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SYMPOSIUM ISSUE: THE MOON COURT ERA

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We strive to view issues pertinent to Hawai'i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai'i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai'i me ke kuana'ike laulā. Ho'okomo mākou i nā 'atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā 'atikala waiwai e ho'ololi ana i nā mea kū kānāwai ma Hawai'i a ma nā 'āina 'ē, me ke kālele 'ana i nā kumuhana like 'ole e like me nā kānāwai pū'ali koa, ka mālama 'āina, nā kānāwai ona 'āina, a nā pono o nā po'e 'ōiwi.

Translation by Pauahi Ho'okano

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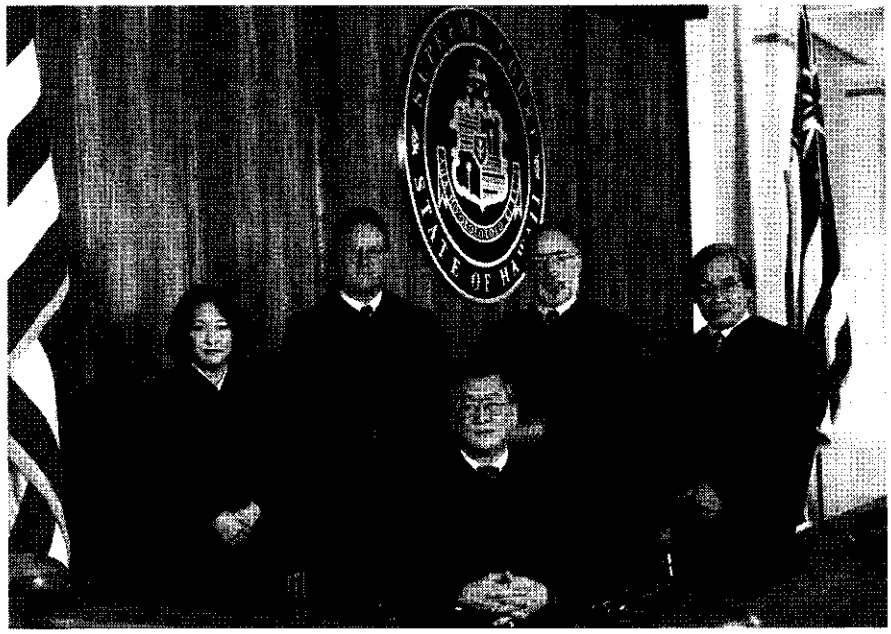
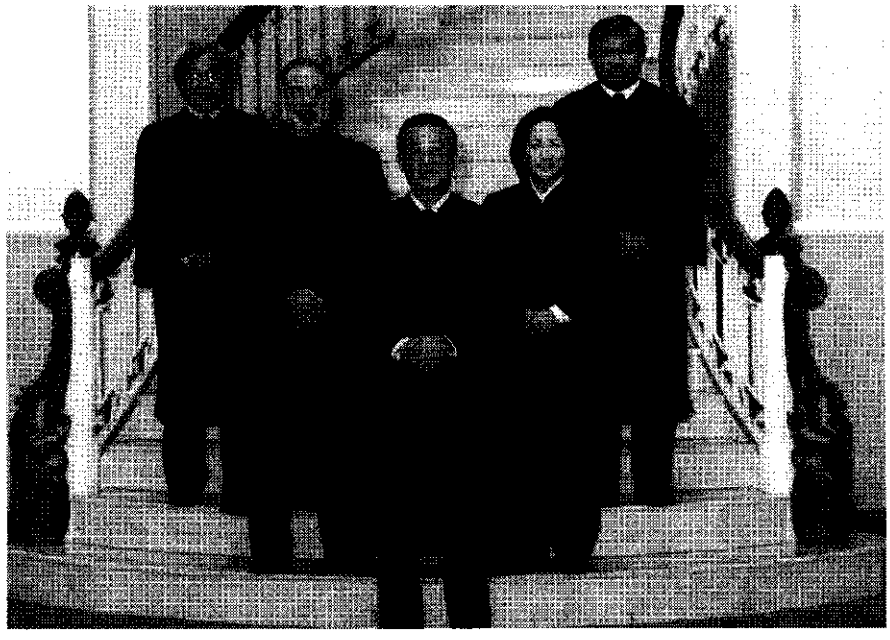
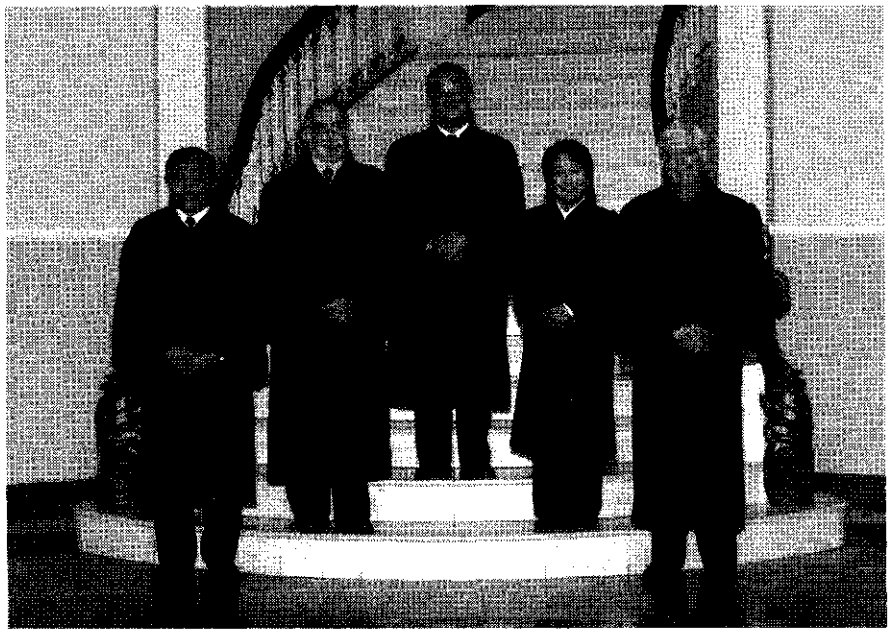
The University of Hawai'i Law Review would like to express its appreciation to the administration, faculty, and staff of the William S. Richardson School of Law. Special thanks to Ms. Julie Suenaga.



