and O'ahu IBC member Dr. Kehau Abad, standard archaeological practices would require execution of an AIS using a stratified random sampling approach.[339] This approach looks to the entire property and takes a stratified sample (which includes all the different types of areas on the property, i.e. areas with and without vegetation, areas on the mountain side of the property and areas on the ocean side of the property) at random.[340] Instead of this stratified random sampling approach, SHPD Deputy Director Nancy McMahon approved the use of a judgmental sampling method for the AIS executed on the Brescia property.[341] Using this method, the only areas tested were those areas falling under the footprint of the house.[342]

The judgmental sampling method of executing an AIS is not valid.[343] The purpose of an AIS is to identify the cultural significance of the entire property.[344] A judgmental sampling method cannot be used to accurately extrapolate the significance of the entire property, whereas a stratified random sampling approach can.[345] If the only area surveyed is the area under the proposed development, the IBC and any other parties relying on the survey will not receive an accurate picture of the cultural significance of the property as a whole.[346] The archaeologists are not actually looking for iwi; in fact, they are

---

[335] *Id.*

[336] *See generally* Greer, *Deconstructing Hawai'i's Burial Laws*, *supra* note 289.

[337] Abad, *supra* note 264.

[338] *Id.*

[339] *Id.*

[340] *Id.*

[341] Kalama, *supra* note 329.

[342] *Id.*

[343] *See* Abad, *supra* note 264.

[344] Kalama, *supra* note 329.

[345] *Id.*

[346] Understanding the cultural significance of the entire property is very significant in Hawaiian culture because the iwi are not the only culturally significant resource. When iwi were interred, they sanctified the surrounding area as well, providing the entire area with spiritual power. From a legal standpoint, understanding the cultural significance of the entire area is important because in making decisions regarding preservation or relocation of remains, both the SHPD and the IBCs, must give more weight to preserving remains on a property where there are multiple sets present. *See* HAW. REV. STAT. § 6E-42 (2009).

purposefully leaving these iwi unidentified so that development can be pushed through.[347]

In using a sampling method that cannot accurately assess the entire property, the archaeologists and the State do not fully recognize the importance of iwi to Native Hawaiians. Using procedures that are not the most effective for locating iwi shows the archaeologists' and State's lack of empathy for the harms suffered by Native Hawaiians; rather than showing these remains the respect they deserve, the archaeologists and the State look to procedures that circumvent the process for identifying and preserving these remains.[348]

The Brescia case evidences further archaeological abuse. In the first two phases of the AIS, SCS excavated twenty-six trenches at an average depth of 114 centimeters. Twenty-eight iwi kūpuna were discovered. After the discovery of these iwi kūpuna, SCS worked with the engineers to design shallower footings for the house in hopes of avoiding discovery of any further iwi kūpuna.[349] McMahon approved the plan to excavate at these shallower depths.[350] In the remaining phases of excavation, SCS uncovered only two more iwi kūpuna.[351] However, the eighteen trenches excavated in the latter phases of the AIS were only excavated to an average depth of eighty-three centimeters, thirty-one centimeters shallower than the earlier excavations.[352]

Again, the preceding example is not an appropriate approach for completing an AIS.[353] According to Dr. Abad, when completing an AIS, common archaeological practices require digging down to a sterile layer[354] before the excavation is complete.[355] By digging to shallower depths, SCS circumvented the AIS process. A true picture of the entire property's cultural significance will never be painted.[356] What is presented is only an artificial sketch of what SCS, the developer, and SHPD wanted to portray.

By allowing developers to undermine the AIS process, SHPD does not adequately recognize the importance of nā iwi kūpuna. To make an appropriate

---

[347] Kalama, *supra* note 329.

[348] Greer, *Deconstructing Hawai'i's Burial Laws*, *supra* note 289, at 20.

[349] Greer, *supra* note 14.

[350] *Id.*

[351] *Id.*

[352] Abad, *supra* note 264.

[353] *Id.*

[354] There is no arbitrary depth to which an archaeologist should dig when completing an archaeological survey. *Id.* However, the archaeologist should dig down to a sterile layer. *Id.* A sterile layer is one where there is no evidence of human activity. *Id.* Dr. Abad suggests that good archaeological practices require archaeologists to dig down several centimeters past the sterile layer just for good measure to ensure that this layer is in fact the sterile layer. *Id.*

[355] *Id.*

[356] Some cultural practitioners believe that there are over three hundred sets of Native Hawaiian remains on Brescia's lot. *Id.*

decision regarding the disposition of Native Hawaiian remains, the IBCs rely on the information gathered in these surveys. When the developer and archaeologist provide an incomplete sketch, the IBC is unable to make meaningful decisions regarding nā iwi kūpuna. Contributing to this problem, SHPD undermines the process by allowing AISes that fail to provide sufficient information for the IBC to make informed decisions and by allowing developers to proceed before properly identifying remains.[357] By allowing developers to move forward unchecked, SHPD limits mitigating avenues and forces the IBC to make tough decisions.[358] By forcing the IBC into these tough decisions, the State is not taking responsibility for past actions; rather, the State is sidestepping its responsibility and placing an undue burden on the IBC. The State also fails to take responsibility because SHPD, in exercising its discretionary power to allow archaeologists to use these flawed procedures, exerts its power over Native Hawaiians to further subordinate their shared interests. Instead of reallocating the group power, the State continues to use the law against Native Hawaiian interests.

Furthermore, by undermining this process, SHPD, archaeologists, and developers do not recognize the cultural significance of iwi. "The importance of the iwi [does] not lie only in the bones themselves. The importance of the iwi goes much further."[359] As one Kapa'a resident and Hawaiian activist said in response to Brescia's definition of "preservation," "[t]he bones have a spiritual essence. It extends throughout . . . up, down, sideways. We need people who understand our cultural practices to be making decisions on this."[360] Because nā iwi kūpuna share their spiritual essence with the surrounding area, a complete picture must be painted before decisions are made regarding iwi. Before reconciliation can be meaningful, both the developers and SHPD must recognize the importance of iwi. They must empathize with the injuries caused to the Native Hawaiian people by the desecration of iwi. Finally, they must take responsibility for these harms and act accordingly.

By amending the law to include stringent guidelines for completion of an AIS that require use of generally accepted archaeological practices (including stratified sampling methods and excavation to a sterile layer), the legislature will not only assist the IBCs in making informed decisions by recognizing the importance of iwi, taking responsibility for past harms, and reconstructing the political relationship with Native Hawaiians by offering them some form of self-governance over these iwi, it will also prevent the abuse and circumvention

---

[357] Kalama, *supra* note 329.

[358] *Id.*

[359] Greer, *supra* note 14.

[360] Nathan Eagle, *Fight for Iwi Continues*, GARDEN ISLAND, Aug. 29, 2008, http://thegardenisland.com/news/article_fa69e1ab-5d82-5581-b596-27a531e4e8d3.html.

of the law. Preventing this abuse will help to foster a more trusting relationship between the government, developers, and Native Hawaiians.

C. Educating Parties on the Cultural Significance of Iwi Kūpuna Will Facilitate Reconciliation

The governmental branches responsible for protecting iwi, developers, and the general populace must be educated about the importance of iwi, the injuries suffered by Native Hawaiians as a result of desecration, and the means of preventing such desecration. Educating the public is an "integral component of reparations."[361] "Public education serves to commemorate, to impart lessons learned, and to generate a new justice narrative about a democracy's commitment to civil and human rights."[362]

One of the main failures of the current burial protection legislation is the lack of conscious engagement by SHPD and developers in working toward healing social wounds. Professor Yamamoto suggests that everyone—policymakers, Native Hawaiian and development groups, and the general populace—must "fully engage all four of these Rs to heal social wounds."[363] By educating policymakers and other interested groups, everyone involved in the process of burial protection will become more conscious of the social ills inflicted upon the Native Hawaiian people. An increased consciousness will guide a stronger reconciliation effort by facilitating recognition and responsibility. Furthermore, education will lead to a shift in the collective consciousness, assisting in reconstruction and reparation.

To foster this increased consciousness, the State should implement an educational program for developers, archaeologists, and historic preservation employees, as a form of reparatory action for Native Hawaiians. The legislature should dedicate funding to support the implementation of such educational programs. Further, the legislature should amend the law to require continued education.

Native Hawaiians must be included in this educational process. In doing so, the State will allow Native Hawaiians to tell their own story, to reframe history, and to participate in their own recovery. This inclusion will also assist in restructuring the power relationship between the State, developers, and Native Hawaiians.

Most importantly, including Native Hawaiians in this process will facilitate truly transformative repair. For reparation to be effective, acts of reparation

---

[361] Yamamoto & Obrey, *supra* note 200, at 35.

[362] *Id.*

[363] *Id.*

must be "accompanied by attitudinal and social structural transformation."[364] These acts must "result over time in a restructuring of the institutions and relationships that gave rise to the underlying justice grievance."[365]

VI. CONCLUSION

Once again, the question is posed: Na wai e hō'ola i nā iwi? In 1988, a kāhea (call to action)[366] was heard by Native Hawaiians around the state when the remains of more than a thousand of our ancestors were disinterred from their graves. While the disinterment at Honokahua was not the first time that Native Hawaiian graves had been disturbed by development on a large scale, it was "the first time anybody latched on to what was happening and stayed with it and slowed the process down enough so that we could really see and understand what was going on and other people could understand it, and the uproar could occur."[367] Similarly, the desecration on Brescia's property is not the first to occur since the implementation of Act 306 in 1990. The Native Hawaiian community must take this opportunity, like it did over twenty years ago at Honokahua, and "really see and understand what [is] going on."[368] Honokahua helped create the laws for Native Hawaiian burial protections; the time has come to take another step in the right direction and amend these laws to better meet the cultural needs of the indigenous people of Hawai'i.

Native Hawaiians have a cultural and spiritual kuleana, or responsibility, to secure the preservation and protection of nā iwi kūpuna. Despite the State of Hawai'i's commitment to working toward reconciliation efforts with the Native Hawaiian communities, the current legal tools are insufficient to allow the Native Hawaiian community to adequately accomplish this essential kuleana. The continued desecration to nā iwi kūpuna constitutes a direct cultural and physical harm to the Native Hawaiian people that can only be remedied by providing Native Hawaiian communities and the institutions that represent them with the proper legal mechanisms to ensure the proper protection of our cultural treasures. As the next generation, our kuleana to protect the integrity of our iwi kūpuna is integral to the prosperity of our people.

---

[364] YAMAMOTO, *supra* note 70, at 204.

[365] *Id.* at 208.

[366] PŪKU'I & ELBERT, *supra* note 1, at 111.

[367] SHPD, *supra* note 98 (quoting Dana Naone Hall, former chairwoman of the Maui/Lāna'i IBC and active in iwi kūpuna protection since Honokahua).

[368] *Id.*

Ala Loop and the Private Right of Action Under Hawai'i Constitution Article XI, Section 9: Charting a Path Toward a Cohesive Enforcement Scheme

Noa Ching and Michelle Oh*

I. INTRODUCTION

Throughout the past century, national and state legislatures have created administrative agencies in order to enforce complex statutory schemes involving land use and environmental policies.[1] The vesting of authority in these administrative agencies eventually raised questions of enforcement when a citizen felt that an administrative agency failed to perform its duties.[2] In Hawai'i, the legislature has provided for private rights of action in certain statutes to allow individuals to sue both agencies and fellow citizens who violate the law.[3] When a statute does not provide a private right of action, the courts generally give administrative agencies exclusive authority to enforce land use and environmental statutes.[4] In 2010's *County of Hawai'i v. Ala Loop Homeowners*,[5] however, the Hawai'i Supreme Court significantly transformed Hawai'i law regarding private rights of action.

The controversy in *Ala Loop* began in July of 2003, when Wai'ola Waters of Life Charter School (Wai'ola) attempted to open a school on a parcel of land in an agriculture district on the island of Hawai'i.[6] Little did the school know that

---

* J.D. candidates 2012, William S. Richardson School of Law. The authors would like to thank Lynda Arakawa, Chris Leong, and the members of the University of Hawai'i Law Review for reading and commenting on earlier drafts of this article.

[1] *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1194, 1204, 1213-14 (1982); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 785-86 (2011).

[2] *See* Stewart & Sunstein, *supra* note 1, at 1195-96; Lemos, *supra* note 1, at 786-87.

[3] *See, e.g.*, HAW. REV. STAT. § 342B-56 (2010) ("[A]ny person may commence a civil action on that person's own behalf against . . . [a]ny person (including the State and the director) who is alleged to be in violation of this chapter . . . ."); *id.* § 205A-6 (2001 & Supp. 2010) ("[A]ny person or agency may commence a civil action alleging that any agency . . . [i]s not in compliance with one or more of the objectives, policies, and guidelines provided or authorized by this chapter.").

[4] *See, e.g.*, Pono v. Moloka'i Ranch, Ltd., 119 Haw. 164, 194 P.3d 1126 (App. 2008).

[5] 123 Haw. 391, 235 P.3d 1103 (2010).

[6] *Id.* at 394, 235 P.3d at 1106.

the seemingly innocuous purchase—which drew concerns from neighboring residents, the Ala Loop Homeowners[7] (Homeowners)—would produce a decision that could fundamentally change the interpretation and enforcement of several land use and environmental laws in the State of Hawai'i. While the battle between Wai'ola and the Homeowners progressed to the Hawai'i Supreme Court, the citizens of Hawai'i continued to rely primarily on administrative agencies instead of private lawsuits to enforce state land use and environmental laws. After the Hawai'i Supreme Court issued its decision in *Ala Loop*, however, Hawai'i citizens discovered that a private right of action for land use and environmental statutes had been created—not by statute, but by article XI, section 9 of the Hawai'i Constitution.[8]

Part II of this note will examine the background of the dispute between Wai'ola and Ala Loop Homeowners, as well as the Hawai'i Supreme Court's reasoning and holding in *Ala Loop*. Part III will argue that the court in *Ala Loop* should have clarified its interpretation of article XI, section 9's "reasonable limitations and regulation" clause as applied to the private right of action. Finally, Part IV will analyze potential "reasonable limitations and regulations" that would strike a balance between administrative authority and private enforcement.

II. BACKGROUND

A. Facts and Procedural History

In July of 2003, Wai'ola became established as a charter school and obtained a twenty-eight acre parcel of land on the island of Hawai'i, where it intended to open a school.[9] The parcel, however, was zoned for agricultural use under Hawai'i Revised Statutes (H.R.S.) chapter 205;[10] this agricultural use generally includes farming and ranching but not the operation of a school.[11] Although a

---

[7] *Id.* at 395, 235 P.3d at 1107.

[8] *See id.* at 425, 235 P.3d at 1137 ("Ala Loop had a private right of action under article XI, section 9 of the Hawai'i Constitution to enforce its chapter 205 claims against Wai'ola.").

[9] *Id.* at 394, 235 P.3d at 1106.

[10] *Id.*; *see also* HAW. REV. STAT. ch. 205 (2001 & Supp. 2010) (providing for different uses of land and the special use permit scheme). Land in Hawai'i "is divided into four use districts: urban, rural, agricultural and conservation. The [State Land Use Commission] is responsible for grouping contiguous parcels of land into these districts according to the present and foreseeable use and character of the land." DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAI'I 21 (2d ed. 2010) (internal citations omitted).

[11] *See* CALLIES, *supra* note 10, at 21. Specifically, agricultural land may be used for the cultivation of "crops, orchards, and forests; animal husbandry, fish farming, wind farms, solar energy facilities . . . scientific monitoring stations not equipped for use as a residence, agricultural tourism on working farms, and open-area recreational facilities." *Id.* at 22 (internal

landowner may seek a special permit from the county planning commission for otherwise unpermitted uses,[12] Wai'ola did not try to obtain a permit because H.R.S. section 302A-1184 exempts charter schools from state laws not related to health and safety.[13]

Wai'ola's neighboring residents on Ala Loop Road, the Homeowners, expressed their concerns about Wai'ola's plans to the County of Hawai'i Planning Department.[14] The Planning Department responded that charter schools were exempt from state land use laws except for laws related to health and safety; therefore, Wai'ola was exempt from state laws requiring special use permits.[15]

The Homeowners then contacted the County of Hawai'i Office of the Corporation Counsel to express their disagreement with the Planning Department's interpretation.[16] The Corporation Counsel responded that charter schools are exempt from the special use permit requirements contained in H.R.S. section 205-6;[17] however, the schools had to acquire a county use permit under chapter 25 of the Hawai'i County Code.[18] Shortly thereafter, the State Attorney General informed the Corporation Counsel that charter schools were subject to special use permit requirements under H.R.S. section 205-6.[19]

---

citations omitted).

[12] *Id.* at 25.

[13] *Ala Loop*, 123 Haw. at 394, 235 P.3d at 1106. New century charter schools are "exempt from all applicable state laws" except various laws regarding collective bargaining, exclusive representatives, discriminatory practices, and health and safety requirements. HAW. REV. STAT. § 302A-1184 (Supp. 2002) (repealed 2006, reenacted as HAW REV. STAT. § 302B-9 (Supp. 2006)).

[14] *Ala Loop*, 123 Haw. at 394-95, 235 P.3d at 1106-07.

[15] *Id.* at 395, 235 P.3d at 1107.

[16] *Id.*

[17] In general, "any person who desires to use . . . land within an agricultural or rural district other than for an agricultural or rural use . . . may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired." HAW. REV. STAT. § 205-6(a) (2001 & Supp. 2010).

[18] *Ala Loop*, 123 Haw. at 396, 235 P.3d at 1108. Hawai'i County Code chapter 25 states the following in reference to use permits for schools:

> (a) The following uses shall be permitted within designated County zoning districts only if a use permit is obtained for the use from the commission:
>
> . . .
>
> (10) Schools in RS, RD, RM, RA, FA and A districts, provided that a minimum building site area of ten thousand square feet shall be required within the RS, RD, RM, and RA districts.

Haw. Cnty. Code § 25-2-61 (2005), *available at* http://www.co.hawaii.hi.us/countycode/chapter25.pdf.

[19] *Ala Loop*, 123 Haw. at 396, 235 P.3d at 1108.

To obtain judicial clarification on these issues, the County of Hawai'i filed a complaint in the Circuit Court of the Third Circuit for declaratory relief against the Homeowners.[20] The Homeowners responded with a counterclaim against the County of Hawai'i, requesting declaratory relief that Wai'ola must obtain a special use permit under H.R.S. chapter 205 before operating a school.[21] Additionally, the Homeowners requested injunctive relief to enjoin the County of Hawai'i from issuing building permits until Wai'ola obtained a special use permit.[22] The Ala Loop Homeowners also filed a cross-claim against Wai'ola to enjoin the charter school from conducting any school-related activities on the property without a special use permit.[23]

Wai'ola failed to timely respond to the Homeowners' cross-claim, and the circuit court entered default judgment against Wai'ola.[24] The circuit court concluded, among other things, that (1) the Homeowners had standing to assert claims against Wai'ola for failing to abide by state land use regulations, (2) H.R.S. section 302A-1184 did not exempt a new century charter school from complying with H.R.S. chapter 205, (3) H.R.S. chapter 205 does not allow the property to be used for school-related activities because it was designated for agricultural use, and (4) Wai'ola violated H.R.S. chapter 205 by conducting school-related activities on the property.[25] Based on the above conclusions of law, the circuit court granted the Homeowners' request for declaratory relief.[26] The court ruled that Wai'ola was required to obtain a special use permit and granted a permanent injunction barring Wai'ola from conducting school activities until Wai'ola acquired a special use permit under H.R.S. chapter 205.[27]

On March 12, 2009, the Intermediate Court of Appeals (ICA) reversed the circuit court's ruling, finding that the Homeowners lacked standing to enforce H.R.S. chapter 205 in court.[28] The ICA relied on its 2008 opinion, *Pono v.*

---

[20] The Ala Loop Homeowners sought declaratory relief to confirm that (1) "charter schools [were] exempt from obtaining a [s]tate special [use] permit" and (2) schools were required to follow chapter 25 of the Hawai'i County Code and obtain a county use permit. *Id.* (internal quotation marks omitted).

[21] *Id.*

[22] *Id.* at 397, 235 P.3d at 1109.

[23] *Id.*

[24] *Id.* at 399, 235 P.3d at 1111. Wai'ola encountered difficulties in engaging the office of the Attorney General (AG) to represent the school because the AG disagreed with Wai'ola's interpretation of H.R.S. chapter 205's applicability to charter schools. *Id.* at 397-98, 235 P.3d at 1109-10.

[25] *Id.* at 400-01, 235 P.3d at 1112-13.

[26] *Id.* at 401, 235 P.3d at 1113.

[27] *Id.*

[28] Cnty. of Hawai'i v. Ala Loop Homeowners, No. 27707, 2009 WL 623377, at *6 (Haw. Ct. App. Mar. 12, 2009).

Molokai Ranch, Ltd.,[29] which stated that citizens do "not have authority to privately enforce H.R.S. chapter 205 . . . and, therefore, lack[] standing to invoke the circuit court's jurisdiction to determine . . . [H.R.S.] chapter 205 . . . claims."[30] To reach the conclusion that the plaintiffs did not have a private right of action, the *Pono* court used a test established in *Reliable Collection Agency v. Cole*,[31] where the Hawai'i Supreme Court examined (1) whether the plaintiff is part of a "class for whose especial benefit the statute was enacted," (2) whether legislative intent indicated creation or denial of the remedy, and (3) whether a private right of action is "consistent with the underlying[] purpose of the legislative scheme."[32] The ICA also used the Hawai'i Supreme Court's decision in *Rees v. Carlisle*[33] to apply the principle that the determining factor in the *Reliable* test should be legislative intent.[34] Under the *Rees/Reliable* test, the *Pono* court found that (1) no H.R.S. statute created a private right to enforce H.R.S. chapter 205 and (2) there was no indication of legislative intent to create a private right of action to enforce H.R.S. chapter 205.[35]

The ICA in *Ala Loop* followed the previous decisions of *Pono* and *Lanai Co., Inc. v. Land Use Commission*[36] and held that H.R.S. section 205-12[37] vests

---

[29] 119 Haw. 164, 194 P.3d 1126 (App. 2008). In *Pono*, Defendant Molokai Ranch (MR) planned to build several types of campgrounds on its land located along the "Great Molokai Ranch Trail." *Id.* at 165, 194 P.3d at 1127. A dispute arose between a private, unincorporated association called "Pono" and MR as to whether MR needed a special use permit required under H.R.S. chapter 205 in order to construct the proposed campgrounds. *Id.* at 165-66, 194 P.3d at 1126-27. Plaintiff Pono sued Defendants for declaratory and injunctive relief.

[30] *Id.* at 167, 194 P.3d at 1129. While standing is not always dependent on an express private right of action, for cases involving administrative agency enforcement the legislature sometimes denies individuals standing to sue except for the review of agency actions provided by H.R.S. section 91-14. *See Ala Loop*, 123 Haw. at 422, 235 P.3d at 1134 ("[W]hile the . . . impacts that the neighboring landowners alleged provided . . . standing under HRS § 91-14 as 'persons aggrieved,' at no point in our discussion in those cases did we suggest that they had a cause of action independent of chapter 91 based on their status as neighboring landowners.").

[31] 59 Haw. 503, 584 P.2d 107 (1978).

[32] *Pono*, 119 Haw. at 185, 194 P.3d at 1147 (citing Reliable Collection Agency v. Cole, 59 Haw. at 507, 584 P.2d at 109).

[33] 113 Haw. 446, 153 P.3d 1131 (2007).

[34] *Pono*, 119 Haw. at 185, 194 P.3d at 1147 (citing Rees v. Carlisle, 113 Haw. at 458, 153 P.3d at 1143).

[35] *Id.* at 188, 194 P.3d at 1150. The court in *Pono* found that there "is no provision in HRS chapter 205 that expressly authorizes a private individual to enforce the chapter." *Id.* at 187, 194 P.3d at 1149. Additionally, the court looked at the legislative history of chapter 205, and held that it "is obvious then that when the legislature desires to provide a private cause of action to Hawai'i's citizens to remedy a statutory violation, it knows how to do so and has done so expressly. It has not done so in the case of HRS chapter 205." *Id.* at 188, 194 P.3d at 1150.

[36] 105 Haw. 296, 97 P.3d 372 (2004) (holding that the counties, not the Land Use Commission (LUC), have the authority to enforce H.R.S. chapter 205). The ICA reasoned that the vesting of authority in the counties precluded private individuals from enforcing chapter

authority in the counties, not private actors, to enforce the regulatory scheme.[38] Thus, the ICA concluded that the Homeowners did not have a private right of action and reversed the circuit court's judgment.[39] Because the ICA did not have jurisdiction to enter judgment in the case, it declined to examine the merits of the other parts of the claim.[40]

B. Hawai'i Supreme Court's Analysis of Ala Loop

On July 9, 2010, the Hawai'i Supreme Court in *Ala Loop* reversed the ICA's decision[41] and overruled the ICA's holding in *Pono* that H.R.S. chapter 205 did not provide a private right of action to enforce the permitting scheme.[42] The court concluded that the *Rees/Reliable* test used in *Pono* for finding a private right of action is appropriate to determine whether the legislature intended to create a private right of action in a statute; however, the test does not apply when the state constitution creates the private right of action.[43]

Specifically, the Hawai'i Supreme Court found that the ICA in *Pono* erred by failing to examine whether article XI, section 9 of the Hawai'i Constitution established a private right of action to enforce H.R.S. chapter 205.[44] Article XI, section 9 of the Hawai'i Constitution states:

---

205. Cnty. of Hawai'i v. Ala Loop Homeowners, No. 27707, 2009 WL 623377, at *5 (Haw. Ct. App. Mar. 12, 2009).

[37] "The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations." HAW. REV. STAT. § 205-12 (2001).

[38] *Ala Loop*, 2009 WL 623377, at *5.

[39] *Id.*

[40] *Id.* The ICA declined to examine the following issues on appeal:

> 2. The Circuit Court erred when it failed to recognize that the Association's claims for declaratory and injunctive relief and for nuisance per se against Wai'ola, a state agency, are barred by sovereign immunity;
>
> 3. The Circuit Court misapplied Hawaii Rules of Civil Procedure (HRCP) Rule 55(c) and abused its discretion in denying Wai'ola's Motion to Set Aside Entry of Default;
>
> 4. The Circuit Court lacked sufficient admissible, competent evidence for, and therefore erred in entering, default judgment under HRCP Rule 55(e) in the Association's favor; and
>
> 5. The Circuit Court erred in concluding that Wai'ola was using its farm in violation of State and County land use and zoning laws.

Id.

[41] Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Haw. 391, 394, 235 P.3d 1103, 1106 (2010).

[42] *Id.* at 406-10, 235 P.3d at 1118-22.

[43] *Id.* at 408, 235 P.3d at 1120.

[44] *Id.*

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.[45]

The Hawai'i Supreme Court examined (1) whether H.R.S. chapter 205 was a "law relating to environmental quality" as articulated in article XI, section 9; (2) whether article XI, section 9 was self-executing; and (3) if the provision is self-executing, whether the legislature acted to impose "reasonable limitations and regulation" that would preclude a private right of action to enforce H.R.S. chapter 205.[46]

First, the court found that H.R.S. chapter 205 was an environmental law because it was related to "conservation, protection and enhancement of natural resources," as articulated by the Hawai'i Constitution.[47] The court reached this result by examining the legislative history behind H.R.S. chapter 205 and finding that the law's purpose was to "preserve, protect and encourage the development of lands . . . for the public welfare"[48] and to "conserve forests, water resources and land."[49] The court also found that prior case law indicated that the spirit of the law was to protect resources.[50] In addition to the legislative history of H.R.S. chapter 205, the court examined H.R.S. section 607-25 (Fee Recovery Statute), which governs the recovery of attorneys' fees in private actions against private parties who develop land without the required permits and approvals;[51] the court found that the legislature intended to encourage and help the public "enforce laws intended to protect the environment" by awarding

---

[45] HAW. CONST. art. XI, § 9.

[46] *Ala Loop*, 123 Haw. at 409, 235 P.3d at 1121.

[47] *Id.* at 409, 235 P.3d at 1121 (quoting HAW. CONST. art. XI, § 9).

[48] *Id.* (quoting Act of 1961, No. 187, § 1, 1961 Haw. Sess. Laws 299 (codified at HAW. REV. STAT. ch. 205 (2001 & Supp. 2010)).

[49] *Id.*

[50] *Id.* at 410, 235 P.3d at 1122 (citing Curtis v. Bd. of Appeals, 90 Haw. 384, 396, 978 P.2d 822, 834 (1999)).

[51] HAW. REV. STAT. § 607-25 (1993 & Supp. 2010) (stating that the court can award reasonable attorneys' fees and costs to the prevailing private party suing for injunctive relief against another private party who did not acquire the necessary permits and approvals from a government agency). The statutes covered by H.R.S. section 607-25 include H.R.S. section 205-205A, implying that a private party should be able to recover attorneys' fees and costs for bringing a suit to enforce the 205-205A permitting scheme. *See id.* Therefore, H.R.S section 607-25's purpose of environmental protection is also evidence of H.R.S. chapter 205's identification as an environmental statute. *Ala Loop*, 123 Haw. at 410, 235 P.3d at 1122.

attorneys' fees to successful private parties in order to defray the cost of litigation.[52]

In the next step of the analysis, the court found that article XI, section 9 was self-executing.[53] The Hawai'i Supreme Court explained the importance of this determination: "[A] provision 'is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.'"[54] If the court ruled that article XI, section 9 was not self-executing, then private parties would be precluded from using the constitution for standing to sue for violations of laws relating to environmental quality.[55]

Using the test in *State v. Rodrigues*[56]—which established precedent on constitutional self-executory provisions—and Hawai'i Constitution article XVI, section 16,[57] the Hawai'i Supreme Court first concluded that the plain language and framer history of article XI, section 9 indicates the provision is self-executing.[58] The court interpreted the "subject to reasonable limitations and regulation as provided by law" clause of article XI, section 9 to mean that the legislature could place reasonable limitations on the right; legislative action was not required for private parties to be able to exercise the right.[59] The court also noted that environmental statutes and regulations existed at the time the provision was added to the Hawai'i Constitution; therefore, the "reasonable limitations and regulations" referred to the existing regulations instead of requiring future regulation.[60] Next, the court examined the history of the 1978

---

[52] *Ala Loop*, 123 Haw. at 410, 415-16, 235 P.3d at 1122, 1127-28.

[53] *Id.* at 410-17, 235 P.3d at 1122-29.

[54] *Id.* at 410, 235 P.3d at 1122 (citing State v. Rodrigues, 63 Haw. 412, 414, 629 P.2d 1111, 1113 (1981)).

[55] *See id.* at 416, 235 P.3d at 1128; *see also* David Kimo Frankel, *Enforcement of Environmental Laws in Hawaii*, 16 U. HAW. L. REV. 85, 135 (1994).

[56] 63 Haw. 412, 629 P.2d 1111 (1981). A constitutional provision is deemed self-executing if (1) "it supplies a sufficient rule by means of which the right may be enjoyed and protected," or (2) "the duty imposed may be enforced." *Id.* at 414, 629 P.2d at 1113 (internal citation omitted).

[57] "[P]rovisions of this constitution shall be self-executing to the fullest extent that their respective natures permit." HAW. CONST. art. XVI, § 16.

[58] *Ala Loop*, 123 Haw. at 410-17, 235 P.3d at 1122-29.

[59] *Id.* at 413, 235 P.3d at 1125.

[60] *Id.* at 411, 235 P.3d at 1123. The Hawai'i Supreme Court in *Ala Loop* contrasted *Rodrigues* (holding that article I, section 11 was not self-executing because at the time of the amendment, no constitutional provisions or statutes existed regarding the issue the amendment addressed) with *In re Water Use Permit Applications*, 94 Haw. 97, 131-32, 9 P.3d 409, 443-44 (2000) (holding that article XI, section 7 was self-executing because it adopted a well known doctrine as a principle of constitutional law) and *United Public Workers v. Yogi*, 101 Haw. 46, 62 P.3d 189 (2002) (holding that the phrase "as provided by law" referred to existing statutes and constitutional provisions instead of requiring future legislation). From the above cases, the

constitutional convention to examine the intent of the framers at the time article XI, section 9 was ratified.[61] The court concluded that the convention's Committee on Environment, Agriculture, Conservation and Land intended the provision to be self-executing.[62]

Finally, the court determined that the legislature did not impose reasonable limitations or regulations that would preclude the Homeowners from enforcing H.R.S. chapter 205.[63] Article XI, section 9 gave the legislature authority "to impose 'reasonable limitations and regulation' on potential litigants . . . who seek to bring private actions to enforce laws relating to environmental quality."[64] Wai'ola argued that H.R.S. section 205-12,[65] which gives counties authority to enforce chapter 205, was a "reasonable limitation[] and regulation within the meaning of the provision" because the legislature expressly granted the counties authority to enforce restrictions and conditions on agriculture districts.[66] Wai'ola reasoned that the explicit delegation of power to the counties precluded the Homeowners' private right of action.[67] The Hawai'i Supreme Court, however, rejected this argument, noting that "[t]he abolishment of the private right altogether . . . would not be a reasonable limitation within

---

court derived the principle that constitutional provisions addressing subject matter with already existing regulations were self-executing, while provisions that did not have existing laws or regulations were not self-executing. *Ala Loop*, 123 Haw. at 411-13, 235 P.3d at 1123-25.

[61] *Ala Loop*, 123 Haw. at 413-15, 235 P.3d at 1125-27.

[62] "[T]he [Committee on Environment, Agriculture, Conservation and Land] report explicitly recognizes that the provision 'provides that individuals may directly sue public and private violators.'" *Id.* at 413-14, 235 P.3d at 1125-26 (quoting STAND. COMM. REP. NO. 77, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 689-690 (1980)).

[63] *Id.* at 417-18, 235 P.3d at 1129-30.

[64] *Id.* at 417, 235 P.3d at 1129 (quoting HAW. CONST. art. XI, § 9).

[65] "The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts . . . ." HAW. REV. STAT. § 205-12 (2001).

[66] *Ala Loop*, 123 Haw. at 417, 235 P.3d at 1129 (internal quotations omitted).

[67] *Id.* The reasoning behind Wai'ola's argument is explained by the statutory interpretation principle of *expressio unius est exclusio alterius*:

> [A] statute which provides for a thing to be done in a particular manner or by a prescribed person or tribunal implies that it shall not be done otherwise or by a different person or tribunal . . . the express mention of one thing implies the exclusion of another . . . .

State v. Harada, 98 Haw. 18, 42, 41 P.3d 174, 198 (2002) (quoting State *ex rel.* Battle v. Hereford, 133 S.E.2d 86, 90 (W.Va. 1963) (internal citations omitted)). Wai'ola's argument relied on *Lanai Co. v. Land Use Commission*, 105 Haw. 296, 97 P.3d 372 (2004), which ruled that the legislature explicitly gave sole authority for enforcement of H.R.S. section 205 to the counties, not the LUC. 105 Haw. at 318, 97 P.3d at 394. The Hawai'i Supreme Court in *Lanai Co.* found that if the legislature wanted to give power to the LUC, the statute would have listed the LUC as an enforcer. *Id.*

the meaning of the provision."[68] Because the private right of action was a constitutional right, the legislature did not have authority to pass a limitation or regulation that eliminated the right.[69] The Hawai'i Supreme Court thus held that the Homeowners had a private right of action to sue the defendants under article XI, section 9 for violating H.R.S. section 205 because Wai'ola did not demonstrate that a reasonable limitation existed.[70]

III. *ALA LOOP*'S POTENTIAL NEGATIVE IMPACTS FOR HAWAI'I

The decision in *Ala Loop* has the potential to negatively impact Hawai'i because it could spur a significant increase in private actions to enforce statutes relating to environmental quality. Such an increase may (1) raise the risk of litigation surrounding development projects, which would chill investments and increase the costs of development and (2) undermine the purpose of Hawai'i's environmental agencies. Lisa Woods Munger, a leading lawyer in environmental and land use law in Hawai'i, aptly summarized the questions that *Ala Loop* created but did not answer: "Can anybody sue? Can anybody sue at any time? Can a series of people sue? Forever and ever? What limits are there, if any?"[71]

A. Ala Loop *Raises the Risk of Litigation Toward Development Projects*

Ala Loop may hinder ongoing and proposed development projects because the decision not only increased the risk of lawsuits that can now be brought under chapter 205, but it may have also unintentionally created a private right of action for a variety of crucial developmental laws in Hawai'i.

Under *Ala Loop*, other statutes besides H.R.S. chapter 205 may now have a private right of action through article XI, section 9. The court in *Ala Loop* did not limit its analysis to only H.R.S. chapter 205.[72] Instead, it laid a blueprint for future courts to determine whether a private right of action exists under article XI, section 9. As mentioned above, the blueprint considers factors including (1) whether the statute relates to "environmental quality" within the meaning of article XI, section 9, and if so, (2) whether language in the statute places "reasonable limitations and regulations" which would preclude parties

---

[68] *Ala Loop*, 123 Haw. at 418, 235 P.3d at 1130 (internal quotation omitted).

[69] *Id.*

[70] *Id.*

[71] *See* Lisa Woods Munger, Partner, Goodsill Anderson Quinn & Stifel LLP, Remarks at the University of Hawai'i Environmental Law Program Colloquium: Ala Loop Homeowners Association (Oct. 14, 2010), *available at* http://www.vimeo.com/15890111.

[72] *See Ala Loop*, 123 Haw. 391, 235 P.3d 1103. Nowhere in *Ala Loop* does the court expressly limit its analysis to H.R.S. chapter 205. *See id.*

from maintaining private actions.[73] Under these two factors, other Hawai'i statutes may have private rights of action through article XI, section 9.

For example, following *Ala Loop*, H.R.S. chapter 342D, which regulates the discharge of water pollutants in Hawai'i,[74] could be considered a law that has a newly created private right of action for enforcement. Under chapter 342D, anyone who "discharges any water pollutant or effluent into a public treatment work or sewage system may be required to apply for a pretreatment permit."[75] Chapter 342D grants regulation and enforcement powers to the Department of Health (DOH) and the Attorney General.[76] Chapter 342D does not expressly allow a private entity to sue the DOH or another private entity for violating the chapter.

After *Ala Loop*, however, article XI, section 9 arguably creates a private right of action to enforce H.R.S. chapter 342D in part because 342D relates to "environmental quality." Analogous to H.R.S. chapter 205's legislative history, the purpose of H.R.S. chapter 342D is to "establish[] permit procedures, provide[] for monitoring and enforcement of regulations, . . . [and] to prevent, control and abate pollution."[77] In other words, its purpose focuses on environmental quality. The Fee Recovery Statute also lists chapter 342D in addition to chapter 205.[78] As discussed above, the court in *Ala Loop* considered the inclusion of chapter 205 in the Fee Recovery Statute as a factor in determining whether or not chapter 205 was a law relating to "environmental quality."[79] Finally, it is arguable that there are no reasonable regulations within H.R.S. chapter 342D that would preclude private lawsuits under article XI, section 9.[80] Thus, after *Ala Loop*, a private right of action to enforce H.R.S. chapter 342D may exist.

Other Hawai'i statutes could also be affected by *Ala Loop*. For example, H.R.S. chapter 205A, which regulates development within Hawai'i's coastal

---

[73] *Id.*; *see supra* Part II.

[74] HAW. REV. STAT. ch. 342D (2010); *see also* GOODSILL ANDERSON QUINN & STIFEL LLP, HAWAI'I ENVIRONMENTAL LAW HANDBOOK 73 (Lisa Woods Munger ed., 2000) ("Chapter 342D establishes the National Pollutant Discharge Elimination System (NPDES) permit program required under the Clean Water Act.").

[75] GOODSILL ANDERSON QUINN & STIFEL, *supra* note 74, at 81 (citing HAW. REV. STAT. ANN. ch. 342D (LexisNexis 1999)).

[76] HAW. REV. STAT. § 342D-17 (2010) ("All state and county health authorities and police officers shall enforce this chapter and the rules and orders of the department."); *see also* GOODSILL ANDERSON QUINN & STIFEL, *supra* note 74, at 73.

[77] SEN. STAND. COMM. REP. NO. 616, 15th Leg., Reg. Sess. (Haw. 1989), *reprinted in* 1989 HAW. SEN. J. at 1044.

[78] HAW. REV. STAT. § 607-25 (1993 & Supp. 2010).

[79] *See supra* notes 51-52 and accompanying text.

[80] *See generally* HAW. REV. STAT. ch. 342D (2010).

zone,[81] could also be considered a law that private entities have a right to enforce under article XI, section 9. Although H.R.S. chapter 205A allows private entities or agencies to sue an *agency* to contest an issuance of a Special Management Permit, chapter 205A does not explicitly allow a private right of action against other private actors to enforce its provisions.[82] Additionally, the Hawai'i Supreme Court has previously held that H.R.S. chapter 205A by itself does not provide a private right of action for failing to properly acquire a Special Management Permit.[83]

Following *Ala Loop*, however, H.R.S. chapter 205A is arguably a law that private citizens have a right to enforce against other private citizens. First, H.R.S. chapter 205A appears to be a law relating to "environmental quality" within article XI, section 9. Similar to the legislative histories of chapters 205 and 342D, H.R.S. chapter 205A has an environmental purpose to "preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawai'i."[84] Additionally, like H.R.S. chapters 205 and 342D, H.R.S. chapter 205A is listed in the Fee Recovery Statute.[85] Finally, it is arguable that there are no reasonable regulations within H.R.S. chapter 205A that would preclude private lawsuits under article XI, section 9.[86]

---

[81] *See generally id.* ch. 205A (2001 & Supp. 2010). *See also* CALLIES, *supra* note 10, at 209. Any type of proposed development with the exception of most single family houses within the coastal zone requires a developer to apply for a Shoreline Management Permit (SMP). *Id.* The coastal zone varies from two hundred yards to more than a mile in width. *See id.*

[82] *Compare* HAW. REV. STAT. ch. 205 (2001 & Supp. 2010) (no private right of action) *with* HAW. REV. STAT. ch. 205A (2001 & Supp. 2010) (providing for a right of action against the agency, but not against private individuals).

[83] *See* Kona Old Hawaiian Trails Grp. v. Lyman, 69 Haw. 81, 92-94, 734 P.2d 161, 168-69 (1987). In *Kona Old*, the Lanihau Corporation owned two parcels of property within the special management area at Kailua-Kona. *Id.* at 83, 734 P.2d at 163. The company applied for and obtained a special use permit, as required under H.R.S. chapter 205A, from the Hawai'i County Department of Planning director. *Id.* at 84, 734 P.2d at 164. An association of residents named "Kona Old" sued the Director of Planning, alleging that the permit was incorrectly issued. *Id.* at 85, 734 P.2d at 164. Kona Old claimed it had a right to sue private actors under H.R.S. section 205A-6. *Id.* at 86 n.4, 734 P.2d at 165 n.4. The court held it did not have jurisdiction under H.R.S. section 205A-6, noting the chapter's legislative history: "Your committee feels that judicial review should be available to any person, but that legal actions should be against governmental agencies, rather than individuals." *Id.* at 92 n.12, 734 P.2d at 168 n.12 (quoting STAND. COMM. REP. NO. 779, in 1977 HAW. SEN. J., at 1187).

[84] *Compare* HAW. REV. STAT. § 205A-21 (2001) *with* Act of July 11, 1961, No. 187, § 1, 1961 Haw. Sess. Laws 299 (codified at HAW. REV. STAT. ch. 205 (2001 & Supp. 2010) ("[The purpose of H.R.S. chapter 205 is] to preserve, protect and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare[.]"), *and* HAW. REV. STAT. ch. 342D (2010) (purpose of H.R.S. chapter 342D is to protect inland and marine waters).

[85] *See supra* notes 51-52, 81.

[86] *See generally* HAW. REV. STAT. ch. 205A (2001 & Supp. 2010).

Ala Loop's potential impact does not end here. The Fee Recovery Statute lists more than a dozen other laws—ranging from H.R.S. chapter 183 regarding the forest reserves and water development to noise pollution laws under H.R.S. chapter 342F—that may be considered laws relating to environmental quality enforceable by private parties under article XI, section 9.[87]

Thus, *Ala Loop* has "fundamentally rewritten Hawaii land use law"[88] by allowing private rights of action to enforce what has traditionally been a statute regulated by county agencies.[89] The court placed no tangible limit on these private rights,[90] and the "floodgates being opened" for lawsuits using article XI, section 9 is a real possibility.[91]

As discussed above, *Ala Loop* created some unresolved issues. First, *Ala Loop* may have opened the door for more private lawsuits to enforce zoning statutes under H.R.S. chapter 205.[92] Second, *Ala Loop* may have also opened

---

[87] *See id.* § 607-25(c) (1993 & Supp. 2010). Section 607-25 also lists chapters 6E, 46, 54, 171, 174C, 180C, 183C, 184, 195, 195D, 266, 342B, 342H, 342J, 342L, and 343. It is important to note that the court in *Ala Loop* did not state that a law *must* be listed in section 607-25 to be considered a law related to environmental quality. *See* Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Haw. 391, 410, 235 P.3d 1103, 1122 (2010). The court only used section 607-25 as *further* evidence that chapter 205 was a law related to environmental quality. *Id.* Thus, the laws listed in section 607-25 comprise a non-exhaustive list of laws that may have a private right of action under article XI, section 9. It is arguable that laws not included in section 607-25 can also be enforced through article XI, section 9.