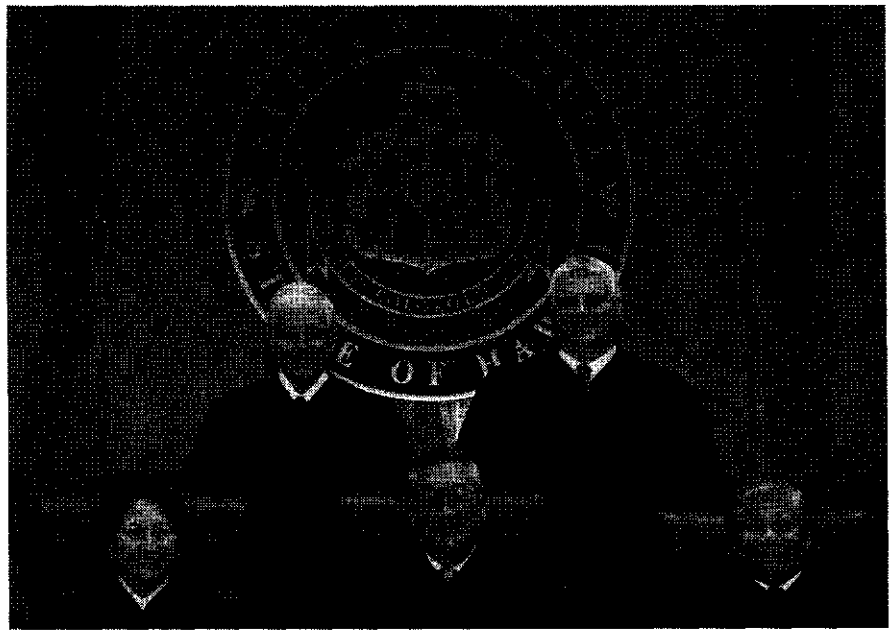
The Moon Court, 1993-2000: Associate Justice Paula A. Nakayama, Associate Justice Robert G. Klein, Chief Justice Ronald T.Y. Moon, Associate Justice Steven H. Levinson, and Associate Justice Mario R. Ramil.