[88] Robert Thomas, *HAWSCT Finds Zoning Statutes Are Environmental Laws - Court Creates A Private Right of Action To Enforce Chapter 205*, INVERSECONDEMNATION.COM (July 9, 2010), http://www.inversecondemnation.com/inversecondemnation/2010/07/hawsct-finds-zoning-statutes-are-environmental-laws-and-creates-a-private-right-of-action-to-enforce.html. *See also* Munger, *supra* note 71.

[89] *See* Pono v. Molokai Ranch, Ltd., 119 Haw. 164, 180-90, 194 P.3d 1126, 1142-52 (App. 2008) ("[P]rivate citizens do not have a private right of action to enforce the provisions of HRS chapter 205 and, therefore, lack standing to invoke a circuit court's jurisdiction to determine their claims to enforce Chapter 205."). *See* Thomas Yeh, Partner, Tsukazaki Yeh & Moore LLP, Remarks at the University of Hawai'i Environmental Law Program Colloquium: Ala Loop Homeowners Association (Oct. 14, 2010), *available at* http://www.vimeo.com/15890111.

[90] *Ala Loop*, 123 Haw. at 452, 235 P.3d at 1164 (Acoba, J., dissenting) ("The majority attempts to define the constitutional right as encompassing the *entirety* of HRS chapter 205 through judicial "case law" in its opinion. Without the prescription of "reasonable procedural and jurisdiction matters, and a reasonable statute of limitations . . . this approach invites havoc in future applications of a private right of action . . .") (internal brackets and citations omitted).

[91] Interview by Jay Fidell with Doug Codiga, of Counsel, Schlack Ito LLP, in Honolulu, Haw. (July 27, 2010), *available at* http://vimeo.com/13906331.

[92] *See generally Ala Loop*, 123 Haw. 391, 235 P.3d 1103. It is unknown whether or not courts will allow more suits by private entities for H.R.S. section 205 violations. *See generally id.*; *see also* Munger, supra note 71 ("The breadth of the language of [*Ala Loop*] is sweeping and unknown.").

the door for lawsuits by private entities for violations of other statutes besides H.R.S. chapter 205.[93]

Such unanswered questions increase the risk developers face in Hawai'i. Indeed, many top local planning firms are concerned about their clients' projects, as *Ala Loop* places developers in a "climate in which [they are] sensitive to the possibility that environmental documents can be challenged out of unexpected directions."[94] Additionally, most businesses and development projects are extremely sensitive to court orders stopping operations or construction; a short delay by a lawsuit can cost millions and destroy a company's finances.[95] The *Ala Loop* decision's potential to increase lawsuits against developers worsens Hawai'i's existing image "as having a bad business environment."[96] Investors face increasing risks in deciding whether "to make large [investments in] Hawai'i."[97] Ultimately, *Ala Loop* hurts businesses because it exposes them to additional risk of lawsuits that can chill investments toward Hawai'i's development projects.

---

[93] *See supra* Part III.A.

[94] E-mail from John Kirkpatrick, Senior Socio-Econ. Analyst, Belt Collins Hawai'i, to Noa Ching (Oct. 22, 2010, 12:24 PST) (on file with authors).

[95] The Hawaii Superferry and the Hōkūli'a development project are pertinent examples of how delays brought about by legal action can bring financial ruin to a company. The Hawaii Superferry was forced to stop service in March 2009 after the Hawai'i Supreme Court ruled that the special legislation in 2007 permitting the Superferry to operate prior to completion of an environmental impact study was unconstitutional. *See* Sierra Club v. Dep't of Transp., 120 Haw. 181, 202 P.3d 1226 (2009). Two months after suspending service, the Hawaii Superferry filed for bankruptcy. *See In re* HSF Holding, Inc., 421 B.R. 716, 720 (Bankr. D. Del. 2010) ("On May 30, 2009, HSF and Superferry each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code."). Superferry claimed that "[a]s a direct result of the Hawaii Supreme Court decision last March, [it] had to shut down operations. There has been no relief from that decision. With no ability to operate, the company has had no revenues, only ongoing expenses to maintain the vessels . . . ." *Hawaii Superferry's statement of Bankruptcy*, HONOLULU ADVERTISER, May 30, 2009, *available at* http://the.honoluluadvertiser.com/article/2009/ May/30/br/hawaii90530041.html. Hōkūli'a, a 1550-acre luxury residential project on the Big Island of Hawai'i, was ordered to stop development by Circuit Court Judge Ronald Ibarra in September 2003. The delay cost the developer "many millions of dollars." Kevin Dayton, *Hokulia Created Legal Cloud*, HONOLULU ADVERTISER, (Mar. 21, 2006). Hōkūli'a was eventually auctioned in 2010. *See* Shayndi Rice and Robbie Whelan, *Paradise Lost: A Project in Hawaii Stumbles*, WALL ST. J., May 16, 2010, *available at* http://online.wsj.com/article/SB10001424052748704912004575252713409264610.html.

[96] Greg Wiles, *Hawai'i's Image Affected by Decision*, HONOLULU ADVERTISER, Oct. 10 2007, *available at* http://the.honoluluadvertiser.com/article/2007/Oct/10/In/hawaii710100416.html.

[97] *Id.*

B. Ala Loop *Could Potentially Undermine the Purpose of Hawai'i's Environmental Agencies*

Ala Loop may undermine the purpose of Hawai'i's administrative agencies with regard to environmental and land use laws because private parties may try to circumvent the administrative process and seek relief directly in court through article XI, section 9. Many environmental statutes such as H.R.S. chapter 205A have an administrative process where agencies issue permits, fees, and penalties.[98] A problem arises when such a statute is considered a law of "environmental quality" and a private right of action also exists under article XI, section 9. A plaintiff may try to sue immediately under article XI, section 9 in lieu of waiting for administrative relief because of possible advantages a judicial forum would provide over the administrative process.[99] This type of strategy is similar to forum shopping and is generally frowned upon because it is "inimical to sound judicial administration."[100]

It is also generally more prudent to have administrative agencies regulate complex and specialized zoning and permitting laws instead of a court because administrative agencies are composed of specialists whose education and experience complement the agency. Indeed, "in deference to the administrative agency's expertise and experience in its particular field, the courts should not substitute their own judgment for that of the administrative agency."[101] Private

---

[98] *See* HAW. REV. STAT. ch. 205A (2001 & Supp. 2010); *see also id.* ch. 342D (2010) (water quality); *id.* ch. 342B (2010) (air pollution).

[99] It is noted that lawsuits to enforce environmental statutes can be costly, and such costs may provide a natural barrier for excessive suits. *See* STAND. COMM. REP. NO. 77, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 690 (1980) ("[T]here should be few additional lawsuits [from article XI, section 9], given the barriers that *litigation costs* present." (emphasis added)); Frankel, *supra* note 55, at 136-37 ("A more formidable obstacle to using the constitution to enforce [a] law is the need to pay for the lawsuit. Litigation is expensive."). The high cost, however, has not stopped numerous individuals from suing, or soliciting organizations to litigate on their behalf. *See, e.g.*, Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Haw. 391, 414, 235 P.3d 1103, 1126 (2010) (group of homeowners sued County of Hawai'i and charter school to enforce zoning statute); Sierra Club v. Dep't of Transp., 120 Haw. 181, 202 P.3d 1226 (2009) (Sierra Club sued on behalf of individuals to enforce chapter 343); Pono v. Molokai Ranch, Ltd., 119 Haw. 164, 194 P.3d 1126 (App. 2008) (unincorporated association and several individuals sued to enforce zoning statute).

[100] Moss v. Am. Int'l Adjustment Co., 86 Haw. 59, 65, 947 P.2d 371, 377 (1997) (quoting Jordan v. Hamada, 64 Haw. 446, 448, 643 P.2d 70, 72 (1982)). *See also* Stewart & Sunstein, *supra* note 1, at 1292-93 ("Private rights of action circumvent administrative responsibility for regulatory policy. Litigants asserting such rights can force courts to define the content of necessarily overbroad regulatory statutes, thereby undermining the advantages of political accountability, specialization, and centralization that administrative regulation was designed to provide.").

[101] Camara v. Agsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984). *See also* Haw. Gov't

suits can cultivate judicial interpretations of a regulation without agency discretion or input, taking power from the administrative agency originally created to enforce the regulation.[102]

IV. POST-ALA LOOP—CREATING A COHESIVE ENFORCEMENT SCHEME

Future courts must narrow and clarify *Ala Loop*'s current "sweeping and unknown"[103] opinion in order to harmonize the private right of action under article XI, section 9, with Hawai'i's business, judicial, and administrative interests.[104] One way to clarify and narrow the *Ala Loop* decision is to define what constitutes "reasonable limitations and regulations" under article XI, section 9.

A. Ala Loop*'s Framework for Determining "Reasonable Limitations and Regulations as Provided by Law"*

Ala Loop suggested that "reasonable limitations and regulations" in the form of "statutes of limitations or procedural or jurisdictional limitations" could restrict the right of action in a "particular instance."[105] Although the Hawai'i Supreme Court did not provide a specific standard for what constitutes a

---

Emps. Ass'n AFSCME Local 152 v. Lingle, 124 Haw. 197, 208, 239 P.3d 1, 32 (2010) (holding that legislative policy is furthered when administrative agencies decide infractions within their jurisdiction first, rather than a court); Topliss v. Planning Comm'n, 9 Haw. App. 377, 383-84, 842 P.2d 648, 653 (1993) ("An administrative agency's decision within its sphere of expertise is given a presumption of validity.").

[102] Stewart & Sunstein, *supra* note 1, at 1292-93. ("Litigants asserting such [private rights of action] can force courts to define the content of necessarily overbroad regulatory statutes, thereby undermining the advantages of political accountability, specialization, and centralization that administrative regulation was designed to provide. Private rights of action may also impair an agency's ability to harmonize potentially conflicting statutory provisions and to negotiate with regulated firms and other affected interests in order to establish a workable and consistent regulatory scheme."). Unlike private rights of actions, judicial review under H.R.S. chapter 91 establishes court review of an agency's decision, which allows the agency to first develop the record below and issue a ruling. HAW. REV. STAT. § 91-14 (1993 & Supp. 2010). Hawai'i statutes and case law afford agency decisions some deference. *Id.*; Aio v. Hamada, 66 Haw. 401, 406, 664 P.2d 727, 731 (1983) ("[T]o preserve the function of administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determinations, a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise . . .") (internal citations omitted); *Topliss*, 9 Haw. App. at 383-84, 842 P.2d at 653.

[103] *See* Munger, *supra* note 71.

[104] *See supra* Part III.B.

[105] Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Haw. 391, 418, 235 P.3d 1103, 1130 (2010).

"reasonable" limitation or regulation, the court provided some guidance through its analysis of H.R.S. chapter 205.[106] The first principle, according to the court, is that a limitation or regulation is not "reasonable" if it completely eliminates the ability to exercise the private right of action.[107]

The second principle is that the "private right of action complements and does not replace or limit existing government enforcement authority."[108] The 1978 constitutional convention's Committee on Environment, Agriculture, Conservation and Land stated this principle in its report on article XI, section 9 following its discussion of the potential effects of the private right of action on the current environmental enforcement scheme.[109] Although the Hawai'i Supreme Court in *Ala Loop* used the provision to suggest that the framers did not intend for the government to "supplant" the private right of action, the phrase also indicates that the framers did not want the private right of action to "replace" government authority.[110] Therefore, limitations or regulations that prevent the private right of action from replacing or limiting government enforcement authority should be considered "reasonable" because such limitations implement the intent of the framers.[111]

B. The Doctrines of Exhaustion and Primary Jurisdiction Are Reasonable Limitations

As mentioned above, the private right of action in article XI, section 9 could be interpreted to allow private actors to bypass an administrative enforcement scheme created by the legislature by filing an original claim in court.[112] Allowing the private right of action to be used in such a manner would render administrative enforcement schemes superfluous, which was likely not the intention of the Hawai'i Supreme Court.[113] To prevent private enforcement from subsuming public enforcement, the Hawai'i Supreme Court in future cases should interpret two common law doctrines of comity[114] between the

---

[106] *See supra* text accompanying notes 63-70.

[107] *See supra* notes 63-70 and accompanying text.

[108] *Ala Loop*, 123 Haw. at 418, 235 P.3d at 1130 (quoting STAND. COMM. REP. NO. 77, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 690 (1980)).

[109] *Id.*

[110] *See id.*

[111] *See id.*

[112] *See supra* Part III.B.2.

[113] *See Ala Loop*, 123 Haw. at 418, 235 P.3d at 1130 (citing STAND. COMM. REP. NO. 77, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 690 (1980)).

[114] The Hawai'i Supreme Court has explained comity "as the principle that courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction out of deference and mutual respect." Metcalf v. Voluntary Emps.' Benefit Ass'n of Haw., 99 Hawai'i 53, 58, 52 P.3d 823, 828 (2002) (quoting Chun v. Bd. of Trs. of Emps.' Ret.

courts and administrative agencies as constituting a "reasonable limitation" on the private right of action—the doctrines of exhaustion and primary jurisdiction.[115] Although differences exist between the two doctrines and when they are applied, both uphold judicial deference to the legislature's creation of administrative agencies to enforce certain statutory schemes.[116]

1. Doctrine of exhaustion

The doctrine of exhaustion stands for the principle that parties must utilize all forms of relief provided by the administrative process established by the legislature before seeking a remedy in court.[117] The doctrine applies when "a claim is cognizable in the first instance by an administrative agency alone."[118] This agency jurisdiction to resolve such claims is usually explicitly stated in statutory provisions.[119] The underlying rationale behind the doctrine of exhaustion is that the "avenues of relief nearest and simplest should be pursued first."[120] Thus, the judicial process will wait until the entire administrative process is completed before reviewing agency action.[121]

The main Hawai'i case explaining the doctrines of exhaustion and primary jurisdiction is *Kona Old Hawaiian Trails Group v. Lyman*.[122] In *Kona Old*, the plaintiff sought judicial review of the planning director's decision granting a special management area minor permit to Lanihau Corporation.[123] In the first part of the analysis dealing with exhaustion, the Hawai'i Supreme Court found that the Hawaii Administrative Procedure Act (HAPA) provided for judicial review of an administrative decision only if an administrative agency issued a

---

Sys., 92 Haw. 432, 446, 992 P.2d 127, 141 (2000)).

[115] *Ala Loop*, 123 Haw. at 418, 235 P.3d at 1130. In addition to the doctrines of exhaustion and primary jurisdiction, the traditional judicially-created requirements of ripeness, finality, and standing would likely still apply. *Cf. id.* at 405, 235 P.3d at 1117 (examining the issue of mootness before moving forward in the case analysis). However, discussion of these other judicial doctrines and their application to environmental claims brought under Article XI, section 9 is outside the scope of this note.

[116] *See* Kona Old Hawaiian Trails Grp. v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987); Pono v. Molokai Ranch, Ltd., 119 Hawai'i 164, 182, 194 P.3d 1126, 1144 (App. 2008).

[117] *Kona Old*, 69 Haw. at 93, 734 P.2d at 169.

[118] *Pono*, 119 Hawai'i at 182, 194 P.3d at 1144 (Foley, J., concurring).

[119] *See Kona Old*, 69 Haw. at 93, 734 P.2d at 169. H.R.S. section 91-14(a) provided for judicial review, but the review required a "final decision or order in a contested case." *Id.* at 90-92, 734 P.2d at 167-68.

[120] *Id.* at 93, 734 P.2d at 169 (citing Moore v. City of E. Cleveland, 431 U.S. 494, 524 (1977) (Burger, C.J., dissenting)).

[121] *See id.*

[122] 69 Haw. 81, 734 P.2d 161.

[123] *Id.* at 83-84, 734 P.2d at 163.

final decision or order in a contested case.[124] The court held that a proceeding is a "contested case" when (1) the statutory law requires an agency hearing,[125] and (2) a plaintiff "avail[s] itself of this opportunity for an agency hearing."[126] The County of Hawai'i charter provided for an administrative tribunal hearing where the plaintiff could have contested the planning director's decision, but the plaintiff did not participate in the agency hearing.[127] Therefore, the court concluded that the judiciary did not have jurisdiction because the plaintiff failed to exhaust its administrative remedies.[128]

2. Doctrine of primary jurisdiction

The doctrine of primary jurisdiction provides that, when appropriate, the judiciary should suspend adjudication of a claim and refer the dispute to an administrative body for its views.[129] The doctrine applies in cases where the courts have original jurisdiction over the claim (usually provided by statute),[130] but the "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body."[131] The judiciary is divested of its original jurisdiction,[132] and the court waits until the administrative body resolves the underlying issues.[133] The Intermediate Court of Appeals noted that "a seemingly contrary statutory provision will yield to the overriding policy promoted by the doctrine."[134]

In *Kona Old*, the Hawai'i Supreme Court examined H.R.S. section 205A-6 and found that individuals have a private right of action to force an agency to comply with the provisions of H.R.S. chapter 205A.[135] Despite the explicit

---

[124] *Id.* at 90, 734 P.2d at 167.

[125] *Id.*

[126] *Id.* at 92, 734 P.2d at 168.

[127] *Id.* at 90-92, 734 P.2d at 167-168.

[128] *Id.*

[129] Pono v. Molokai Ranch, Ltd., 119 Haw. 164, 182, 194 P.3d 1126, 1144 (App. 2008) (Foley, J., concurring).

[130] In contrast to the doctrine of exhaustion (where the court does not have jurisdiction conferred by statute), an explicit provision in a statute usually confers original jurisdiction for the judiciary in cases involving primary jurisdiction. *Id.* *See* HAW. REV. STAT. § 342B-56 (2010) (Hawai'i Air Pollution Control Act).

[131] *Pono*, 119 Haw. at 182, 194 P.3d at 1144.

[132] *Id.*

[133] *Kona Old*, 69 Haw. at 93, 734 P.2d at 168-69.

[134] *Id.* at 93, 734 P.2d at 169.

[135] *Id.* at 92, 734 P.2d at 168. H.R.S. section 205A-6 (2001 & Supp. 2010) states:

Cause of Action.

a. Subject to chapters 661 and 662, any person or agency may commence a civil action alleging that any agency:

statutory provision conferring original jurisdiction on the courts to enforce the Coastal Zone Management Act, however, the court found that issuing a special management area permit required "resolution of issues which, under [the] regulatory scheme, have been placed within the special competence of the county planning department."[136] The Hawai'i Supreme Court thus held that courts should defer to administrative agencies regarding "cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion."[137]

3. *Applying* Ala Loop*'s "reasonable limitations and regulations" standard to the doctrines of exhaustion and primary jurisdiction*

In *Ala Loop*, the Hawai'i Supreme Court seemed receptive to future arguments addressing whether the doctrines of exhaustion and primary jurisdiction constitute a "reasonable limitation and regulation" under article XI, section 9.[138] Although the court overruled *Pono*'s holding that plaintiffs do not have a private right of action to enforce H.R.S. chapter 205, the court did not disagree with Judge Foley's concurring opinion in *Pono* analyzing the doctrines of primary jurisdiction and exhaustion.[139] Although both doctrines were directly implicated in the Hawai'i Supreme Court's establishment of a private right of action in *Ala Loop*, the court declined to address how the doctrines interacted with the private right of action.[140] Based on the Hawai'i Supreme Court's prior jurisprudence regarding the doctrines of exhaustion and primary jurisdiction in *Kona Old*,[141] the court should find that the doctrines qualify as a "reasonable limitation" on the private right of action.

---

1. Is not in compliance with one or more of the objectives, policies, and guidelines provided or authorized by this chapter within the special management area and the waters from the shoreline to the seaward limit of the State's jurisdiction; or

2. Has failed to perform any act or duty required to be performed under this chapter; or

3. In exercising any duty required to be performed under this chapter, has not complied with the provisions of this chapter.

[136] *Kona Old*, 69 Haw. at 93-94, 734 P.2d at 169 (quoting United States v. W. Pac. R.R., 382 U.S. 59, 64 (1956)).

[137] *Id.* (quoting Far E. Conference v. United States, 342 U.S. 570, 574-75 (1952)).

[138] The Hawai'i Supreme Court cited Judge Foley's concurring opinion in *Pono v. Molokai Ranch, Ltd.* to illustrate the doctrine of exhaustion as applied in the State of Hawai'i. Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Haw. 391, 418, 235 P.3d 1103, 1130 (2010).

[139] *Id.*

[140] *Id.* at 418, 235 P.3d at 1130. Because the court found that Wai'ola failed to raise the doctrines of primary jurisdiction and exhaustion as an example of a "reasonable limitation or regulation," the court side-stepped the issue and explicitly stated that "we do not address whether the application of those doctrines would constitute a reasonable limitation or restriction under the facts of this case." *Id.*

[141] *Kona Old*, 69 Haw. at 93, 734 P.2d at 168-69.

The doctrines of exhaustion and primary jurisdiction are fully compatible with *Ala Loop*'s interpretation of "reasonable limitations and regulations"[142] on the private right of action to enforce environmental rights under the Hawai'i Constitution. First, neither doctrine "abolish[es] . . . the private right altogether."[143] As the Hawai'i Supreme Court explained in *Kona Old*, the doctrines address "the timing of the request for judicial relief."[144] *Kona Old*'s analysis of H.R.S. section 205A-6 demonstrates that a plaintiff's private right of action under article XI, section 9 may be used to enforce an agency or individual's compliance with a statutory scheme *after* the agency passes a decision in its area of expertise.[145] The exercise of the right is deferred until after agency action; the right is not eliminated entirely.

Second, the doctrines of exhaustion and primary jurisdiction constitute a jurisdictional limitation under law that would prevent the private right of action from "replac[ing] or limit[ing] existing government enforcement authority."[146] The judiciary created the doctrines of exhaustion and primary jurisdiction to acknowledge the value of the administrative process in resolving complex issues in a particular area of law.[147] Directors, boards, and other officers in administrative agencies are usually required to have extensive experience in their fields to qualify for their positions.[148] Although judges have expertise in interpreting the law, the judiciary does not have the same level of specialization regarding knowledge of technical or complex land use or environmental issues.[149] Based on qualifications and experience, the agency is in a better

---

[142] *Ala Loop*, 123 Haw. at 418, 235 P.3d at 1130.

[143] *Id.*

[144] *Kona Old*, 69 Haw. at 92, 734 P.2d at 168.

[145] *See* Pono v. Molokai Ranch, Ltd., 119 Haw. 164, 182, 194 P.3d 1126, 1144 (App. 2008).

[146] *Ala Loop*, 123 Haw. at 418, 235 P.3d at 1130 (citing STAND. COMM. REP. NO. 77, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 690 (1980)).

[147] *See Pono*, 119 Haw. at 182, 194 P.3d at 1144.

[148] *See, e.g.*, Charter of the County of Hawai'i (CCH) § 6-7.2(a) (2010) ("The planning director shall be appointed by the mayor, confirmed by the council . . . . The planning director shall have had a minimum of five years of training and experience in a responsible planning position, or a degree in planning, engineering, architecture, geography, or another planning-related field and three years of experience in a responsible planning position. No less than three years of experience shall have been in an administrative capacity."); *id.* § 6-9.2 (2010) ("The board of appeals . . . shall be representative of the community, and . . . persons with background or expertise in broad areas of planning and construction shall be given preference, although such knowledge is not a prerequisite for membership.").

[149] *See, e.g.*, CCH § 6-7.2(a). *See* Paolo R. Ricci et al., *Precaution, uncertainty, and causation in environmental decisions*, 29 ENV'T INT'L 1, 17-18 (2003) (discussing the precautionary principle in law-making and the complexity of environmental decisions because of data deficiencies), *available at* http://www.dss.dpem.tuc.gr/pdf/Precaution%20uncertainty%20and%20causation%20in%20environmental%20decis.pdf.

position to make decisions in highly specialized, complicated areas of law.[150] Additionally, requiring all issues of a similar nature to be adjudicated by an agency with expertise provides uniformity and consistency in policy and law, promoting efficiency and judicial economy.[151]

The above reasons for using the doctrines of exhaustion and primary jurisdiction to limit private rights of action are particularly strong for environmental schemes that do not have statutory provisions for citizen suits. Some Hawai'i environmental laws provide citizen suit provisions with limitations that demonstrate preference for agency action, but not all environmental statutes have such provisions. Examples of the former include the Hawai'i Air Pollution Control Act[152] and H.R.S. chapter 205A, which governs coastal zone management.[153] The limiting provisions on citizen suits in these statutes include the following: (1) directing private actors to notify agencies;[154] (2) language providing a cause of action to force agencies to enforce the law against violators (as opposed to suing the private actor directly);[155] and (3) denying the right to a citizen suit in cases where the agency commences a civil action.[156] The limitations provide uniformity and

---

[150] *See* Ricci et al., *supra* note 149, at 18 ("Furthermore, judicial bodies may not have the expertise to deal with complex scientific knowledge and therefore verdicts can be socially inefficient. Specifically, the judiciary does not have access to the expertise that agencies and authorities have, although it can hire independent experts."); Stewart & Sunstein, *supra* note 1, at 1293 n.411 (1982) ("Not only must the court resolve the question whether a violation of regulatory requirements occurred, but it also must attempt to measure the economic impact of noncompliance. In complex areas of economic regulation, such measurements may approach the impossible."). *Cf. id.* ("Regulatory controversies often raise economic and scientific questions that courts are ill equipped to resolve. These burdens are greater in suits asserting private rights of action than in initiation or defense cases, for the court must decide issues de novo, without the benefit of prior agency deliberations.").

[151] *See Pono*, 119 Haw. at 182, 194 P.3d at 1144; Ricci, *supra* note 149, at 17-18.

[152] HAW. REV. STAT. § 342B-56 (2010).

[153] *Id.* § 205A-6 (2001 & Supp. 2010).

[154] *Id.* § 342B-56(c)(1) (2010). H.R.S. section 342B-56(c)(1) provides that:

(C) No action may be commenced:

1. Under subsection (a)(1):

(A) Prior to sixty days after the plaintiff has given notice of the violation to (i) the director, (ii) the department, and (iii) any alleged violator of the standard, limitation, or order; or

(B) If the director or the department has commenced and is diligently prosecuting a civil action to require compliance with the standard, limitation, or order, but in any such action any person may intervene as a matter of right[.]

[155] *Id.* § 205A-6(a) (2001 & Supp. 2010); *id.* § 342B-3(a) (2010) ("[T]he director shall prevent, control, and abate air pollution and the emission of air pollutants in the state.").

[156] *Id.* § 342B-56(c)(1)(B) (2010). While any person may commence a civil action against any person who is alleged to be in violation of HRS chapter 342B, no action may be taken "[i]f the director or the department has commenced and is diligently prosecuting a civil action to require compliance with the standard, limitation, or order . . . ." *Id.*

predictability in the environmental enforcement scheme because they direct most claims through agency action or interpretation before a court resolves the issue.[157] In contrast, H.R.S. chapter 342D, which governs water pollutant discharge permits, does not provide for a citizen suit;[158] H.R.S. section 342D-9 and H.R.S. section 342D-17 authorizes the DOH director and other "state and county health authorities and police officers" to enforce the water quality statute.[159] Following *Ala Loop,* however, private actors could potentially sue violators without going through the Department of Health.[160] If the Hawai'i courts adjudicated several water quality claims at the same time, the plaintiffs may present a wide range of theories or interpretations of the statute, resulting in contrary holdings and inequitable results.[161] This creates the potential for significant tension and unpredictability in discerning and enforcing the law.[162] However, applying the doctrines of exhaustion and primary jurisdiction to H.R.S. chapter 342D would funnel actions through the agency of expertise, allowing for uniform enforcement.

Limiting the private right of action under article XI, section 9 of the Hawai'i Constitution by using the doctrines of exhaustion and primary jurisdiction would promote a cohesive environmental enforcement regime that respects the expertise of agencies while allowing for the private right of action to protect

---

[157] *See* Stewart & Sunstein, *supra* note 1, at 1293. The authors of this casenote recognize that *Ala Loop* might call into doubt the effectiveness of these legislative limitations on citizen suits because of Hawai'i Constitution article XI, section 9's private right of action against individual actors. *See supra* Part III.A. Future decisions post-*Ala Loop* might render these current statutory limitations ineffective if the courts do not consider them to be "reasonable limitations." This uncertainty might support the argument that the doctrines of exhaustion and primary jurisdiction are needed to provide a coherent statutory, administrative, and judicial enforcement scheme.

[158] HAW. REV. STAT. ch. 342D (2010).

[159] *See id.* §§ 342D-9, 342D-17 (2010) (giving the director the power to impose penalties for violations of chapter 342D, and giving government authorities the power to enforce chapter 342D and the rules and orders of the DOH).

[160] *See supra* Part III.A.

[161] Kona Old Hawaiian Trails Grp. v. Lyman, 69 Haw. 81, 93, 734 P.2d 161, 169 (1987) ("Uniformity and consistency in the regulation of business entrusted to a particular agency are secured . . . by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.") (internal citation omitted); Ricci et al., *supra* note 149, at 17-18 ("The differential application of the same principle between courts that sit in different jurisdictions also creates inequities.").

[162] *See* Ricci et al., *supra* note 149, at 17-18; Stewart & Sunstein, *supra* note 1, at 1298 ("Nonuniform enforcement of a statutory standard might create economic distortions . . . . Private rights of action . . . lead to decentralized enforcement that is uncoordinated, unpredictable, and sometimes inconsistent. Decisions to initiate enforcement actions are left in the hands of numerous individual litigants; statutory norms are interpreted by widely scattered judges and juries; and appellate review provides only limited assurance of consistency.").

environmental rights. Although an individual plaintiff might not be able to access the courts immediately, the advantages gained by deferring to administrative agencies—namely better decision-making and uniformity in the law—justify imposing limitations in order to preserve the benefits of the government enforcement scheme.

V. CONCLUSION

Ala Loop's creation of a private right of action to enforce H.R.S. chapter 205 under article XI, section 9 of the Hawai'i Constitution has significant implications for the areas of land use and environmental law. The "sweeping and unknown"[163] opinion left many questions unanswered as to the extent of private rights of action in enforcing land use and environmental laws, creating unpredictability in the business environment as well as tension in the administrative enforcement scheme. Because a private right of action under article XI, section 9 has broad implications, the Hawai'i Supreme Court should provide more guidance in future cases regarding what constitutes a "reasonable limitation or regulation" of this private right. Specifically, the court should find that the doctrines of exhaustion and primary jurisdiction fall within the definition of a "reasonable limitation or regulation." By using these doctrines of comity to prevent the private right from replacing the current government enforcement scheme, the court will be able to chart a path that will promote a more predictable and efficient regulatory scheme to benefit the citizens of Hawai'i.

---

[163] Munger, *supra* note 71.

A Case for Hope: Examining *Graham v. Florida* and Its Implications for Eighth Amendment Jurisprudence

Michi Momose*

I. INTRODUCTION

As a society, we believe that children are different from adults. The juvenile justice system[1] was created on this very premise: that "children have a lesser degree of responsibility for their actions than adults, [and] that they are in the formative stages of their development."[2] Thus, the intended goal of the juvenile system was "rehabilitation rather than punishment."[3] Recently, however, social perceptions have shifted to reflect a more punitive stance towards crime, and children are increasingly tried as adults in the criminal courts.[4] This treatment has generated much controversy regarding juvenile sentencing practices,[5] reflecting the tension between the social perception of children as different, and the consequences of the judicial recognition that children are therefore less culpable for their crimes. This tension is palpable in the context of sentencing juvenile offenders to the second most severe punishment available: life in prison without the possibility of parole.

---

* J.D. candidate 2012, University of Hawai'i at Mānoa William S. Richardson School of Law.

[1] There is no single "juvenile justice system"; more than fifty-one state systems operate relatively independently from each other. Essential similarities, however, exist between the state systems that warrant using the term "juvenile justice system" to refer to the systems collectively. Gary S. Katzmann, *Introduction: Issues and Institutions*, *in* SECURING OUR CHILDREN'S FUTURE: NEW APPROACHES TO JUVENILE JUSTICE AND YOUTH VIOLENCE 1, 8 (Gary S. Katzmann ed., 2002).

[2] *Id.* at 9.

[3] *Id.*

[4] AARON KUPCHIK, JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS 1-2 (2006).

[5] *See* Tate v. State, 864 So. 2d 44 (Fla. Dist. Ct. App. 2003). This case garnered much public attention because defendant Lionel Tate was only twelve years old when he killed a six-year-old child by "repeatedly imitating professional wrestling moves." KUPCHIK, *supra* note 4, at 2. Tate was tried as an adult pursuant to Florida law, which gave prosecutors discretion to prosecute children under fourteen years of age in criminal court; he became "the youngest American ever sentenced to life in prison." *Id.* The sentence was later reversed by the Florida appeals court. *Id.*

In the 2010 case *Graham v. Florida,* the United States Supreme Court held in a 6-3 decision that sentencing juvenile offenders to life without parole for non-homicide offenses constitutes cruel and unusual punishment and is thus prohibited by the Eighth Amendment to the Constitution.[6] This striking decision was the first time the Court imposed a categorical prohibition on a non-capital sentence for an entire class of offenders.[7] As a result of *Graham,* states must now give juvenile non-homicide offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[8] States can still, however, continue to imprison juvenile non-homicide offenders for life as long as the term is not imposed at the outset.[9]

This note will analyze *Graham* in the context of prior Supreme Court cases involving the Eighth Amendment. Specifically, this note will examine the majority's use of the analysis traditionally reserved for death penalty cases as well as the majority's use of international practice to support its holding. This note will also discuss the possible impact of *Graham* on a variety of current sentencing practices, including de facto life sentences for juvenile non-homicide offenders, and life sentences for juvenile homicide offenders and non-violent adult offenders.

Part II discusses the development of the Supreme Court's Eighth Amendment jurisprudence prior to *Graham.* Part III discusses the facts and holding of *Graham.* Part IV analyzes the Court's reasoning in *Graham,* looking first at the Court's application of capital review to a non-capital sentencing practice, and then at the Court's citation of international consensus to support its holding. Part IV closes with a discussion of the impact that *Graham* has had on individuals serving life without parole for offenses they committed as juveniles, as well as the impact that *Graham* may have on national sentencing practices, by examining lower courts' interpretations of the Court's instruction that juvenile non-homicide offenders have "some meaningful opportunity" for release.

II. SUPREME COURT EIGHTH AMENDMENT JURISPRUDENCE PRIOR TO *GRAHAM*

Supreme Court Eighth Amendment jurisprudence prior to *Graham* primarily involved challenges to the death penalty and to the length of prison sentences. In considering these cases, the Court has had to interpret and apply the Eighth

---

[6] 130 S. Ct. 2011, 2030 (2010).

[7] *Id.* at 2046 (Thomas, J., dissenting).

[8] *Id.* at 2030 (majority opinion).

[9] *Id.*

Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[10]

The underlying principle of the Eighth Amendment is the inherent dignity of human beings.[11] While states have the power to impose punishments, the Eighth Amendment ensures that states exercise this power "within the limits of civilized standards."[12] This principle has endured; the Court explained most recently in *Graham* that the Eighth Amendment provides that "the State must respect the human attributes even of those who have committed serious crimes."[13]

Based on this understanding, the Court has construed the Eighth Amendment to prohibit "inherently barbaric punishments."[14] In 1879, the Court used this standard to hold that the Eighth Amendment forbids punishments of torture such as disembowelment and dragging.[15] In 1890, the Court stated that the word "cruel" in the Eighth Amendment implied "something inhuman and barbarous"—more than mere death.[16] Modes of execution were cruel where it involved "torture or a lingering death."[17] This approach to the Eighth Amendment was very narrow.[18]

In 1976, however, the Court in *Gregg v. Georgia* recognized that its jurisprudence has not confined the Eighth Amendment to the narrow "barbaric" analysis, but rather "interpreted [the Eighth Amendment] in a flexible and dynamic manner."[19] The *Gregg* Court crystallized this flexible approach to the Eighth Amendment.[20] Citing precedent demonstrating that the Court has not regarded the Eighth Amendment as a "static concept,"[21] the Court held that the

---

[10] U.S. CONST. amend. VIII, § 1. The cruel and unusual punishment clause of the Eighth Amendment applies to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 667 (1962). The Fourteenth Amendment reads in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV.

[11] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[12] *Id.*

[13] *Graham*, 130 S. Ct. at 2021.

[14] *Id.* (citing Hope v. Pelzer, 536 U.S. 730 (2002); Wilkerson v. Utah, 99 U.S. 130 (1879)).

[15] *Wilkerson*, 99 U.S. at 136-37.

[16] *In re* Kemmler, 136 U.S. 436, 447 (1890).

[17] *Id.*

[18] Trimble v. State, 478 A.2d 1143, 1159 (Md. 1984).

[19] 428 U.S. 153, 171 (1976).

[20] *Trimble*, 478 A.2d at 1158.

[21] *Gregg*, 428 U.S. at 173 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)); *see also* Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968). *But cf.* Robinson v. California, 370 U.S. 660, 666 (1962) (holding that a state statute criminalizing addiction to narcotics violates the Eighth Amendment because addiction is like any other disease and "a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and

Eighth Amendment should be interpreted based on "evolving standards of decency that mark the progress of a maturing society" and the notion of excessiveness.[22] Decency is determined through "objective indicia" of public attitude, while the excessiveness inquiry determines whether the punishment inflicts unnecessary pain or is "grossly out of proportion to the severity of the crime."[23] In articulating this standard, the *Gregg* Court reaffirmed non-capital cases in which the Court had invalidated the punishment of hard labor for falsifying public records,[24] the punishment of denaturalization for Army desertion,[25] and the imposition of any punishment for being addicted to narcotics.[26] Thus, the *Gregg* Court solidified this "general approach to Eighth Amendment claims"[27] and made standards of decency a "central focus in Eighth Amendment jurisprudence."[28]

Supreme Court cases applying the *Gregg* approach to the Eighth Amendment have generally fallen into two classes: those involving challenges to the length of the sentence given the particular circumstances, and those involving categorical challenges to the death penalty.[29]

A. Non-categorical Challenges to Sentence Lengths

Petitioners challenging the lengths of their prison sentences have asked the Court to determine whether, under the circumstances, a given sentence is "unconstitutionally excessive."[30] The Court's leading case in this category, *Harmelin v. Michigan*, established a "grossly disproportionate" standard—a difficult standard to meet.[31] The first step in determining whether a sentence is grossly disproportionate is to compare the seriousness of the offense with the sentence.[32] If the Court finds an "inference of gross disproportionality," the second step is to compare the sentence with those "received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions."[33] If a defendant's sentence still appears grossly

---

unusual punishment.").

[22] *Gregg*, 428 U.S. at 173.

[23] *Id.*

[24] Weems v. United States, 217 U.S. 349 (1910).

[25] Trop v. Dulles, 356 U.S. 86 (1958).

[26] *Robinson*, 370 U.S. 660.

[27] Trimble v. State, 478 A.2d 1143, 1159 (Md. 1984).

[28] *Id.*

[29] Graham v. Florida, 130 S. Ct. 2021 (2010).

[30] *Id.*

[31] 501 U.S. 957, 1005 (1991).

[32] *Id.*

[33] *Id.* at 1004.

disproportionate after this second comparison, then the sentence is held unconstitutional.[34]

The Court demonstrated how strictly it construes proportionality in the 1980 case, *Rummel v. Estelle*, in which it upheld a life sentence for obtaining $120.75 under false pretenses.[35] The Court focused on the "objective criteria against which" the proportionality of the punishment is measured[36] and called for deference to legislative schemes such as the Texas recidivist statute the defendant was sentenced under.[37]

The Court applied *Rummel* in 1982 to uphold a forty-year sentence for marijuana possession with intent to distribute and distribution.[38] The following year, however, the Court invalidated a sentence of life in prison without parole for a defendant who was convicted of his seventh non-violent felony, passing a worthless check.[39] More recently, in 2003, the Court upheld a sentence of twenty-five years to life in prison for stealing golf clubs, where the theft was a "third strike" under California's three-strikes sentencing regime.[40] These cases demonstrate how strictly the proportionality test is construed, and although at times there are different outcomes, the Court has demonstrated that "successful challenges to the proportionality of . . . sentences" other than the death penalty will be "exceedingly rare."[41]

B. Categorical Challenges Under the Eighth Amendment

The second class of Eighth Amendment cases that developed categorical rules prior to *Graham* dealt largely with the death penalty.[42] The two types of

---

[34] *Id.* at 1005.

[35] 445 U.S. 263, 266 (1980).

[36] *Id.* at 275.

[37] *Id.* at 274-77. The Texas recidivist statute under which the defendant, William James Rummel, was sentenced provided for a mandatory life sentence with the possibility of parole upon a third non-capital felony conviction. *Id.* at 264. Rummel's first felony was fraudulent use of a credit card for $80, and his second felony was passing a forged check for $28.36. *Id.* at 265. The Court noted that Texas generally granted "good time" credits rather liberally to prisoners, which had "allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." *Id.* at 280. However, the Court stated that because there was no enforceable "right" to parole, the Court could not treat Rummel's life sentence as equivalent to a twelve year sentence. *Id.*

[38] Hutto v. Davis, 454 U.S. 370, 370, 374 (1982).

[39] Solem v. Helm, 463 U.S. 277, 279-81, 303 (1983). The Court distinguished the case from *Rummel* because the defendant in *Solem* was sentenced to life without the possibility of parole, whereas the defendant in *Rummel* was eligible for parole. *Id.* at 297.

[40] Ewing v. California, 538 U.S. 11, 28-31 (2003).

[41] *Solem*, 463 U.S. at 289-90 (quoting *Rummel*, 445 U.S. at 272); *see also Hutto*, 454 U.S. at 374.

[42] Graham v. Florida, 130 S. Ct. 2021, 2022 (2010).

capital cases where the Court formulated categorical rules include: cases turning on the "nature of the offense" and cases turning on the "characteristics of the offender."[43]

1. Categorical cases turning on the nature of the offense

Cases in which the Court established categorical rules based on the nature of the offense have typically involved the death penalty[44] and have established that the death penalty is an impermissible punishment for non-homicide crimes.[45]

In *Coker v. Georgia*, for example, the Court held that imposing the death penalty for rape was "grossly disproportionate and excessive."[46] *Coker* reiterated that any penalty is "excessive" if it: "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[47]

Applying this standard, the Court reasoned that imposing the death penalty for rape was unconstitutional because the rape victim still has life, and because the death penalty "is unique in its severity and irrevocability."[48] This judicial recognition that the death penalty is unique in character from other forms of punishment would continue to play an important role in Eighth Amendment cases.

In another case, *Enmund v. Florida*, the Court held that imposing the death penalty for felony murder on a defendant "who neither took life, attempted to take life, nor intended to take life," violated the Eighth Amendment.[49] The defendant in that case had been waiting outside in a car while his two accomplices committed a robbery, during the course of which two homeowners were shot and killed.[50]

2. Categorical cases turning on the offender's characteristics

Cases turning on the offender's characteristics have concluded that the Eighth Amendment prohibits the use of the death penalty against defendants

---

[43] *Id.*

[44] *But see* Robinson v. California, 370 U.S. 660 (1962) (barring criminal punishment for the "offense" of being addicted to drugs); Trop v. Dulles, 356 U.S. 86 (1958) (barring denationalization as punishment).

[45] *Graham*, 130 S. Ct. at 2022.

[46] 433 U.S. 584, 592 (1977).

[47] *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

[48] *Id.* at 598 (quoting *Gregg*, 428 U.S. at 187).

[49] 458 U.S. 782, 787-88 (1982).

[50] *Id.* at 783-85.

under the age of eighteen[51] and against defendants with low "intellectual functioning."[52]

In the 1988 case *Thompson v. Oklahoma*, the Court held that the Eighth Amendment prohibited imposing the death penalty on a defendant who was under the age of sixteen at the time of the offense.[53] The defendant was fifteen years old when he and three others murdered his brother-in-law, who had physically abused the defendant's sister.[54] The Court explained that the first step of the analysis is to examine "evolving standards of decency," which is determined by looking at objective indicators such as legislative enactments and jury determinations.[55] Although such indicators are weighed heavily, the Court said that under the second step of the analysis, it is ultimately up to the Court to independently judge whether a sentence is permitted by the Eighth Amendment.[56]

Undertaking this analysis, the plurality began by finding that states were unanimous in treating individuals under age sixteen as minors,[57] which reflected the basic societal understanding that a fifteen-year-old is incapable of acting as an adult.[58] As such, the Court concluded that imposing the death penalty on a fifteen year-old "is now generally abhorrent to the conscience of the community."[59] The Court then moved to the second step of the analysis—the Court reached an independent judgment that children under sixteen years old were simply less culpable than adults, and that therefore, their actions could not warrant capital punishment.[60] Although the plurality explained that the Court had already accepted this proposition in previous cases,[61] the plurality

---

[51] Roper v. Simmons, 543 U.S. 551 (2005).