The Moon Court, 2000-2002: Associate Justice Mario R. Ramil, Associate Justice Steven H. Levinson, Chief Justice Ronald T.Y. Moon, Associate Justice Paula A. Nakayama, and Associate Justice Simeon R. Acoba, Jr.



The Moon Court, 2003-2008: Associate Justice Simeon R. Acoba, Jr., Associate Justice Steven H. Levinson, Chief Justice Ronald T.Y. Moon, Associate Justice Paula A. Nakayama, and Associate Justice James E. Duffy, Jr.



The Moon Court, 2009-2010: Associate Justice Paula A. Nakayama, Associate Justice James E. Duffy, Jr., Chief Justice Ronald T.Y. Moon, Associate Justice Mark E. Recktenwald, and Associate Justice Simeon R. Acoba, Jr.

Introduction

Lynda L. Arakawa and Christopher J.I. Leong*

The year 2010 was particularly significant for Hawai'i's legal community as one of great change and transition. On June 21, we learned of the passing of William S. Richardson, the man we all knew simply as "CJ." Although his professional career included such weighty titles as Lieutenant Governor, Chief Justice, and even Bishop Estate Trustee, we know that he was most proud of being the driving force behind creating the law school that now bears his name. As living proof of that legacy, we have joined thousands of others whose legal careers may never have come into being had there been no William S. Richardson School of Law—in other words, had there been no William S. Richardson.

Accordingly, we dedicated the previous issue of the *University of Hawai'i Law Review* to CJ and crafted it into a tribute to his life and work.[1] With the blessing of the Richardson family, who also contributed a charming portrait of their father and grandfather to the tribute,[2] we compiled a range of personal recollections and scholarly articles from some of the most respected people in our legal community who also were personally and professionally close to CJ. Though the tribute is just one source of material about what CJ did and who he was, we think we will have succeeded even if it only serves to educate future Richardson lawyers[3] a little about this man to whom we are all indebted.

The other noteworthy change came on August 31, when Ronald T.Y. Moon retired after serving for seventeen years as Chief Justice of the Hawai'i Supreme Court. With full understanding that the retirement of a chief justice is far from an everyday occurrence, we knew that we could use the law review as a vehicle to provide commentary and analysis of the court during Chief Justice Moon's tenure. We thus decided to devote our whole second issue to this subject; planning began in earnest in early 2010 as to the topics we should cover and the people we should approach to write the various articles. Our goal, unchanged since the conception of this project, has been to provide a worthy successor to the Summer 1992 issue of this law review, which was entitled "The Hawaii Supreme Court Since 1982: A Symposium Issue" and

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* Class of 2011, William S. Richardson School of Law, University of Hawai'i at Mānoa; Co-Editors-in-Chief, Volume 33, *University of Hawai'i Law Review*.

[1] *See generally* Tribute, *Chief Justice William S. Richardson (1919-2010)*, 33 U. HAW. L. REV. 1 (2010).

[2] *See* The Family of William S. Richardson, *Father and Grandfather*, 33 U. HAW. L. REV. 57 (2010).

[3] *See* Mari Matsuda, *A Richardson Lawyer*, 33 U. HAW. L. REV. 61 (2010).

analyzed the court during the tenure of Chief Justice Herman T.F. Lum, who subsequently retired at the end of his term in 1993.

As though the editors of that Lum Court issue seemed to be directly advising us despite a gap of nearly twenty years, they wrote with convincing simplicity in their own introduction: "In educating lawyers for Hawai'i, our law school has a duty to study and evaluate Hawai'i case law."[4] During this time of transition from the Moon Court to the Recktenwald Court,[5] we take this opportunity to present an analysis of the Moon Court's jurisprudence in several areas of substantive law. Although we could not possibly expect to mention every single case decided during these seventeen years or even reach every substantive topic, we do hope we have at least captured the essence of the Moon Court in the articles that follow.