[52] Graham v. Florida, 130 S. Ct. 2011, 2022 (2010) (citing Atkins v. Virginia, 536 U.S. 304 (2002)); *see also* Thompson v. Oklahoma, 487 U.S. 815 (1988).

[53] 487 U.S. at 838. Justice Stevens delivered the opinion, joined by Justices Brennan, Marshall, and Blackmun, with Justice O'Connor concurring. Justice Scalia wrote the dissenting opinion, joined by Chief Justice Rehnquist and Justice White.

[54] *Id.* at 818; *see also id.* at 860 (Scalia, J., dissenting).

[55] *Id.* at 822-23 (majority opinion) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[56] *Id.* at 833 (citing Enmund v. Florida, 458 U.S. 782, 797 (1982)).

[57] *Id.* at 824.

[58] *Id.* at 824-25.

[59] *Id.* at 832.

[60] *Id.* at 833.

[61] *Id.* at 835; *see also* Belloti v. Baird, 443 U.S. 622, 635 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.); Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (holding that in capital cases, a defendant's age is considered a mitigating factor because "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." History shows legal and judicial recognition of this fact that minors "generally are less mature and responsible than adults.").

went on to cite considerable evidence[62] showing that "adolescents as a class are less mature and responsible than adults"[63] and are less capable of controlling their conduct and considering long-term consequences.[64] Because of these characteristics, as well as adolescents' "capacity for growth, and society's fiduciary obligations to its children," the plurality held that the death penalty—which is meant to provide retribution and deterrence—served no purpose for adolescents and was inapplicable to defendants fifteen years old and younger.[65]

Just one year later, in 1989, the Court reversed its philosophy. In *Stanford v. Kentucky*, a plurality of the Court[66] held that imposing the death penalty on individuals for homicides committed when they were sixteen and seventeen years old did *not* violate the Eighth Amendment.[67] The facts of *Stanford* presented a good opportunity for the plurality, in an opinion written by Justice Scalia, to reverse the Court's position on capital punishment as applied to juvenile offenders. The Court considered two companion death penalty cases in *Stanford*. In the first, the defendant, Kevin Stanford, and an accomplice robbed a gas station and sexually assaulted a female attendant.[68] They drove her to a nearby area where Stanford shot her in the face and the back of the head.[69] Stanford was seventeen years and four months old at the time of his offense.[70] In the second case, Heath Wilkins, who was sixteen years and six months old, robbed a convenience store with an accomplice and stabbed a

---

[62] *Thompson*, 487 U.S. at 834-36 (citing TWENTIETH CENTURY FUND TASK FORCE, CONFRONTING YOUTH CRIME: REPORT ON SENTENCING POLICY TOWARD YOUNG OFFENDERS 7 (1978) (arguing that youth crimes may harm victims just as much as adult crimes, but that youth "deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults"); Sanford J. Fox, *The Juvenile Court: Its Context, Problems and Opportunities*, *in* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 11, 11-12 (1967) (stating that the "basic philosophy" on which the Juvenile Court operates is "an absence of the basis for adult criminal accountability"); Lawrence Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 VITA HUMANA 11, 30 (1963) (discussing studies that demonstrate that "large groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth represented by the age factor")).

[63] *Thompson*, 487 U.S. at 834.

[64] *Id.* (citing Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982)).

[65] *Id.* at 836.

[66] The composition of the Court had not changed since *Thompson*, but Justice Kennedy, who had not taken part in *Thompson*, voted with Chief Justice Rehnquist and Justices Scalia and White. Justice O'Connor—the swing vote in *Thompson*—provided the fifth vote in her concurrence. Justices Brennan, Marshall, Blackmun, and Stevens, who had formed the plurality along with Justice O'Connor in *Thompson*, dissented.

[67] 492 U.S. 361, 380 (1989).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 364.

female worker, the mother of two children, multiple times.[71] The plurality upheld the death penalty for Stanford and Wilkins, concluding that they failed to show that there was a national consensus against the practice of executing sixteen- and seventeen-year-olds.[72] The plurality relied almost exclusively on this finding[73] without undertaking a proportionality analysis and similarly dismissing an analysis of whether the punishment had any penological benefits.[74] The reasoning for dismissing these analyses was that the Court had "never invalidated a punishment" on such bases alone.[75] The plurality also rejected the second step of the analysis undertaken in *Thompson*—the Court's "independent judgment" regarding whether the Eighth Amendment permits the punishment at issue.[76] The Court reasoned that such an approach "replace[s] judges of the law with a committee of philosopher-kings."[77]

In 2005, the Court in *Roper v. Simmons* overturned *Stanford* and set the minimum age for the death penalty at eighteen.[78] The defendant was seventeen when he and an accomplice broke into a home,[79] bound the victim, and threw her from a bridge into waters below, where she drowned.[80] The majority declared *Stanford* "no longer controlling on this issue"[81] and established the analysis that would be used in future Eighth Amendment cases. First, a court must determine whether a national consensus has formed regarding the sentencing practice.[82] In making this determination, a court must look to "objective indicia of society's standards, as expressed in legislative enactments and state practice."[83] Second, a court must make its own "independent judgment" about whether the sentencing practice is disproportionate and violates the Eighth Amendment.[84] Thus, the majority returned to the established rule prior to *Stanford*, that "the Constitution contemplates that in

---

[71] *Id.*

[72] *Id.* at 373.

[73] *Id.*

[74] *Id.* at 379.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] 543 U.S. 551, 578-79 (2005). The Court had changed considerably since *Stanford*, with Justices Brennan, Marshall, Blackmun, and White being replaced by Justices Souter, Ginsburg, Breyer, and Thomas. Justice Kennedy switched sides from *Stanford* and wrote the majority opinion in *Roper*, joined by Justices Stevens, Souter, Ginsburg, and Breyer.

[79] *Id.* at 556.

[80] *Id.* at 556-57.

[81] *Id.* at 574.

[82] *Id.* at 563.

[83] *Id.* at 552.

[84] *Id.* at 563.

the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[85]

III. FACTS OF *GRAHAM V. FLORIDA*

Terrance Graham was sixteen years old when he and three other teenagers attempted to rob a Florida restaurant in July 2003.[86] One of the teenage accomplices worked at the restaurant and left a door unlocked, allowing Graham and a third youth to enter the restaurant wearing masks.[87] The third youth hit the restaurant manager twice in the back of the head with a metal bar.[88] When the manager started yelling at Graham and his accomplice, the two fled without taking any money and escaped in a car driven by a fourth teen.[89]

In accordance with Florida state law,[90] the prosecutor used his discretion to charge Graham as an adult for armed burglary with assault and battery and attempted armed robbery.[91] The charges were first- and second-degree felonies carrying maximum penalties of life without parole and fifteen years' imprisonment, respectively.[92] In December 2003, Graham pled guilty to both charges pursuant to a plea agreement.[93] The trial court accepted the plea agreement without determining guilt as to the charges and sentenced Graham to two concurrent three-year probation terms, with the condition that Graham serve the first twelve months of probation in a county jail.[94] Graham received credit for time served awaiting trial and was released on June 25, 2004.[95]

Less than six months later, on December 2, 2004, Graham was arrested for allegedly participating in a home invasion robbery with two adult accomplices.[96] It was thirty-four days before Graham's eighteenth birthday.[97] The State alleged that the three forcibly entered a home, with Graham holding a

---

[85] *Id.* (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).

[86] Graham v. Florida, 130 S. Ct. 2011, 2018 (2010).

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] In Florida, a prosecutor has discretion to charge sixteen- and seventeen-year-olds as adults or juveniles for most felonies. *Id.* at 2018 (citing FLA. STAT. § 985.227(1)(b) (2003) (subsequently renumbered § 985.557(1)(b) (2008))).

[91] *Id.*

[92] *Id.* Armed burglary with assault/battery is a first-degree felony in Florida. FLA. STAT. §§ 810.02(1)(b), (2)(a) (2003). Attempted armed-robbery is a second-degree felony in Florida. *Id.* §§ 812.13(2)(b), 777.04(1), (4)(a), 775.082(3)(c).

[93] *Graham*, 130 S. Ct. at 2018.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 2018-19. The adult accomplices were both twenty-year-old men. *Id.* at 2018.

[97] *Id.* at 2019.

pistol to the homeowner's chest.[98] The three held the homeowner and his friend at gunpoint while they searched the home for money, trapping the victims inside a closet before leaving.[99] The same night, Graham and the two men allegedly attempted another robbery, during which one of the accomplices was shot.[100] Graham, driving his father's car, dropped the two men off at a hospital.[101] As he drove away from the hospital, he disregarded a police officer's signal to pull over, crashed into a telephone pole, and attempted to flee on foot before he was apprehended.[102] Although Graham initially denied being involved in the home invasion and the second attempted robbery,[103] a detective informed Graham that he had been identified by the home invasion victims and asked him, "Aside from the two robberies tonight how many more were you involved in?"[104] Graham responded that before that night, he had been involved in "[t]wo to three" other robberies.[105]

During his trial for alleged violations of his probation terms,[106] Graham insisted that he was not involved in the home invasion but admitted fleeing from the police and thus violating his probation.[107] Graham made this admission despite the trial court's warning that it "could expose him to a life sentence on the earlier charges."[108] The trial court held that he had violated his probation "by committing a home invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity."[109] Based on Florida law, the minimum sentence that Graham could have received was five years' imprisonment, "absent a downward departure by the judge."[110] Although the maximum sentence was life imprisonment, none of the parties involved requested that sentence.[111] Defense counsel requested five years' imprisonment, the Florida Department of Corrections recommended up to four years, and the State asked for thirty years for armed burglary and fifteen years for the attempted armed robbery.[112]

---

98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*

At the sentencing hearing, however, the trial judge disregarded all of the recommendations and sentenced Graham to the maximum prison sentence for each of the previous charges: life for armed burglary and fifteen years for the attempted robbery.[113] Because Florida had abolished its parole system, Graham was effectively sentenced to life without parole.[114] The essence of the judge's reasoning was that Graham was incorrigible and thus deserved the sentence. The judge surmised that Graham had a good family support system[115] and had already been given an opportunity to reform himself when the first trial judge sentenced him to probation.[116] The judge cited Graham's "escalating pattern of criminal conduct" and stated that the court could not do anything more to deter Graham.[117] The judge concluded: "This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision."[118]

Graham challenged the life sentence, claiming that it violated the Eighth Amendment.[119] The First District Court of Appeal of Florida affirmed the sentence, reasoning that the sentence was not grossly disproportionate given the seriousness and violence of the crimes.[120] The court noted that Graham was not a "pre-teen" but a seventeen-year-old at the time of the probation violations and concluded that Graham was incapable of rehabilitation.[121] The Florida Supreme Court denied review.[122]

The U.S. Supreme Court, however, held that Graham's sentence violated the Eighth Amendment.[123] The Court established a categorical ruling that "for a juvenile offender who did not commit homicide, the Eighth Amendment forbids the sentence of life without parole."[124] The rationale for the categorical ruling was that it was the only way to prevent the sentence from being imposed on juvenile non-homicide offenders who, as a class, have limited culpability and a greater capacity for change.[125] The majority, however, distinguished

---

[113] *Id.* at 2020.

[114] *Id.* Florida abolished its parole system in 2003. *See* FLA. STAT. § 921.002(1)(e) (2003). Thus, a life sentence has no possibility of parole absent the exceptional circumstances of a defendant being granted executive clemency. *Graham*, 130 S. Ct. at 2020.

[115] *Graham*, 130 S. Ct. at 2020. How the trial court got this impression is curious given the fact that Graham's parents were drug addicts, he was diagnosed at an early age with attention deficit hyperactivity disorder, and he was drinking alcohol and using tobacco from age nine and smoking marijuana from age thirteen. *Id.* at 2018.

[116] *Id.* at 2020.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] Graham v. State, 982 So. 2d 43, 51-52 (Fla. Dist. Ct. App. 2008).

[121] *Id.*

[122] Graham v. State, No. SC08-1169, 2008 WL 3896182, at *1 (Fla. Aug. 22, 2008).

[123] *Graham*, 130 S. Ct. at 2034.

[124] *Id.* at 2030.

[125] *Id.*

between a life without parole sentence being handed down to a juvenile non-homicide offender at a sentencing hearing and the actual practice of imprisoning the same offender for life.[126] According to the majority, the former is cruel and unusual, while the latter is permitted because juveniles who "turn out to be irredeemable" deserve life imprisonment.[127] Thus, states are not required to actually release a juvenile non-homicide offender during his lifetime.[128] States cannot, however, "make the judgment at the outset" that juvenile non-homicide offenders will be imprisoned for life; states must provide such offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[129]

Chief Justice Roberts, who concurred with the majority opinion, stated that he would not have fashioned a categorical rule, but would have instead decided the case using the "narrow proportionality" review used for non-death penalty cases.[130] Roberts preferred the proportionality test because of its case-specific inquiry[131] and because such an analysis could still be informed by the judicial recognition of juveniles' lessened culpability.[132] According to Roberts, Graham's sentence was grossly disproportionate because the crime he committed—armed burglary with assault or battery—was less severe than other crimes such as murder or rape.[133] The lesser severity, coupled with Graham's diminished culpability as a juvenile, made his conduct grossly disproportionate to the penalty of life without parole, a sentence second only to the death penalty.[134]

The dissent argued that the Eighth Amendment was not originally understood "to require proportionality in sentencing";[135] thus, the Court's use of the proportionality test to bar capital punishment for certain categories of individuals "lack[ed] a principled foundation."[136] The dissent argued that a national consensus against sentencing juveniles to life without parole was simply non-existent,[137] and that the majority's independent judgment that juveniles are categorically less culpable than adults did not withstand analysis because the holding permits life without parole sentences for juveniles who

---

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 2036 (Roberts, C.J., concurring).

[131] *See id.* at 2042.

[132] *Id.* at 2040.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 2044 (Thomas, J., dissenting). Justice Scalia joined the dissent, and Justice Alito joined in part.

[136] *Id.* at 2046.

[137] *Id.* at 2049.

commit homicides.[138] The dissent also rejected the concurrence's conclusion that Graham's sentence was grossly disproportionate to his offense, comparing Graham's crime (a "violent felony") to the facts of *Harmelin*, in which the Court upheld a life without parole sentence for an offender who committed his first nonviolent drug offense.[139] The dissent also argued that although *Roper* established that juveniles "cannot with reliability be classified among the *worst* offenders," this did not justify holding that juveniles are categorically ineligible for life without parole.[140]

IV. ANALYSIS OF *GRAHAM*

In *Graham*, the Supreme Court established for the first time that a sentence of life without parole is comparable to the death penalty and that juveniles have diminished culpability for their crimes in both contexts.[141] The majority also continued the Court's tradition in Eighth Amendment cases to support its holding with evidence of the broad international consensus against sentencing juveniles to life without parole.[142] Still, although the holding in *Graham* appears to be a clear-cut prohibition on a sentencing practice, it leaves many questions for future Eighth Amendment challenges.

A. Applying Capital Review to a Sentencing Practice

The majority in *Graham* declared for the first time that an entire class—juvenile non-homicide offenders—were ineligible for a non-capital sentence.[143] In establishing this rule, the majority used the categorical analysis that the Court had previously employed solely for death penalty cases.[144]

As mentioned above, the Court's Eighth Amendment cases have generally fallen into two categories: cases involving as-applied challenges to the length of a sentence, and cases involving categorical challenges to a sentencing practice.[145] The majority determined that Graham's case fits into the second class because Graham sought a categorical prohibition on sentencing juvenile non-homicide offenders to life without parole.[146] Prior to *Graham*, categorical

---

[138] *Id.* at 2055.
[139] *Id.* at 2056.
[140] *Id.* (emphasis in original).
[141] *Id.* at 2027-29 (majority opinion).
[142] *Id.* at 2033.
[143] *Id.* at 2046 (Thomas, J., dissenting).
[144] *Id.*
[145] *Id.* at 2021 (majority opinion).
[146] *Id.* at 2022-23.

challenges to the Eighth Amendment dealt largely with the death penalty.[147] Non-capital sentences had been considered under the first category of cases in which the Court applies the strict proportionality standard on a case-by-case basis.[148] According to the concurrence, the majority's approach of "treating juvenile life sentences as analogous to capital punishment" seemed to contravene the Court's "longstanding view that 'the death penalty is different from other punishments in kind rather than degree.'"[149]

Indeed, the majority, while recognizing that the death penalty is unique, also focused on the characteristics it shared with life without parole sentences.[150] The majority pointed out that life without parole, like the death penalty, "alters the offender's life by a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration."[151] Most importantly, the majority drew a distinction between adult and juvenile life without parole. Juvenile life without parole is particularly severe (and thus more similar to the death penalty) because juveniles will serve on average more years in prison than the adult offender sentenced to life without parole.[152] Life without parole, particularly for a juvenile defendant, "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the defendant], he will remain in prison for the rest of his days."[153]

The cruelty of imposing a life sentence to a juvenile is analogous to the cruelty of imposing a death sentence on a juvenile. The European Court of Human Rights said in a 1989 case that subjecting a defendant to "death row" in the United States violated the right to be free of inhumane and degrading treatment.[154] The inherently inhumane part, according to the court, was not the actual death but the lengthy process leading up to it.[155] The court considered this to amount to psychological torture.[156]

---

[147] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (barring the death penalty for individuals with low-functioning IQs); Roper v. Simmons, 543 U.S. 551 (2005) (barring the death penalty for juveniles younger than 18); Enmund v. Florida, 458 U.S. 782 (1982) (barring the death penalty for felony murder).

[148] *Graham*, 130 S. Ct. at 2037 (Roberts, C.J., concurring).

[149] *Id.* at 2038-39 (quoting Solem v. Helm, 463 U.S. 277, 294 (1983)).

[150] *Id.* at 2027 (majority opinion).

[151] *Id.*

[152] *Id.*

[153] Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989).

[154] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989). In this case, the Court declined to extradite a defendant to the United States based on its analysis that subjecting the defendant to the death penalty in the United States would violate Article 3 of the European Convention on Human Rights. *Id.*

[155] *Id.*

[156] *Id.*

In analogizing the death penalty and juvenile life without parole, the *Graham* majority recognized this reality. A prisoner serving a life without parole sentence for a crime he committed as a high school student expressed this familiar sentiment: "They said a kid can't get the death penalty, but life without, it's the same thing. I'm condemned . . . I don't understand the difference."[157]

It was important for the majority to draw attention to the similarities between life without parole sentences and death sentences in order to justify applying the categorical approach to a noncapital sentence. A major justification for the majority in establishing the categorical rule was the theory that "juveniles have lessened culpability [and] are less deserving of the most severe punishments."[158] This recognition had been used in Eighth Amendment cases in the context of the death penalty, most recently in *Roper v. Simmons*.[159] Thus, in order to use lessened juvenile culpability to justify its holding, and to use the categorical approach that this recognition was part of, the Court in *Graham* needed to frame life without parole sentences as comparable to the death penalty.[160]

Although the majority's analysis was a departure from the Court's precedent, even the dissent acknowledged that "the Eighth Amendment itself makes no distinction between capital and noncapital sentencing."[161] In *Graham*, the Court was confronted with a completely new issue: a categorical challenge to a particular sentencing practice. The concurrence criticized the majority's use of "Graham's case as a vehicle to proclaim a new constitutional rule—applicable well beyond the particular facts of Graham's case."[162] However, the majority needed to use the categorical analysis in order to establish a "clear line" to prevent even the possibility that juveniles would be sentenced to life without

---

[157] HUMAN RIGHTS WATCH, WHEN I DIE, THEY'LL SEND ME HOME: YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA 3-4 (2008), http://fairsentencingforyouth.org/pdf/When_I_Die.pdf. At the time of the interview with Human Rights Watch, Robert D. was thirty-two years old, serving a life without parole sentence for participating "in a robbery in which his codefendant unexpectedly shot the victim."

[158] Graham v. Florida, 130 S. Ct. 2011, 2026, 2030 (2010).

[159] Roper v. Simmons, 543 U.S. 551, 569 (2005); *see also* Thompson v. Oklahoma, 487 U.S. 815, 833 (1988) (asking, in deciding that the death penalty for minors violated the Eighth Amendment, "whether the juvenile's culpability should be measured by the same standard as an adult"); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (stating that "our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults [and that] 'minors often lack the experience, perspective, and judgment' expected of adults" (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979))).

[160] *See Graham*, 130 S. Ct. at 2027.

[161] *Id.* at 2046 (Thomas, J., dissenting).

[162] *Id.* at 2041 (Roberts, J., concurring).

parole for offenses they were categorically less culpable for.[163] This broad protection of juveniles is consistent with the Court's recognition that juveniles as a class are different from adults in terms of their lesser culpability and that they suffer more severely than adults when punished with life in prison without the possibility of parole.

B. Citing International Practice to Inform Eighth Amendment Jurisprudence

The holding in *Graham* is supported by the great weight of international opinion; indeed, an international consensus has developed against the practice of sentencing juveniles to life without parole.[164] The majority's approach of looking to international consensus is consistent with the Court's precedent in Eighth Amendment cases, which have often cited international opinion as support for a holding.[165] For example, in *Trop v. Dulles*, the Court looked at a United Nations survey of nationality laws[166] to support its holding that statelessness imposed as punishment was barred by the Eighth Amendment.[167] The Court cited the fact that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."[168]

In *Coker*, the Court's decision that the death penalty could not be imposed in non-homicide rape cases was actually informed by international opinion; the Court did not simply use international opinion as subsequent support for its holding.[169] The Court cited a United Nations world survey[170] and stated that claims that the death penalty was an "indispensable part" of the U.S. criminal justice system were invalid considering the "legislative decisions" in most other nations.[171] In *Thompson*, the Court looked to the views of other Anglo-American nations and leading Western European countries to reach its holding that executing an individual younger than sixteen years old contravened "civilized standards of decency."[172]

---

[163] *Id.* at 2030 (majority opinion).

[164] *Id.* at 2033-34.

[165] *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 103 (1958); Enmund v. Florida, 458 U.S. 782, 788 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Thompson v. Oklahoma, 487 U.S. 815, 830 (1988).

[166] *Trop*, 356 U.S. at 103 (citing Laws Concerning Nationality, U.N. Doc. ST/LEG/SER.B/4 (1954)).

[167] *Id.* at 101.

[168] *Id.* at 102.

[169] *Coker*, 433 U.S. at 592 n.4; *see also Enmund*, 458 U.S. at 788-89.

[170] *Coker*, 433 U.S. at 596 n.10.

[171] *Id.* at 592 n.4.

[172] Thompson v. Oklahoma, 487 U.S. 815, 830 (1988).

Indeed, the Court's consideration of international opinion and law is evident throughout the Court's history. As early as 1804, the Court established the "Charming Betsy" canon that the Court will always interpret a domestic statute under the presumption that Congress did not intend for it to conflict with international law.[173] In 1900, the Court established in *The Paquete Habana* that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction."[174] Recently, in 2004, the Court affirmed in *Sosa v. Alvarez-Machain* that U.S. domestic law has recognized international law for two centuries, thus making it inconsistent for federal courts to ignore international norms intended to protect individual rights.[175] International law has also influenced the Constitution; the phrase "cruel and unusual" itself was adopted directly from the English Bill of Rights of 1689.[176]

The cruel and unusual punishments clause necessarily entails making a moral judgment to determine what the evolving standards of decency are regarding a particular punishment.[177] Such standards are inevitably influenced by the rest of the world, and the Court should at least take notice of global trends in condemning a practice in support of a holding. International opinion about the treatment of juveniles is strong and has been codified in multilateral treaties such as the Convention on the Rights of the Child (CRC).[178] The CRC expressly prohibits the imposition of "life imprisonment without possibility of release" for any offense by individuals younger than eighteen years of age.[179] The United States and Somalia are the only participant countries that have not ratified the CRC.[180]

In light of the deference and respect that the Court has shown for international law, and particularly because of the strong international consensus against condemning juveniles to life in prison without the possibility of parole, it is appropriate for the Court to at least reference international law and opinion when determining the standards of decency regarding a specific practice in the United States. To acknowledge that certain practices are widely condemned or supported by the international community "does not lessen our fidelity to the

---

[173] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[174] The Paquete Habana, 175 U.S. 677, 700 (1900).

[175] 542 U.S. 692, 729-30 (2004).

[176] Gregg v. Georgia, 428 U.S. 153, 169 (1976) (citing Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839, 852-53 (1969)).

[177] Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

[178] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

[179] *Id.* at art. 37(a).

[180] United Nations Treaty Collection, Status of Ratifications of the Convention on the Rights of the Child, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Feb. 12, 2011).

Constitution or our pride in its origins."[181] Rather, it acknowledges the role that the United States has consistently held itself out to fill, as a participant and leader in global politics and a defender of human rights.

C. Impact of Graham *on Current Sentencing Practices*

The impact that *Graham* will have on current sentencing practices in the United States will depend on how the lower courts construe the Court's holding, which as written leaves much discretion to states and individual judges. *Graham* established a categorical rule prohibiting states from sentencing juvenile offenders to life without parole for non-homicide offenses. It does not, however, preclude states from imprisoning juveniles for life; states may still determine during the course of juveniles' incarceration that they should never be released.[182] Thus, no states are required to release juvenile non-homicide offenders currently sentenced to life without parole. States are simply required to give such offenders "some meaningful opportunity" to demonstrate sufficient "maturity and rehabilitation" for release.[183]

There is no doubt that the holding in *Graham* will have a significant impact, particularly for individuals serving life without parole sentences for non-homicide offenses they committed as juveniles. The *Graham* majority found that there were "129 juvenile nonhomicide offenders serving life without parole sentences."[184] The categorical holding in *Graham* provides those individuals with a vehicle for challenging their sentences. This is demonstrated by recent cases in Iowa, where it is estimated that there are eight individuals serving life without parole sentences for non-homicide crimes they committed as juveniles.[185] For example, the Iowa Supreme Court held that a sentence of life in prison without the possibility of parole for a first-degree kidnapping conviction was unconstitutional based on *Graham*.[186] The defendant, Julio Bonilla, was sixteen years old at the time of the offense, and was sentenced pursuant to Iowa Code section 902.1, which mandated life imprisonment

---

[181] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[182] Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

[183] *Id.*

[184] *Id.* at 2024.

[185] Lynda Waddington, *Bill seeks to conform Iowa law with SCOTUS juvenile offenders ruling*, THE IOWA INDEPENDENT (Mar. 10, 2011, 10:00 AM), http://iowaindependent.com/53585/bill-seeks-to-conform-iowa-law-with-scotus-juvenile-offenders-ruling.

[186] Bonilla v. State, 791 N.W.2d 697, 698-99 (Iowa 2010). Bonilla's kidnapping conviction arose from evidence that Bonilla and three other males forced a sixteen-year-old pregnant woman into a car with them, and then drove to a secluded area where the woman was sexually assaulted. State v. Bonilla, No. 6-413/05-0596, 2006 Iowa App. LEXIS 1293, at*2-*3 (Iowa Ct. App. Nov. 16, 2006).

without parole for class A felonies such as first-degree kidnapping.[187] The Iowa Supreme Court held that *Graham* applied retroactively to Bonilla and held that the portion of section 902.1 making offenders ineligible for parole was unconstitutional as applied to Bonilla.[188] In addition, the court struck down a portion of another state law, as applied to Bonilla, that excluded offenders convicted of class A felonies from annual case reviews.[189] This effectively made Bonilla immediately eligible for an annual case review before the parole board.[190] Cases like this have sparked a debate in Iowa over the legislative reform needed to conform state laws to the *Graham* ruling.[191] They also demonstrate the significance of the *Graham* decision for individuals falling squarely within the categorical ruling—those serving life without parole sentences for non-homicide offenses they committed as juveniles.

However, the *Graham* holding is still problematic because the Court did not provide any guidelines for what constitutes a "meaningful opportunity," when it must occur, or "what Eighth Amendment principles will govern review by the parole boards."[192] This means that the protection *Graham* provides for juveniles is fairly limited. Although juveniles cannot be sentenced to life without parole, they can be sentenced to very lengthy terms without parole. Indeed, during oral arguments in *Graham*, Graham's attorney conceded that "a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional."[193]

Other cases interpreting *Graham* in the months following the decision demonstrate the limited holding of the case. In July 2010, a California district court held in *Bell v. Haws* that sentencing a juvenile, Michael Bell, to fifty-four years to life in prison did not constitute cruel and unusual punishment "under the narrow rule announced in *Graham*."[194] Bell would be eligible for parole at

---

[187] *Bonilla*, 791 N.W.2d at 699.

[188] *Id.* at 700-02.

[189] *Id.* at 702.

[190] *Id.*

[191] *See* Waddington, *supra* note 185 (describing the debate over a bill introduced in the Iowa House of Representatives in March 2011, which would give judges discretion to determine mandatory minimums for juvenile offenders).

[192] Graham v. Florida, 130 S. Ct. 2011, 2057 (2010) (Thomas, J., dissenting).

[193] *Id.* at 2058 (Alito, J., dissenting).

[194] No. CV09-3346-JFW (MLG), 2010 WL 3447218, at *1 (C.D. Cal. July 14, 2010) *report and recommendation adopted*, CV09-3346-JFW (MLG), 2010 WL 3430515 (C.D. Cal. Aug. 27, 2010). Bell was convicted of multiple counts of first degree robbery and forcible oral copulation, and one count each of attempted kidnapping and assault. *Id.* Bell was sentenced to fifty-four years to life in prison for the robbery conviction. *Id.* He was fourteen years old at the time of his offenses. *Id.* at *2. Bell and a male accomplice were admitted into an acquaintance's home, then Bell held a gun to the acquaintance's head. *Id.* at *3. They attempted to take two game systems but left when told by the acquaintance's mother. *Id.* An hour later, Bell and his accomplice forcibly entered the nearby home of E.M. and her eight-year-

age sixty-nine; the State argued that the eligibility date was at least ten years within Bell's life expectancy, while Bell argued that he was "unlikely to survive" until then.[195] Bell claimed that this transformed his sentence into a de facto life without parole sentence, which was prohibited by *Graham*.[196] The court, however, held that *Graham* was inapplicable because Bell was not actually sentenced to life without the possibility of parole,[197] and because *Graham* left it to the states to determine what satisfied the "requirement to provide a realistic opportunity for parole."[198] The court acknowledged its intention for Bell to be imprisoned for the rest of his life but held that as long as a parole date was set within his expected lifetime, even just a year within life expectancy (as Bell argued), the life sentence did not constitute cruel and unusual punishment as defined by *Graham*.[199]

Even in *People v. Mendez*, a case which seems to extend *Graham*, the California Court of Appeal was not able to rely on the limited holding of *Graham*.[200] The defendants, Victor Manuel Mendez and Luis Enrique Ramos, were tried as adults and convicted of carjacking, assault with a firearm, and second-degree robbery with criminal street gang and firearm enhancements.[201] Mendez was sixteen and Ramos was fifteen at the time of the offenses.[202] Mendez was sentenced to eighty-four years to life, while Ramos was sentenced to forty-eight years and eight months.[203] Citing *Graham*, Mendez claimed that his sentence was cruel and unusual punishment because it amounted to a de facto life without parole sentence.[204] The court calculated that Mendez would

---

old son. *Id.* During the robbery, Bell and his accomplice raped E.M. several times at gunpoint. *Id.* at *4. They attempted to leave with E.M. but she was able to escape. *Id.* at *5.

[195] *Id.* at *9.

[196] *Id.*

[197] *Id.* at *10.

[198] *Id.* at *11.

[199] *Id.*

[200] 114 Cal. Rptr. 3d 870, 882-83 (App. 2010).

[201] *Id.* at 873. Mendez and Ramos were involved in a string of four robberies committed in one night. *Id.* at 873-74. Mendez and Ramos hijacked a car and used it to commit the other robberies. *Id.* Mendez and Ramos both threatened the victims by pointing a gun at them, but only Ramos used the gun to strike a victim in the head. *Id.* A Los Angeles Police Department officer identified Mendez and Ramos at the trial as active gang members. *Id.* at 876.

[202] *Id.* at 873.

[203] *Id.*

[204] *Id.* at 881.

not be eligible for parole until he was older than eighty-eight years old,[205] which Mendez argued was beyond his projected life expectancy.[206]

The court held that Mendez's sentence, "which was imposed on a juvenile who did not commit a homicide or inflict bodily injury and which makes him ineligible for parole until well beyond his life expectancy," violated the Eighth Amendment.[207] In reaching this conclusion, the court found that Mendez's sentence and a life without parole sentence are "materially indistinguishable."[208] However, Mendez's de facto life without parole sentence could not be reversed based on *Graham* because *Graham*'s holding was limited to juveniles who were actually sentenced to life without parole.[209] The Court announced that it was simply guided by the principles of *Graham* in undertaking its analysis.[210] The court reasoned that even though *Graham* did not define a "meaningful" opportunity for release, "common sense dictates that a juvenile who is sentenced at the age of eighteen and who is not eligible for parole until after he is expected to die" does not have such a meaningful and realistic opportunity for parole.[211] Ultimately, however, the *Mendez* court based its decision not on *Graham* but on the traditional proportionality test.[212] Because *Graham* does not prohibit de facto life sentences, this interpretation by the *Mendez* court can only be duplicated where the court is similarly willing to follow the underlying principles of *Graham*.

The decision in *Graham* may also lead to more challenges to life without parole sentences imposed on juvenile homicide offenders. Approximately 2600 individuals in the United States are serving life without parole sentences for homicides they committed as juveniles.[213] In *Roper* and *Graham*, the Court established that juveniles as a class "have lessened culpability" and are thus "less deserving of the most severe punishments."[214] This reasoning naturally raises the question of what the real difference is between juveniles who commit homicides and those who commit other crimes. For example, the dissent in

---

[205] *Id.* at 882. Mendez was sentenced at age eighteen and received credit for 848 days of time served. *Id.* Because Mendez was convicted of violent felonies "he is limited to 15 percent work time credit on his determinate sentence," and his life term for carjacking has a fifteen-year minimum parole eligibility for which he cannot earn work time credit. *Id.*

[206] *Id.*

[207] *Id.* at 873.

[208] *Id.* at 882.

[209] *Id.*

[210] *Id.* at 883.

[211] *Id.*

[212] *Id.* at 883-84.

[213] *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUMAN RIGHTS WATCH (Oct. 2, 2009), http://www.hrw.org/en/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole.

[214] Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

Graham saw no distinction in terms of "depravity and irredeemability" between a seventeen-year-old who uses a gun to kill and a seventeen-year-old who rapes but does not kill.[215] The majority recognized a general distinction between defendants who kill and those who do not, but focused its analysis on juveniles as a class without distinguishing between juvenile homicide and non-homicide offenders.[216] Its conclusion that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability"[217] does not make a dispositive statement on whether juvenile homicide offenders would be culpable enough for it to be constitutional to sentence such offenders to life in prison without parole.[218] Nevertheless, lower courts have thus far been unwilling to extend *Graham* to cases involving juveniles sentenced to life without parole for homicides. For example, in *Miller v. State*, the Court of Criminal Appeals of Alabama held that a juvenile who committed a homicide did not have the "twice diminished moral culpability" that the defendant in *Graham* had.[219] The *Miller* defendant had diminished culpability for his age (he was fourteen at the time of the offense),[220] but his crime of homicide was not "included in any category of offenses that are less culpable."[221] Therefore, his life without parole sentence for capital murder was held not to violate the Eighth Amendment and was therefore consistent with *Graham*.[222] In another case, the Superior Court of Delaware held that *Graham* did not preclude sentencing a juvenile defendant to life without parole for attempted homicide because it was the intent to kill that rendered the juvenile more culpable and deserving of the sentence.[223]

Despite limits to *Graham*'s holding in terms of juvenile offenders, *Graham* may also have implications for cases involving adult offenders and Eighth Amendment challenges. In an unrelated case, *United States v. Graham*, the

---

[215] *Id.* at 2055 (Thomas, J., dissenting).

[216] *Id.* at 2026-27 (majority opinion).

[217] *Id.* at 2027.

[218] *But see id.* at 2041 (Roberts, J., concurring) (arguing that "there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders" (emphasis in original)).

[219] No. CR-06-0741, 2010 WL 3377692, at *8 (Ala. Crim. App. Aug. 27, 2010). Evan Miller (age fourteen) and Colby Smith (age sixteen) allegedly robbed and beat Miller's neighbor, Cole Cannon, in Cannon's trailer. *Id.* at *1. Miller then set Cannon's trailer on fire. *Id.* Forensic pathology revealed that Cannon died of smoke and soot inhalation, multiple blunt force injuries and ethanol intoxication. *Id.* at *3.

[220] *Id.* at *7.

[221] *Id.*

[222] *Id.* at *9.

[223] State v. Twyman, Cr. ID No. 9707012195, 2010 WL 4261921, at *2 (Del. Super. Ct. Oct. 19, 2010). Korey E. Twyman (fifteen at the time) and a co-defendant, seeking revenge for a prior altercation, shot three people who were sitting in chairs talking. *Id.* at *1. Two of the victims died. *Id.*

U.S. Court of Appeals for the Sixth Circuit upheld a life without parole sentence for an adult offender where "an adult conviction resulting from a juvenile-age offense" was counted as part of the "three strikes" necessary to impose the life sentence.[224] The defendant was an adult when he was convicted of his third strike for drug offenses and given the mandatory life sentence.[225] However, the first strike arose from an offense the defendant committed when he was seventeen, but for which he was charged as an adult.[226] Although the Sixth Circuit acknowledged *Graham v. Florida*, the court distinguished the two cases because in *United States v. Graham*, the defendant was sentenced to life without parole for the third strike, which was an offense committed when he was an adult.[227] However, the dissent argued that using a conviction that arose from a juvenile-age offense (regardless of whether the juvenile was tried as an adult) as part of the three strikes to impose a life sentence violated "sound principles of penological policy based on the Eighth Amendment values" outlined by *Graham v. Florida*.[228] For the dissent, the significance of *Graham v. Florida* was not its holding (which was "technically speaking, probably not binding") but the principle that there is an "important distinction between juvenile and adult criminal conduct."[229]

Subsequently, in *United States v. Badley*, an Ohio district court considered whether a federal statute mandating a life sentence without parole for a non-homicide drug offense violated the Eighth Amendment in light of *Graham v. Florida*.[230] The *Badley* defendant was twenty-one years old at the time of sentencing, and the three felony convictions used to enhance his sentence were adult convictions.[231] The court ultimately rejected the defendant's Eighth Amendment claim because it found that it was bound by the Sixth Circuit's holding in *United States v. Graham*.[232] Notably, however, the court stated in a footnote that the Supreme Court would likely be confronted in the next decade with the "issue of whether mandatory life sentences for non-violent crimes committed by adults" violates the cruel and unusual punishment clause of the Eighth Amendment.[233] Despite its holding, the district court expressed its opinion that mandatory sentencing regimes violate the Eighth Amendment.[234]

---

[224] United States v. Graham, 622 F.3d 445, 456-57, 463 (6th Cir. 2010).

[225] *Id.* at 447.

[226] *Id.* at 454.

[227] *Id.* at 463.

[228] *Id.* at 465 (Merritt, J., dissenting).

[229] *Id.* at 469-70.

[230] United States v. Badley, No. 1:95 CR 125, 2010 WL 4292220, at *1 (N.D. Ohio Oct. 22, 2010), *petition for cert. filed* (U.S. Feb. 10, 2011) (No. 10-9261).

[231] *Id.* at *5.

[232] *Id.*

[233] *Id.* at *5 n.9.

[234] *Id.*

The above cases demonstrate that although the Supreme Court's decision in *Graham v. Florida* has thus far been interpreted very narrowly, the ruling has had a significant effect where it has been applied retroactively to reduce the sentences of individuals serving life without parole sentences for juvenile non-homicide offenses. The above cases also demonstrate that there are possibilities for applying *Graham* to extend Eighth Amendment prohibitions to mandatory life sentences for certain adult offenses, to de facto life sentences for juvenile non-homicide offenders, and to juvenile homicide offenders. Although the holding in *Graham* leaves much discretionary power to states and judges, the underlying principles of *Graham*—that juveniles are distinct from adults and that life without parole sentences are comparable to death sentences—have already taken root in the contextual inquiries of a variety of sentencing practices.

V. CONCLUSION

Graham v. Florida set an unprecedented standard for what constitutes cruel and unusual punishment under the Eighth Amendment by prohibiting the sentencing of juvenile non-homicide offenders to life without parole. Its holding, however, does not mean that juvenile offenders currently serving such sentences will ever be released, and there is no telling what kind of opportunities they will have to demonstrate that they should be released. Lower court cases have not yet considered claims that an incarcerated defendant has not been given a meaningful opportunity to demonstrate rehabilitation. But for all of the limits of the decision, *Graham* provides an opening for more Eighth Amendment challenges to certain sentencing practices. At the very least, *Graham* means that states cannot expressly condemn juveniles to live out the rest of their young lives in prison, without giving them at least the hope of release. The underlying principles of *Graham* are that juveniles are distinct from adults in terms of their lesser culpability and larger capacity for change, and thus less deserving of a punishment as severe as life in prison without the possibility of parole. These principles are the start of a dialogue about what purposes are served by condemning juveniles and whether other sentencing practices are also "cruel and unusual." For those of us who believe that youth deserve hope, regardless of their crimes, *Graham* is a good start.

The Constitution and Inking: How *Anderson v. City of Hermosa Beach* Expanded First Amendment Protection for the Tattoo Industry

Summer Gillenwater Shelverton*

I. INTRODUCTION

In 2006, Johnny Anderson wanted to move his tattoo shop to a better location and decided on Hermosa Beach, California.[1] However, the city of Hermosa Beach's (City) local zoning laws effectively prohibited opening any tattoo establishments within the city limits.[2] Contesting the ordinance, Johnny sued in federal court in Los Angeles, claiming a violation of his First Amendment rights based on his assertion that tattooing is protected artistic expression.[3] The City countered that it prohibited the conduct and the process of tattooing based on health and safety concerns; it did not prohibit the expression of tattoos.[4] Following decisions in other courts, the district court agreed with the City and emphasized the distinction between the product and process of tattooing, holding that

> [t]he process of injecting dye into a person's skin through the use of needles, in contrast with any message conveyed by the tattoo image, is non-expressive conduct that must, in order to acquire First Amendment protection . . . carry with it an intent to convey a message that will be understood by those who viewed it.[5]

Deciding that the act of tattooing is not protected under the First Amendment, the lower court applied rational basis review[6] to the ordinance and upheld it under a health exception.[7]

---

* J.D. Candidate 2012, William S. Richardson School of Law, University of Hawai'i at Mānoa. Special thanks to Dean Aviam Soifer for his suggestions, Christopher Leong for his help with editing, and to Daniel Shelverton and the rest of the author's family for their constant love and encouragement.

[1] Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1057 (9th Cir. 2010).

[2] *Id.*

[3] *Id.*

[4] *See id.* at 1062-63.

[5] *Id.* at 1060 (internal quotation marks omitted).

[6] Under rational basis review, a court must only determine whether a governmental action is "rationally related" to a "legitimate interest of the government." Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

In a unanimous decision by a three-judge panel of the Ninth Circuit Court of Appeals, however, the court determined that the City's ban violated the First Amendment.[8] In an unprecedented opinion, the court held that the tattoo itself, the process of tattooing, and the business of tattooing are purely expressive activities fully protected by the First Amendment.[9] This means that such bans are now unconstitutional in the nine states[10] that must comply with Ninth Circuit rulings. In California alone, three cities prohibiting tattoo parlors—Torrance, Hawthorne, and Manhattan Beach—must now allow them to operate.[11]

This note asserts that the *Anderson* decision was correct even though it clearly departed from Ninth Circuit precedent. As University of California Berkeley law professor Jesse Choper said, "If it's art, it's art, and art gets protection."[12] A tattoo artist's designs are more than simply a service to patrons; they are "individual and unique creative works of visual art, designed . . . in collaboration with the person who is to receive the tattoo."[13] Accordingly, the process should receive as much protection as the work itself. Thus, the Ninth Circuit's decision to extend protection to both tattoos and tattooing is commendable. Of course, because the medium used in tattooing carries with it inherently more risks than other forms of art,[14] certain limitations and restrictions may be warranted and should be considered. This note will address both the merits and potential concerns and limitations of this decision.

Part II of this note provides a brief history of tattoos and an overview of cases that have dealt with bans or restrictions similar to that of Hermosa Beach. Part III discusses the merits of the *Anderson* case, prior differences in First Amendment analyses between tattoos and the process of tattooing, and why the Ninth Circuit's elimination of this distinction is appropriate. Part IV explores both the potential health risks and possible negative secondary effects of tattooing that may serve as legitimate restrictions on the tattoo industry and limit the scope of the case's outcome in the future. Part V concludes that, limitations notwithstanding, tattoos and tattooing are forms of expression

---

[7] *Anderson*, 621 F.3d at 1058.

[8] *Id.* at 1068.