In producing any issue of a law review, it is always the case that many hands are involved. Consequently, we wanted to take this opportunity to recognize and thank our fellow members of the editorial board and our staffwriters for the countless hours they have invested in editing the various articles; our authors for their willingness to share their accumulated knowledge in so many areas of the law; our faculty advisors, Professors Justin Levinson, Jill Ramsfield, and Jon Van Dyke; Dean Avi Soifer and the administration and faculty of the William S. Richardson School of Law for their unwavering support; and especially Julie Suenaga for everything she does for this law review, including ensuring year in and year out that the journal makes it to print.

We must also extend a special note of appreciation to the participants of our symposium, "The Moon Court Era," held on March 31, 2011 at the William S. Richardson School of Law in conjunction with the publication of this issue: Professor Denise Antolini and Professor David Callies, who spoke about land use and the environment; Professor Melody MacKenzie and Hawai'i Supreme Court Associate Justice (ret.) Robert Klein, who spoke about Native Hawaiian rights; and Professor Sylvia Law, Professor Michael Sant'Ambrogio, and Hawai'i Supreme Court Associate Justice (ret.) Steven Levinson, who spoke about the Hawai'i Supreme Court's decision in *Baehr v. Lewin*[6] and the marriage equality movement that has been developing on the national level.

We hope you enjoy this special issue.

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[4] Douglas K. Ushijima, *Introduction*, 14 U. HAW. L. REV. 1, 2 (1992).

[5] Current Chief Justice Mark E. Recktenwald was sworn in on September 14, 2010. Hawai'i State Judiciary, *Chief Justice Mark E. Recktenwald*, http://www.courts.state.hi.us/courts/supreme/justices/associate_justice_mark_e_recktenwald.html (last visited Apr. 29, 2012). He first joined the court as Associate Justice on May 11, 2009, after serving as Chief Judge of the Intermediate Court of Appeals of Hawai'i since April 2007. *Id.*

[6] 74 Haw. 530, 852 P.2d 44 (1993).

A Moon Court Overview: Rent for Space on Earth

Aviam Soifer*

It turns out to be remarkably difficult to classify the Hawai'i Supreme Court during the Moon Era. Chief Justice Ronald T.Y. Moon similarly defies easy classification. Yet this Symposium issue analyzes the man and the court he led for seventeen years, as well as honors him and his colleagues. Ronald Moon served Hawai'i for over twenty-eight years while wearing a judicial robe, including three years as Associate Justice and seventeen years as Chief Justice. His judicial career thus spans nearly half of Hawai'i's entire history as a state, and he holds the record for length of service as chief justice since statehood.

Moon and his fellow justices hardly drew on a blank slate of law when the Moon Court era began in the early 1990s. Nonetheless, the court Moon served and led until 2010 faced considerably more uncharted legal territory than most appellate judges generally encounter as they go about their judicial business. The Hawai'i Supreme Court justices were called upon to apply and interpret a strikingly different, innovative Hawai'i Constitution that had recently been promulgated by the 1978 Constitutional Convention and overwhelmingly ratified by popular vote. They also faced the challenge of whether and how far to take the Richardson Court's path-breaking decisions that considered and applied ancient Hawaiian custom and usage as well as Anglo-American common law. Finally, the very newness of statehood and of its state laws afforded great opportunities but also significant challenges for the state's high court, not least concerning core issues about how the Hawai'i judicial system and its jurisdiction ought to be structured.

Those of us lucky enough to know Ron Moon personally have greatly appreciated his graciousness on and off the bench, as well as his somewhat corny jokes. But we also know a man who is balanced and careful—if not downright cautious—about most things.[1] This probably helps to explain the appreciation as well as the surprises and the critique that permeate the articles in this Symposium issue.

It is almost a cliché, of course, that identifying high courts by the name of whoever is serving as the chief justice is imprecise and sometimes downright misleading. Still, reference to the Moon Court during the years that Ronald

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[1] This only added to the widespread shock that followed when Chief Justice Moon fell off a ladder while working on his house and sustained a serious back injury soon after his retirement in August 2010. Happily, he carefully followed his rehabilitation regimen with characteristic dedication and discipline and Ron Moon now is back to being very engaged in the public life of Hawai'i.

T.Y. Moon was the chief justice is uniquely apt for several linked reasons: first, the Chief Justice of the Hawai'i Supreme Court has more administrative authority than virtually all of his or her counterparts across the United States. This is partially a function of direct power, such as the authority to appoint district court judges, and partially a result of the role the chief justice plays within a very small state in which, moreover, the Supreme Court, the Legislature, and the Governor do their work in very close proximity to one another. "The C.J." enjoys a great deal of built-in respect, and on many occasions the office serves as a bully pulpit to seek structural reform as well as to battle for judiciary budgets and to seek public goals such as enhanced access to justice. Chief Justice Moon stood out for being protective of his prerogatives and generally quite effective in obtaining funds for new courthouses and other needs of the judiciary, even during times of severe budgetary constraints.

This Hawai'i Supreme Court notably led the nation in recognizing the unconstitutionality of banning same-sex marriage,[2] but it did not extend privacy rights beyond the criminal law area—despite an explicit invitation to do so posed by the reference to privacy rights found in article I, section 6 of the Hawai'i Constitution.[3] The same court that recognized far-reaching constitutional rights for Native Hawaiians nevertheless did not sufficiently anchor its extraordinary decision[4] that enjoined state alienation of ceded lands within the Hawai'i Constitution and thereby missed the chance to articulate an adequate and independent state ground that could have insulated its far-reaching and courageous decision from review by the United States Supreme Court.[5] (In this case on remand, the justices ultimately also ducked the question of how to define a Native Hawaiian when the issue was raised and argued by Hawai'i Attorney General Mark Bennett.[6])

Overall, the Moon Court proved strikingly receptive to most environmental claims, including allowing unusually broad standing for plaintiffs.[7] Yet, on the

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[2] *See* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993); *see also* Michael D. Sant'Ambrogio & Sylvia A. Law, Baehr v. Lewin *and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705 (2011).

[3] *See* Jon M. Van Dyke & Melissa Uhl, *Hawai'i's Right to Privacy*, 33 U. HAW. L. REV. 669 (2011).

[4] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 117 Haw. 174, 177 P.3d 884 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009), *on remand sub nom.* Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 121 Haw. 324, 219 P.3d 1111 (2009).

[5] *See* Eric K. Yamamoto & Sara D. Ayabe, *Courts in the "Age of Reconciliation":* Office of Hawaiian Affairs v. HCDCH, 33 U. HAW. L. REV. 503, 520 nn.135-36 (2011); Melody K. MacKenzie, *Ke Ala Pono—The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 U. HAW. L. REV. 447, 497-98 (2011).

[6] *See Office of Hawaiian Affairs*, 121 Haw. at 333, 219 P.3d at 1120.

[7] *See* Denise E. Antolini, *The Moon Court's Environmental Review Jurisprudence:*

other hand and virtually alone among state courts, it also allowed property owners to litigate whether state and local governments were using only a pretense of public use when they exercised their eminent domain power to take private property.[8] On the third hand, within the world of "inside baseball" that is insurance law—a realm replete with decisions with significant practical impact on everyday life, but attracting very little attention, if any, beyond a small cadre of specialists—Professor Hazel Beh notes: "In most instances, the court adopted a moderately pro-insured position, often specifically rejecting more liberal or conservative positions. . . . Regardless of whether any single case was rightly or wrongly decided, having answers proves to have its own value."[9]

The future may show that Moon's most lasting achievement was to reorder appellate jurisdiction in Hawai'i. Utilizing an outline for reform that had lingered for twenty-five years, Moon successfully reduced the burden on the Hawai'i Supreme Court of handling numerous direct appeals.[10] This new discretionary appeal system ultimately may produce shorter opinions.[11] It also has the potential to make the justices less fractious than they were known to have become at times during the Moon Court era. Finally, though the change initially has overburdened the Intermediate Court of Appeals, it may soon generate the increased resources that court needs and deserves.[12]

That an attorney who specialized in insurance defense before he ascended to the bench did so much to change the law in Hawai'i is noteworthy. So is his distinction as the first Korean-American supreme court justice and first chief justice in the United States and surely also as the first jurist to serve as a Marshal of the Rose Bowl Parade. (During his tenure, Chief Justice Moon also spent a great deal of time serving as an always gracious host to visiting delegations of judges and other dignitaries from all over the world.) Critics and friends alike, moreover, delight in pointing out that Ronald T.Y. Moon was

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Throwing Open the Courthouse Doors to Beneficial Public Participation, 33 U. HAW. L. REV. 581 (2011); D. Kapua'ala Sproat, *Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law*, 33 U. HAW. L. REV. 537 (2011).