[9] *Id.*

[10] The Ninth Circuit includes the states of Alaska, Arizona, California, Hawai'i, Idaho, Montana, Nevada, Oregon, and Washington. *See* UNITED STATES COURTS FOR THE NINTH CIRCUIT, http://www.ce9.uscourts.gov/courts.html (last visited Jan. 7, 2011).

[11] Douglas Morino, *Hermosa Tattoo Co. opens for business*, DAILY BREEZE, Dec. 10, 2010, http://www.dailybreeze.com/news/ci_16829867.

[12] *Tattoo Artist Seeks First Amendment Protection*, HERALD & REVIEW, May 31, 2010, http://www.herald-review.com/news/national/article_5790ca4a-69a9-11df-bcb2-001cc4c002e0.html.

[13] *Anderson*, 621 F.3d at 1057.

[14] *See* discussion *infra* Part IV.

protected by the First Amendment and that the Ninth Circuit was justified in invalidating an ordinance prohibiting such expression.

II. BACKGROUND

When determining whether a practice deserves constitutional protection, courts will often look to historical and traditional practices.[15] Thus, a review of the history of tattooing in Western civilization is useful in determining why tattooing may be considered expressive conduct and for understanding one aspect of how the Ninth Circuit arrived at its decision.

A. History of Tattoos in the Western World

Tattooing was primarily introduced in Western civilization via contact with Polynesian cultures in the late eighteenth century.[16] In fact, the word "tattoo" is one of only a few words used internationally that are Polynesian in origin; it derives from the word *tatau* used in Tahiti, Tonga, and Samoa.[17] In Hawai'i, the word became kākau.[18] Prior to European colonization, Native Hawaiians accorded significant reverence to their kākau.[19] Tattoos were used "not only for ornamentation and distinction, but to guard . . . health and spiritual well-being."[20] The designs chosen often had kaona,[21] or hidden meaning and power.[22] Specially trained kahuna, experts in one or more critical tasks, applied the designs themselves. The process was guarded with great secrecy, with all implements destroyed after use.[23] Notably, the royal family was the most extensively adorned, followed by other court officials and those who married

---

[15] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 565 (2003) (conducting a historical analysis to determine if a right was "fundamental").

[16] *See* MICHAEL ATKINSON, TATTOOED: THE SOCIOGENESIS OF A BODY ART 30-31 (2003) (noting the origins of the modern tattoo find its roots in documented European sea travel to the South Pacific); Betty Fullard-Leo, *Body Art*, COFFEE TIMES, Jan. 23, 2011, http://www.coffeetimes.com/tattoos.htm (noting that tattoos are truly "Polynesian in origin" and that tattooing was an art unknown to the western world until Captain Cook's first voyage to Polynesia).

[17] ATKINSON, *supra* note 16, at 31.

[18] *Id. See also* MARY K. PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 130 (rev. ed. 1986).

[19] *See Tattoo and Taboo: Kakau in Hawai'i*, PBS HAWAII, http://www.pbs.org/skinstories/history/hawaii.html (last visited Jan. 23, 2011).

[20] *Id.*

[21] Kaona is defined as "hidden meaning in Hawaiian poetry" or "words with double meanings that might bring good or bad fortune." PUKUI & ELBERT, *supra* note 18, at 130.

[22] Fullard-Leo, *supra* note 16.

[23] *Tattoo and Taboo*, *supra* note 19.

into royalty.[24] After European settlers and missionaries began arriving in the late eighteenth century, however, the previously venerated practice of tattooing began to develop a more negative reputation in response to the rigid Western social and religious values imposed at that time.[25] As a result, the ancient practice of kākau began to vanish,[26] but the controversy over the modern tattoo industry was just beginning.

Following contact with Polynesians and continuing through the twentieth century, Europeans were both fascinated and repelled by the body art of tribal groups, especially those of Hawaiian and other Polynesian cultures.[27] Unlike the reverence ancient cultures traditionally accorded tattoos, Europeans generally viewed such displays as primitive or barbaric.[28] Indeed, during this time, many tattooed people were displayed as freaks and oddities in circuses or carnival sideshows throughout Europe.[29] Adopting European values, the practice of tattooing in the United States has also generally signified one's lower social status or deemed one a member of an "out group."[30] Nonetheless, certain segments of the American population in the last century have embraced tattoos as a means of artistic or symbolic expression.

During the 1920s to 1950s, for example, tattoos acquired some respectability as indicators of patriotism during the course of two World Wars.[31] However, after World War II, the emphasis on middle-class values and conformity again relegated tattooing to an undesirable lower-status behavior.[32] Beginning in the 1950s, and especially during the Vietnam War era, many disaffected groups began to embrace the outlaw image of body art to communicate their opposition to the majority's opinion or mandates of conduct.[33] During this period, those on the outskirts of society questioned the majority's views of race, ethnicity, gender, and class, and individuals engaged in tattooing to distinguish themselves from mainstream cultural norms.[34]

Although tattooing has historically been accepted by only a small subset of American society, public sentiment has begun to change since the early

---

[24] *See Role of Tattoo*, PBS HAWAII, http://www.pbs.org/skinstories/culture/index.html (last visited Mar. 21, 2011). *See also Hawaiian Tattoos*, TO-HAWAII.COM, http://www.to-hawaii.com/culture/hawaiian-tattoos.php (last visited Mar. 3, 2011).

[25] *Tattoo and Taboo*, *supra* note 19.

[26] *Id.*

[27] *See* ATKINSON, *supra* note 16, at 32-34.

[28] *Id.*

[29] *Id.* at 31, 33-35.

[30] *Id.* at 32-34.

[31] *Id.* at 36-38.

[32] *Id.* at 38, 41.

[33] *Id.* at 41.

[34] *Id.* at 42-43.

1990s.[35] Indeed, an estimated forty-five million Americans now have a tattoo.[36] Notably, thirty-six percent of those aged eighteen to twenty-five, and forty percent of those aged twenty-six to forty, have at least one tattoo.[37] Contravening the social construction of tattoos as deviant in the United States, middle-class suburban females are the fastest-growing demographic for tattoos today.[38] Indeed, tattoos today are routinely seen on rock stars, professional sports figures, ice skating champions, fashion models, movie stars, and other public figures who play a significant role in setting the culture's contemporary mores and behavioral patterns.[39]

Given the fluctuating changes in societal valuation of tattoos throughout American history, an observer might likely predict that courts would similarly struggle with legal questions surrounding this topic. Case law indicates that the legal system finds the tattoo industry, and protection thereof, as complicated and controversial as its tumultuous social history. An overview of the cases dealing with First Amendment claims involving bans on tattooing reveals the struggles that courts and tattoo artists often engage in when this right is challenged.

B. Case Law Application of the First Amendment to Tattoos

1. The First Amendment

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[40] Courts have developed a wide variety of tests for what qualifies as "speech," and new forms of protected speech can emerge as new or amorphous issues arise.[41] Generally, however, the court

---

[35] Anthony Jude Picchione, *Tat-Too Bad for Municipalities: Unconstitutional Zoning of Body-Art Establishments*, 84 B.U. L. REV. 829, 833 (2004).

[36] *See Gene Expression Profiles in Tattooed Skin of SKH-1 Hairless Mice*, U.S. FOOD & DRUG ADMIN. (FDA), http://www.accessdata.fda.gov/ScienceForums/forum06/B-36.htm (last updated Aug. 28, 2008).

[37] *See 36% - Tattooed Gen Nexters*, PEW RESEARCH CENTER, http://pewresearch.org/databank/dailynumber/?NumberID=237 (last updated Mar. 21, 2011).

[38] Hoag Levins, *The Changing Cultural Status of the Tattoo Arts in America*, TATTOOARTIST.COM, http://www.tattooartist.com/history.html (last visited Jan. 23, 2011).

[39] *Id.*

[40] U.S. CONST. amend. I.

[41] *See* Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009) (determining whether picketing at a funeral involving signs containing homosexual slurs merits First Amendment protection); *see also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000) (striking down a portion of the Communications Decency Act, which required cable television operations to scramble or block material for channels "primarily dedicated to sexually-oriented programming"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (expanding speech to include wearing an armband in protest of the Vietnam War).

extends the greatest protection to "pure speech"[42] or expressive conduct that is "closely akin" to pure speech.[43] Regulations that burden or ban these types of speech because of their content are largely subject to very strict scrutiny by the court.[44]

Conduct, on the other hand, that does not clearly express an idea does not often receive the same First Amendment protection.[45] Notably, expressive conduct like hair length or clothing style does not qualify as "expressive speech" protected under the First Amendment, sometimes even when the conduct is clearly ideological, sociological, or moral in nature.[46] For example, in *Freeman v. Flake*, three male students challenged school policies prohibiting males from having long hair; they claimed that hair length was a message about their individuality and that the schools' policies violated their First Amendment rights.[47] The Tenth Circuit, however, held that expressions of individuality and other "limitless variet[ies] of conduct" that do not contribute to the "storehouse of ideas" cannot be labeled "expressive speech" whenever a person intends to express an idea.[48] Thus, conduct in this category, where the connection between the conduct and its purported message is unclear, falls outside of the scope of the First Amendment.

Finally, standing between full First Amendment protection and no First Amendment protection are a variety of activities that contain some elements denoted as expression but are insufficient to merit the full constitutional protection that pure speech does. In these types of situations, the government may legitimately impose more extensive regulations because it "generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[49]

Thus, while constitutional protection of speech is readily given, defining the types of conduct that are sufficiently similar to speech to warrant First Amendment protection can be difficult. As noted above, conduct not clearly expressive of an idea and conduct with some expressive elements but dissimilar

---

[42] "Pure speech" is defined as "[w]ords or conduct limited in form to what is necessary to convey the idea. This type of speech is given the greatest constitutional protection." BLACK'S LAW DICTIONARY 1529 (9th ed. 2009).

[43] *See Tinker*, 393 U.S. at 506 (1969).

[44] *See Playboy Entm't Grp., Inc.*, 529 U.S. at 813 (2000).

[45] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

[46] *See* New Rider v. Bd. of Educ. of Indep. Sch. Dist. No. 1, 480 F.2d 693 (10th Cir. 1973) (holding that hair length did not warrant First Amendment protection, even though plaintiff claimed the length was directly related to his religious beliefs).

[47] 448 F.2d 258, 259-260 (10th Cir. 1971).

[48] *Id.* at 260-61.

[49] Texas v. Johnson, 491 U.S. 397, 406 (1989).

from pure speech are examples of the amorphous categories courts struggle to classify, and protection for these categories varies. As non-verbal conduct, tattoos and tattooing inherently fall into the category of activities that do not fit comfortably into the First Amendment analytical framework. As such, courts have struggled to classify tattooing within the realm of First Amendment jurisprudence.[50] Conflicting case law exemplifies this struggle.

2. Challenges to restrictions on tattooing

Courts have considered the application of First Amendment freedom of speech protections to non-verbal speech in the form of tattoos. To defend an individual's right to publicly display a tattoo, or the tattoo business' ability to create a tattoo, the process and the tattoo must meet the necessary elements to constitute a level of "speech" as defined in *Texas v. Johnson*.[51] That is, the tattoo and the process of tattooing must possess an "intent to convey a particularized message" and a great likelihood that "the message would be understood by those who viewed it."[52] Based on these threshold requirements, many courts have refused to extend First Amendment protection to the tattoo industry.

People v. O'Sullivan[53] is the earliest case addressing First Amendment protection of tattooing. In this case, the Appellate Division of the Supreme Court of New York upheld a city law that prohibited "all tattooing of human beings, except by licensed medical doctors for medical purposes."[54] The court stated that tattooing was not "speech or even symbolic speech" and accordingly rejected a First Amendment claim.[55] In 1980, the court in *Yurkew v. Sinclair* addressed an analogous issue when the Minnesota State Fair Board of Managers refused to rent space at a state fair to a tattoo artist.[56] Again, the State contended that tattooing did not rise to the level of speech deserving of First Amendment protection, and that health concerns superseded any rights infringed upon.[57] The court ultimately agreed, stating that, "the actual process of tattooing is not sufficiently communicative in nature so as to rise to the plateau of important activity encompassed by the First Amendment."[58] In 2002, the Supreme Court of South Carolina in *State v. White* held similarly,

---

[50] *See* discussion *infra* Part II.B.2.

[51] *See Johnson*, 491 U.S. at 404-06.

[52] *Id.* at 404.

[53] 409 N.Y.S.2d 332 (App. Div. 1978).

[54] *Id.* at 333.

[55] *Id.*

[56] 495 F. Supp. 1248, 1249 (D. Minn. 1980).

[57] *Id.*

[58] *Id.* at 1253 (citing *O'Sullivan*, 409 N.Y.S.2d at 333).

finding that the plaintiff failed to prove that "the process of tattooing is communicative enough to automatically fall within First Amendment protection."[59]

More recent decisions follow this trend. In 2008, a federal court in Illinois concurred with prior case law in holding that tattooing is not an act protected by the First Amendment.[60] The court stated that expressive conduct must be "sufficiently imbued with elements of communication to fall within the scope" of the First Amendment.[61] Thus, the conduct must intend to convey a particular message and with great likelihood that it be understood by others.[62] The court held that tattooing failed the first prong of the test because the act of tattooing itself is not intended to convey a particular message, even though the artist produces for the customer a unique message that they then wear on their skin.[63] Thus, the tattoo artist's daily work (the tattoo) may be used by customers to convey a message, but the act of producing that work is not protected by the First Amendment.

Notwithstanding the majority of both preceding and subsequent case law holding that tattooing does not merit First Amendment protection, in 2000, the Superior Court of Massachusetts in *Lanphear v. Massachusetts* found that a total ban on tattooing—as opposed to regulations or restrictions—violated the First Amendment.[64] The *Lanphear* court found that "an articulable or particularized message is not a condition of constitutional protection."[65] Rather, the First Amendment encompasses all types of paintings, drawings, and engravings such that it is "beyond argument that the drawn image is protected."[66] Notably, the court held it could not separate the act of creating a tattoo from the tattoo itself, and thus deemed a complete ban on tattooing unconstitutional.[67] The court also weighed the state's interest in health and safety and found that any concerns were "sufficiently addressed through licensing and regulation . . . and sanitary tattooing establishments."[68]

---

[59] 560 S.E.2d 420, 423 (S.C. 2002) (emphasis omitted).

[60] Hold Fast Tattoo, LLC v. City of N. Chicago, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008).

[61] *Id.* at 659 (citing Spence v. Washington, 418 U.S. 405, 409 (1974)).

[62] *Id.* (citing Miller v. Civil City of S. Bend, 904 F.2d 1081, 1086 (7th Cir. 1990)).

[63] *Id.* at 660.

[64] *See* Bobby G. Frederick, *Tattoos and the First Amendment-Art Should be Protected as Art: The South Carolina Supreme Court Upholds the State's Ban on Tattooing*, 55 S.C. L. REV. 231, 235 (2003) (citing *Memorandum of Decision and Order for Judgment on Cross-motions for Summary Judgment*, Lanphear v. Massachusetts, No. 99-1896-B (Mass. Super. Ct. Oct. 20, 2000)).

[65] *Id.* at 235-36.

[66] *Id.* at 236.

[67] *Id.*

[68] *Id.* at 241.

The departure in *Lanphear* from an otherwise consistent trend of refusing to extend First Amendment protection to tattooing is noteworthy, especially because later cases in Massachusetts have upheld *Lanphear*.[69] Though clearly still a minority view, this holding provides some precedent for the decision in *Anderson*.

III. THE TATTOO INDUSTRY MERITS FIRST AMENDMENT PROTECTION

Recent statutory amendments favoring tattoo parlors also suggest a transition in views of the relationship between the tattoo industry and First Amendment protection. Specifically, all state laws completely banning tattooing have been repealed.[70] Oklahoma, the last state to outlaw tattooing, repealed its body art ban and implemented a law legalizing and regulating tattooing in 2006.[71] States have replaced their previous bans on tattooing with less restrictive alternatives—such as sterilization and licensing requirements—to protect the public from potential dangers.[72] In this context, it is not surprising that the Ninth Circuit in *Anderson* rejected a law that effectively prohibited tattoo parlors from operating within city limits. The Ninth Circuit opinion, similar to the *Lanphear* case, eliminates any distinction between the tattoo and the process of tattooing when determining whether the particular conduct merits First Amendment protection.[73] Instead, the Ninth Circuit held that both the tattoo and the act of tattooing are forms of pure expression equally deserving of First Amendment protection.[74] Given the majority of prior cases with contrary holdings, the decision to merge the act and the business of tattooing with the tattoo itself might seem, on its face, unexpected.[75] However, examining the often muddled manner in which prior cases have isolated the process from the product provides a rationale as to why the Ninth Circuit held similarly to the *Lanphear* court and why this holding is appropriate.

---

[69] *See* Macneil v. Bd. of App. of Boston, 18 Mass. L. Rep. 153 (Mass. Super. Ct. 2004) (upholding the decision in *Lanphear*).

[70] Marisa Kakoulas DiMattia, *Oklahoma Lifts Body Art Ban*, LEGAL LINK (May 10, 2006), http://news.bmezine.com/wp-content/uploads/2008/09/pubring/legal/20060510.html (noting that Oklahoma was the last state to repeal a law banning tattooing).

[71] *Id. See also* Okla. Stat. Ann. tit. 21, § 842.3 (West 2006).

[72] Brief of Amicus Curiae Ctr. for Individual Freedom in Support of Petition for Writ of Certiorari at 8, White v. South Carolina, 537 U.S. 825 (2002) (No. 01-1859).

[73] *Compare* Lanphear v. Massachusetts, No. 99-1896-B (Mass. Super. Ct. Oct. 20, 2000) (holding that both the process and product of tattooing merit First Amendment protection) *with* Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010) (same).

[74] *Anderson*, 621 F.3d at 1068.

[75] *See* People v. O'Sullivan, 409 N.Y.S.2d 332, 333 (N.Y. App. Div. 1978); Yurkew v. Sinclair, 495 F. Supp. 1248, 1253 (D. Minn. 1980); State v. White, 560 S.E.2d 420, 423-24 (S.C. 2002); Hold Fast Tattoo, LLC v. N. Chicago, 580 F. Supp. 2d 656, 662 (N.D. Ill. 2008).

A. Distinguishing Tattoos from Tattooing

Prior cases addressing challenges to tattoos or tattooing on First Amendment grounds have consistently emphasized the distinction between the tattoo itself and the process of tattooing.[76] Specifically, most of the pre-*Anderson* cases dealt with challenges to the process of tattooing rather than the tattoo itself.[77] Generally, those courts have held that the physical process of tattooing is subject to the Supreme Court's test for expressive conduct that originated in the 1974 case *Spence v. Washington*.[78] Under *Spence*'s "sufficiently imbued" test, conduct warranting First Amendment protection must be "sufficiently imbued with elements of communication to fall within the scope" of the First Amendment.[79] Tattooing ultimately fails this test because the act itself "is not intended to convey a particularized message."[80] Thus, the act of tattooing has traditionally been considered non-expressive conduct without entitlement to First Amendment protection.[81]

The consensus as to whether the tattoo itself merits First Amendment protection is, however, less clear. The Supreme Court has never ruled as to whether a tattoo constitutes "speech" under the First Amendment. Furthermore, the small number of cases addressing the issue of First Amendment protection for tattoos have produced ambiguous results.[82] For example, in *Stephenson v. Davenport Community School District*, the Eighth Circuit held that a high school student's tattoo did not merit First Amendment protection because it was simply "a form of self-expression" and not intended to convey a particular message.[83] The court, however, failed to note what might have happened had the tattoo bearer intended to convey a message by displaying the tattoo.[84] The answer to this question is, to some extent, alluded to in case law addressing the tattoo process. In a number of the cases discussed earlier, the courts distinguished the process from the tattoo in a manner that suggests tattoos may merit First Amendment protection.[85] Notably, the court in

---

[76] *See Anderson*, 621 F.3d at 1059.

[77] *See O'Sullivan*, 409 N.Y.S.2d 332; *Yurkew*, 495 F. Supp. 1248; *White*, 560 S.E.2d 420; *Hold Fast Tattoo*, 580 F. Supp. 2d 656.

[78] 418 U.S. 405 (1974).

[79] *Id.* at 409.

[80] *Hold Fast Tattoo*, 580 F. Supp. 2d at 660. *See also Yurkew*, 495 F. Supp at 1253-54; *White*, 560 S.E.2d at 423.

[81] *Id.*

[82] *See infra* notes 83-84, 88-93 and accompanying text.

[83] 110 F.3d 1303, 1307 n.4 (8th Cir. 1997).

[84] *See id.* at 1307-08 (noting the absence of commentary addressing situations where First Amendment protection for tattoos might be warranted).

[85] *See Yurkew*, 495 F. Supp. at 1253-54; *White*, 560 S.E.2d at 425-26.

Yurkew was quick to distinguish between possible free speech implications of the tattoo image and the process of tattooing in stating:

> This distinction must be drawn because plaintiff seeks to engraft tattoos on customers at the fair, and not merely exhibit the images conveyed by the tattoo. As noted, the defendants have not precluded plaintiff from exhibiting in some form his tattoos, only that the actual process of tattooing is prohibited.[86]

The court did not address whether the tattoo merits First Amendment protection because courts are "ill[-]equipped to determine such illusory and imponderable questions."[87] Sidestepping the issue, however, suggests that the court might have arrived at a different decision had it subjected the tattoo, rather than the act of tattooing, to a First Amendment analysis.

Courts have also failed to adhere to the demarcation line that they have established between tattoos and the tattooing process. In another case addressing First Amendment protection for the tattoo itself, a Texas federal court in *Riggs v. City of Fort Worth* confused the issue when considering the constitutionality of a local police department's requirement that an officer cover the tattoos on his arms and legs.[88] Citing *Stephenson* and *O'Sullivan*, the court held that "a tattoo is not protected speech under the First Amendment."[89] However, the *Riggs* court misinterpreted these decisions. In *Stephenson,* the dicta applied only to the specific tattoo in question because the issue was only whether that particular tattoo was sufficiently communicative to merit First Amendment protection.[90] It did not state that tattoos per se are unprotected.[91] In contrast, the *O'Sullivan* case did not address constitutional protection of the tattoo itself at all.[92] Rather, it addressed whether the tattooing process was protected speech.[93] Thus, despite their seemingly adverse outcomes, the above cases do not contradict the possibility that tattoos may constitute protected speech under the First Amendment. Case law simply does not adequately resolve this issue.

Though generally holding that the process of tattooing is not entitled to First Amendment protection, courts have either avoided the issue or applied a flawed analysis when evaluating the tattoo itself.[94] Given courts' inability to adhere to a consistent method of constitutional analysis, a new approach to interpreting

---

[86] *Yurkew*, 495 F. Supp. at 1253 n.6.

[87] *Id.* at 1254.

[88] Riggs v. City of Fort Worth, 229 F. Supp. 2d 572 (N.D. Tex. 2002).

[89] *Id.* at 580 (citations omitted).

[90] *See* Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 (8th Cir. 1997).

[91] *Id.*

[92] *See* People v. O'Sullivan, 409 N.Y.S.2d 332 (App. Div. 1978) (addressing whether the act of tattooing, not the tattoo itself, merits constitutional protection).

[93] *Id.*

[94] *See* discussion *supra* Parts II-III.

First Amendment protection for tattoos and tattooing is necessary. This note posits that the decision in *Anderson* successfully met this need.

B. Overview of the Case

The dispute in *Anderson* initially arose because the city of Hermosa Beach, California refused to allow Johnny Anderson to open a tattoo parlor within city limits.[95] Because tattoo parlors were not included in the list of permissible businesses allowed in Hermosa Beach, Anderson filed a request with the City's community development director seeking a finding that tattoo parlors were a "similar use" to permissible businesses.[96] Upon denial of his request, Anderson filed suit in the Central District of California, asserting a First Amendment violation of his constitutional right to freedom of expression.[97] Applying *Spence*'s "sufficiently imbued" test,[98] the district court agreed with the City, stating that tattooing does not merit First Amendment protection because "'the customer has ultimate control over which design she wants tattooed on her skin' and, therefore, 'the tattoo artist does not convey an idea or message discernible to an identifiable audience.'"[99] In other words, tattooing is not a type of conduct "sufficiently imbued with elements of communication"[100] to be protected as free speech. The district court also held that the City's interest in regulating tattoos was legitimate because of the health and safety concerns implicated by the process of tattooing.[101]

The Ninth Circuit, however, held otherwise. Upon examining the issue, the Ninth Circuit opined that in order to decide whether the lower court erred in its decision, the court must first determine whether the act of tattooing constitutes purely expressive activity or conduct merely containing an expressive component.[102] If tattooing is conduct merely containing an expressive component, then the district court's decision to apply *Spence*'s "sufficiently imbued" test and deny First Amendment protection was appropriate.[103] However, if tattooing is a purely expressive activity, then it is "entitled to full First Amendment protection"[104] and may only be restricted if a regulation is reasonable in time, place, and manner to satisfy the interest in restricting it.[105]

---

[95] Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1055 (9th Cir. 2010).

[96] *Id.* at 1057.

[97] *Id.*

[98] *See* discussion *supra* Part III.A.

[99] *Anderson*, 621 F.3d at 1058.

[100] Spence v. Washington, 418 U.S. 405, 409 (1974).

[101] *See Anderson*, 621 F.3d at 1058, 1065.

[102] *Id.* at 1059.

[103] *See id.*

[104] *Id.*

[105] *Id. See also* R.A.V. v. City of St. Paul, 505 U.S. 383, 385 (1992) (distinguishing

The Ninth Circuit ultimately determined that tattooing is a purely expressive activity rather than conduct expressive of an idea and is "thus entitled to full First Amendment protection without any need to resort to *Spence*'s 'sufficiently imbued' test."[106] Furthermore, the court held that the City's total ban on tattooing, even though premised on health concerns, was not a valid constitutional restriction on protected expression because it was not reasonable in "time, place, or manner."[107] However, the concurring opinion of Ninth Circuit Judge John T. Noonan, while accepting the fact that a tattoo may qualify as protected speech, warned that creating tattoos indeed involves inherently more health risks—and may require more regulation to detract minors—than other forms of protected expression.[108] The concurring opinion has merit. Although the Ninth Circuit decision successfully resolves many of the inconsistencies in prior case law addressing the First Amendment and tattooing, the limitations briefly mentioned by Judge Noonan are also significant and warrant discussion. Thus, the remainder of this note will address both the Ninth Circuit's laudatory First Amendment analysis that resulted in protecting the tattoo industry from total bans as well as potential concerns raised by the concurring opinion.

C. Analysis: Protection of the Process and the Product

Rather than circumventing the issue as other courts have, the Ninth Circuit began its analysis for granting or denying constitutional protection by firmly stating that "the tattoo itself is pure First Amendment 'speech.'"[109] "Tattoos are generally composed of words, realistic or abstract images," or symbols and can express a wide variety of messages, "all of which are forms of pure expression that are entitled to full First Amendment protection."[110] Likening tattoos to paintings and other forms of art, the court asserted that the only thing seeming to distinguish a tattoo from these forms of protected expression is the medium utilized; a tattoo is engrafted onto a person's skin rather than canvas or paper.[111] While the court did not profess to understand the work of tattoo artists to the same extent as the art of Leonardo da Vinci, it could nonetheless

---

content-based restrictions on free speech, which are presumptively invalid, from content-neutral restrictions which may be upheld so long as the government has a compelling interest in restricting and the regulation is narrowly tailored and reasonable in time, place, and manner to meet the interest). In *Anderson*, the zoning restriction in question was considered content-neutral, thus the latter analysis applies. *Anderson*, 621 F.3d at 1064.

[106] *Anderson*, 621 F.3d at 1064.

[107] *Id.*

[108] *Id.* at 1068, 1069 (Noonan, J., concurring).

[109] *Id.* at 1060 (majority opinion).

[110] *Id.* at 1061.

[111] *Id.*

take judicial notice of the "skill, artistry, and care that modern tattooists have demonstrated."[112]

Rejecting the "sufficiently imbued" test established in *Spence*, the court also held that the tattooing process constitutes pure expression and merits First Amendment protection.[113] The court stated that neither the Supreme Court nor the Ninth Circuit ever distinguished between the process and product of creating a form of pure expression in terms of First Amendment protection[114] Just as Picasso cannot be disaggregated from his brushes and canvas, nor Beethoven from his strings and woodwinds, a tattoo artist is "inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to full First Amendment protection."[115]

Moreover, the court held that it makes no difference whether the tattoo artist receives remuneration for his or her work.[116] Receiving payment, or "provid[ing] a service" as Johnny Anderson puts it, does not make the tattooing process any less creative or deserving of protection.[117] Indeed, if this were the case, then the First Amendment would not protect Michelangelo's painting of the Sistine Chapel by commission.[118] As with all collaborative processes, both the tattooist and the recipient are engaged in expressive activity.[119]

Ultimately, extending protection to both tattoos and tattooing is the appropriate decision. Suggesting, as other courts have, that the wearing of art is protected but the process of creating that art is not[120] is illogical. As noted previously, "if it's art, it's art, and art gets protection."[121] By eliminating the distinction between the process and the product, the Ninth Circuit has resolved this muddled issue in a manner that is both efficacious and fitting for our contemporary society.

IV. LIMITATIONS: TIME, PLACE, AND MANNER RESTRICTIONS

The Ninth Circuit appropriately granted First Amendment protection to tattoos and the process of tattooing. Just because conduct is granted constitutional protection, however, does not mean that it avoids all restrictions placed upon it.[122] In fact, the government may regulate and restrict even pure

---

[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 1062.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *See, e.g.*, State v. White, 560 S.E.2d 420, 438 (S.C. 2002).
[121] *Tattoo Artist Seeks First Amendment Protection*, *supra* note 12.
[122] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 385-86 (1992) (holding that content-neutral

expression, so long as the regulation is neutral as to content of the speech, is reasonable in time, place, and manner, and is narrowly tailored to meet the interest addressed.[123]

In *Anderson*, the plaintiff argued that the City's outright ban on tattoo parlors was not a valid time, place, and manner restriction because it was substantially broader than necessary to achieve the goal of ensuring that tattooing is performed in a sanitary and safe manner.[124] Thus, the City's regulation was not sufficiently narrow to meet the interest addressed. The City, on the other hand, claimed the regulation was a valid restriction on a constitutionally protected right because it could not effectively ensure tattooing would be performed in a sanitary and safe manner with its current resources, and because no statewide regulations existed "relating to sterilization, sanitation, and standards for tattooists."[125]

The court acknowledged the City's legitimate interest in regulating tattooing because of health concerns and agreed that a total ban might be the most convenient remedy.[126] It ultimately, however, agreed with the plaintiff, asserting that "tattooing is a safe procedure if performed under appropriate sterilized conditions."[127] Thus, until the City provided evidence that it could *not* regulate tattooing in a way that would address health and safety concerns, the court could not justify the City's restrictions.[128] However, the City's argument might merit more consideration than it was given. As the concurring opinion implies, heightened regulations of the tattoo industry are likely necessary to (1) address health concerns and (2) keep the industry closed to minors.[129] As such, these two issues constitute potentially valid time, place, and manner restrictions and serve as limitations on the scope of the decision in *Anderson*.

A. Health and Safety Concerns

The Ninth Circuit might have inadvertently devalued legitimate health and safety concerns in presuming that the City could regulate tattoo businesses effectively on its own.[130] Indeed, with "no statewide regulations relating to

---

restrictions may be upheld so long as the government has a compelling interest in restricting and the regulation is narrowly tailored and reasonable in time, place, and manner to meet the interest).

123 *Id.*

124 *Anderson*, 621 F.3d at 1065.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.* at 1069 (Noonan, J., concurring).

130 *Id.* at 1065 (majority opinion) (stating that "the City has given us no reason to conclude

sterilization, sanitation, and standards for tattooists[,]"[131] finding the resources and information to effectively regulate such a rapidly growing industry is daunting. Unfortunately, the City of Hermosa Beach is likely not the only jurisdiction that does not have sufficient standards to rely upon for guidance.

Despite reports of numerous medical and dermatological complications, "lawmakers have left the tattoo industry virtually unregulated in the United States."[132] This is "especially unsettling in light of the increas[ing] popularity of tattoos."[133] With more and more people getting tattoos and no state regulations or funding to rely upon, a question exists as to whether a local municipality could, in fact, address these concerns adequately through its own regulation of the industry.

Although the Food and Drug Administration (FDA) has the authority to regulate pigments utilized during the process of tattooing, it has declined to do so.[134] Its inaction has left the regulation of tattoo pigments and other safety standards to states and localities.[135] States, however, have either failed altogether to regulate the tattoo industry or imposed only minimal regulations.[136] "As a result, one of the fastest growing businesses in the country"[137] operates with almost no governmental oversight.

The lack of standards for tattoo inks and the application of tattoo inks to people has resulted in numerous medical complications relating to competency of the tattooist and sanitation standards.[138] Complications can range from more minor ailments including warts and psoriasis to serious infections such as hepatitis.[139] Indeed, the court in *Anderson* acknowledged that "tattooing can result in the transmission of such diseases as hepatitis, syphilis, tuberculosis, leprosy, and HIV."[140] Admittedly, these complications are rare[141] and were

---

that these concerns cannot be adequately addressed through regulation of tattooing rather than a total ban on tattoo parlors").

[131] *Id.*

[132] Jessica C. Dixon, *The Perils of Body Art: FDA Regulation of Tattoo and Micropigmentation Pigments*, 58 ADMIN. L. REV. 667, 669 (2006) (citations omitted) (noting that the FDA has "never attempted to regulate tattoo inks and the various pigments used therein, relying instead on state laws to regulate them").

[133] *Id. See also* Levins, *supra* note 38.

[134] *See Tattoos and Permanent Makeup*, U.S. FOOD & DRUG ADMIN. (FDA), http://www.fda.gov/Cosmetics/ProductandIngredientSafety/ProductInformation/ucm108530.htm (last updated Feb. 1, 2010) [hereinafter *Tattoos and Permanent Makeup*].

[135] *Id.*

[136] *See* Dixon, *supra* note 132, at 670-71.

[137] *Id. See also* Levins, *supra* note 38 (revealing that tattooing was the sixth-fastest-growing retail business in 1996 and continues to grow).

[138] Dixon, *supra* note 132, at 679 (citations omitted).

[139] *Id.* at 679-80.

[140] Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1056 (9th Cir. 2010).

[141] Dixon, *supra* note 132, at 680.

more likely to occur in the past when tattooing was not as sophisticated. However, deaths from tattooing still occur.[142] Perhaps more concerning than the rare chance of contracting a disease, many people have recently experienced severe allergic reactions from the actual ink used by the tattooist or aesthetician.[143] These reactions can be quite serious and ultimately require the surgical removal of ink.[144] With no oversight, a major problem underlying these adverse reactions is the scarcity of information available regarding the composition of the inks;[145] the FDA, however, has recently indicated it is in the process of researching inks causing such reactions.[146]

Because of the lack of regulation of the tattoo industry at the state level, and no uniform guidelines at the federal level, local municipalities might simply not be up to the task of regulating such a burgeoning industry. While the lack of state or federal standards and a dearth of resources probably do not support a complete ban on a constitutionally protected form of expression, it does perhaps warrant a more heightened scrutiny than was accorded in *Anderson*.

B. Regulations on Adult Industries

In addition to limitations that may be imposed on the tattoo industry because of legitimate health concerns, Judge Noonan in his concurring opinion suggested that regulations may also be necessary to ensure tattoo businesses do not attract minors.[147] Indeed, tattooing is generally reserved in most states for only adults.[148] As such, the tattoo industry may constitute an "adult use,"

---

[142] *See* T. David I. Wilkes, *The Complications from Dermal Tattooing*, 2 OPTHALMIC PLASTIC & RECONSTRUCTIVE SURGERY 1, 1 (1986) (noting recent infections and deaths from tattooing).

[143] *See Tattoos and Permanent Makeup, supra* note 134 (noting reported adverse reactions to tattoo ink can manifest, sometimes even after years of having the tattoo). *See also Tattoos: Understand Risks and Precautions*, MAYO CLINIC, http://www.mayoclinic.com/health/tattoos-and-piercings/MC00020 (last visited Jan. 23, 2011).

[144] *See* Whitney D. Tope et al., *Black Tattoo Reaction: The Peacock's Tale*, 35 J. AM. ACAD. DERMATOLOGY 477, 477 (1996) (noting that adverse reactions to tattoos can usually persist for months or years even if treated and that tattoos may require surgical removal).

[145] *Tattoo Removal Techniques*, CENTER FOR FOOD SAFETY & APPLIED NUTRITION, FDA, http://www.emaxhealth.com/68/784.htmlhttp://www.emaxhealth.com/68/784.html (Oct. 23, 2004) (stating that individuals have suffered allergic reactions after tattoo removal because the laser likely caused some unknown allergenic substance to be released in the body).

[146] *See Tattoos and Permanent Makeup, supra* note 134 (noting that the FDA "continues to evaluate the extent and severity of adverse events associated with tattooing and is conducting research on inks").

[147] Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1069 (9th Cir. 2010) (Noonan, J., concurring).

[148] *See Tattoos and Body Piercings for Minors*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=14393 (Jan. 2010) (noting that at least thirty-nine states

which some cities and towns have successfully restricted in their zoning ordinances.[149]

In *Young v. American Mini Theatres, Inc.*,[150] the first case to address possible restrictions on adult businesses, the City of Detroit attempted to place restrictions upon adult movie theatres because of the effect these "adult" businesses had on the city.[151] Specifically, urban planners and real estate experts contended that a concentration of such businesses in a given neighborhood "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere."[152] Finding that adult movie theatres created these negative "secondary effects" on the surrounding area, the Court held that the city was justified in placing heavier burdens on such businesses.[153] Furthermore, because the city drafted the ordinance to lessen the negative secondary effects of these establishments, and not to curtail freedom of expression, the city had met its burden of proving its significant governmental interest under the "time, place, and manner" test.[154]

Interestingly, a city need not conduct its own studies to justify negative secondary effects of adult businesses. In *City of Renton v. Playtime Theatres, Inc.*, the Court held that "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."[155] This "reasonable belief" standard is still generally followed,[156] though case law discussed below has effectively imposed certain limitations on such a broad rule.

---

have laws prohibiting minors from getting tattoos).

[149] Adult use zoning and the secondary effects doctrine are closely connected to the power to zone tattoo parlors because some municipalities actually include tattooing as "adult uses" in their zoning ordinances. *See* Dennis, Mass., Zoning By-Law 2.2.6.2, *available at* http://town.dennis.ma.us/Pages/DennisMA_Planning/Final%20ZONING%20BY-LAW%20May%204,%202010%20Amendments.pdf (last visited Feb. 4, 2011) (establishing the Adult Entertainment By-Law for the purpose of "addressing and mitigating the secondary effects of the adult entertainment establishments," which includes tattoo parlors).

[150] 427 U.S. 50, 58-59 (1976) (adjudicating a dispute over ordinances that differentiate between "adult" movie theatres and those that do not display films with explicit sexual content).

[151] *See id.* at 54-55.

[152] *Id.* at 55.

[153] *Id.* at 71-72.

[154] *See id.*

[155] 475 U.S. 41, 51-52 (1986). (concluding that Renton justifiably relied on other cities' findings when crafting and enacting its own zoning ordinance).

[156] For example, in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), the Supreme Court implicitly adopted its prior holding in *Renton* that a city need only show that their reliance on studies is reasonable and "specifically refused to set such a high bat for

One possible limitation concerns the relevance of the study relied upon to prove secondary effects.[157] In a Ninth Circuit case, for example, the court held that a city could not reasonably rely on conclusions of outdated secondary effects studies.[158] The court in this case adjudicated a dispute over the constitutionality of a Los Angeles zoning ordinance prohibiting multiple-use adult establishments based on twenty-year-old studies; the court found that the studies could not effectively be relied upon because they were too far removed from present circumstances.[159] In *Schad v. Borough of Mount Ephraim*,[160] the court further defined the boundaries of the "secondary effects" doctrine. The court clarified the holding of *Young* by observing that *Young* did not "imply that a municipality could ban all adult theaters—much less all live entertainment or all nude dancing—from its commercial districts citywide."[161] Thus, municipalities may not enact ordinances that effectively bar adult uses altogether, regardless of the purported secondary effects.[162]

Moreover, cities seeking to apply burdensome zoning restrictions to tattoo parlors have not always been able to find secondary effects sufficient to support such regulations.[163] Indeed, Johnny Anderson would likely refute any suggestion that tattoo parlors have negative secondary effects at all on the surrounding area. When asked his view of municipal bans and zoning restrictions on tattoo shops, he stated: "They think tattoo shops bring in undesirables. They don't. Our daughters and sons, our grandmothers—everybody is getting tattoos. It's not just for sailors and fallen women anymore."[164]

In *Anderson*, the City's chances of imposing a successful "secondary effects" regulation are questionable. Because the City of Hermosa Beach's ordinance did not just restrict but banned all tattoo establishments from operating within

---

municipalities that want to address merely the secondary effects of protected speech." *Id.* at 438.

[157] *See* Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000), *rev'd*, 535 U.S. 425 (2002). Although ultimately reversed by the Supreme Court, the Ninth Circuit initially rejected the city's twenty-year-old report as an unreasonable basis upon which to base a secondary effects regulation. *Id.* at 726-28.

[158] *Id.*

[159] *Id.* at 429-30.

[160] 452 U.S. 61 (1981).

[161] *Id.* at 71.

[162] Picchione, *supra* note 35, at 849.

[163] *See* MacNeil v. Bd. of App. of Boston, 18 Mass. L. Rep. 153 (Mass. Super. Ct. 2004) (holding that zoning tattoo parlors based on secondary effects is not constitutional without valid studies or by using post-enactment arguments).

[164] Douglas Morino & John Guenther, *Federal court declares Hermosa Beach tattoo parlor ban unconstitutional*, DAILY BREEZE, Sept. 10, 2010, http://www.dailybreeze.com/ci_16035492.

city limits,[165] the secondary effects doctrine probably would not have affected the outcome of the present case. Nevertheless, this doctrine might still be considered for future tattoo cases. It is certainly plausible, especially given the liberal application of the secondary effects doctrine by the Supreme Court,[166] that other municipalities seeking to regulate tattoo shops in the future might successfully argue that they reasonably relied on secondary effects studies.

V. CONCLUSION

It is undeniable that the art of tattooing is an important part of our nation's culture and an important form of expression for many people. Today, tattooing is the sixth fastest growing retail industry in the country and is believed to be the most commonly purchased form of original artwork in the United States.[167] Generally, the mass public is not a "dominant force in national policymaking."[168] On the contrary, the critique is usually that "elite" judicial decision-makers ignore the views of the public and instead use the Constitution to uphold their own opinions.[169] However, the movement of tattoo practices towards more diverse audiences has produced a rare example where mass opinion has influenced elite opinion and thus changed case outcomes—with encouraging results.

By eliminating differences in First Amendment protection between tattoos and tattooing[170] and deeming both purely expressive conduct deserving of protection, the Ninth Circuit has streamlined a previously confusing body of precedent. Of course, creation of a tattoo involves some danger to the health of its recipient, thus requiring health-related regulations "different from regulation, say, of a press."[171] Tattoo parlors may also be subject to stricter regulations if studies indicate that they are causing negative secondary effects

---

[165] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43 (1994) (invalidating a ban on displaying signs on private property).

[166] *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438, 440, 442 (2002) (reversing the Ninth Circuit's refusal to allow a secondary effects restriction based upon a twenty-year old study and reaffirming that a municipality can rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest").

[167] *See* Levins, *supra* note 38.

[168] *See* Paul Quirk & Joseph Hinchliffe, *The Rising Hegemony of Mass Opinion: How Public Opinion Came to Rule the Political System*, 12 U. ILL. POL'Y FORUM 1, 1-5 (1999), http://igpa.uillinois.edu/system/files/PF12-4_hegemony.pdf.

[169] *See* Robert A. Dahl, *A Critique of the Ruling Elite Model*, 52 AM. POL. SCI. REV. 463, 463-464 (1958), *available at* http://www.uazuay.edu.ec/estudios/com_exterior/tamara/Dahl-Critique_of_Ruling_Elite_Model.pdf.

[170] Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1068 (9th Cir. 2010).

[171] *Id.* (Noonan, J., concurring).

on the surrounding area.[172] Thus, regulatory schemes for the tattoo industry that fully address health and sanitation concerns and secondary effects are legitimate, as long as they do not infringe on the First Amendment rights of tattoo artists and their clients. However, very few activities warrant a total ban on a protected art form. Accordingly, the Ninth Circuit in *Anderson* justifiably held the City's total ban on tattoo parlors unconstitutional because it "entirely foreclose[d] a unique and important method of expression"[173] that should be given full First Amendment protection. Finally, as one of the few ancient art forms that is "truly Polynesian in origin," the decision in *Anderson* also serves to vindicate a traditionally revered practice of Native Hawaiians that has been so denigrated over the past two centuries.[174]

---

[172] *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

[173] *Anderson*, 621 F.3d at 1068.

[174] Fullard-Leo, *supra* note 16.