[8] *See* David L. Callies, Emily Klatt & Andrew Nelson, *The Moon Court, Land Use, and Property: A Survey of Hawai'i Case Law 1993-2010*, 33 U. HAW. L. REV. 635, 651-54 (2011).

[9] *See* Hazel Beh, with Tred Eyerly, Keith Hiraoka, Peter Olson, Michael Tanoue & Alan Van Etten, *Key Issues in Hawai'i Insurance Law Answered by the Moon Court*, 33 U. HAW. L. REV. 779, 779, 833 (2011).

[10] *See* Edmund M.Y. Leong & Peter Van Name Esser, *The Development of Hawai'i's Appellate Courts: An Organizational Perspective*, 33 U. HAW. L. REV. 875, 887-96 (2011).

[11] As Mark Twain once quipped, "if I had more time I would write a shorter letter," though some suggest that this *bon mot* should be attributed to French philosopher Blaise Pascal from his "Lettres Provincials"; *see also* Callies, Klatt & Nelson, *supra* note 8, at 637 & n.8 (noting the increase in length of Moon Court opinions as compared to previous courts).

[12] *See* Leong & Esser, *supra* note 10, at 893.

once a registered Republican. His own opinions and those of his colleagues seem to have surprised many people much of the time. Often there appeared to be a yin/yang quality of lengthy attention at times to procedural issues and technical details, and at other times a willingness to issue bold opinions and sweeping rulings.

In an analysis of the Moon Court's criminal law opinions by Kamaile Nichols and Richard Wallsgrove, for example, they note: "It is no surprise that along Hawai'i's long and tangled grapevine of law clerks and other young lawyers, C.J. Moon had a reputation as a friendly stickler for the rules."[13] This somewhat anomalous stance, they make clear, entailed attention to rules binding the prosecutors as well as the defendants. Their examination of decisions about evidentiary matters and about searches and seizures and related issues describes an array of decisions that were often pragmatic, sometimes hard to reconcile with other precedents, and generally open to new kinds of claims—while still seeking to remain rule-bound, albeit in a friendly way.

At points seemingly far removed along a spectrum of judicial approaches, Denise Antolini, Melody MacKenzie, and Kapua Sproat praise Chief Justice Moon and the court, while David Callies and his co-authors criticize them for engaging in innovative and often broad-brush approaches to environmental law, water rights, and Native Hawaiian claims. As Kapua Sproat summarizes: "The Moon Court had the courage to respect both the letter and spirit of the law even when that position lacked universal support."[14] Many others, of course, have been and remain less sanguine when they perceive judges to be following the spirit as well as the letter of law.

What probably stands out most about the court under Moon's leadership was its use—and critics would say its abuse—of the public trust doctrine, both in procedural and substantive ways. While to some this constitutes unsupportable judicial interventionism, to others it is simply following and building upon admirable precedents, particularly those from the Richardson Court, that accepted and applied ancient indigenous practices as part of Hawai'i's unique history. To a great extent, this debate appears to revolve around how far back in time and how deeply into context judges ought to look when they resolve disputes that involve individual ownership in tension with communal interests. Simultaneously, however, such judicial decisions potentially do a great deal to shape the future of the Hawaiian islands, far beyond the relatively narrow realm of clients and litigators who come before the courts.

Some sense of how to resolve substantial paradoxes that seem inherent in trying to classify Chief Justice Moon and the decisions of the court he led might

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[13] Kamaile Nichols & Richard Wallsgrove, *Chief Justice Moon's Criminal Past*, 33 U. HAW. L. REV. 755, 756 (2011).

[14] Sproat, *supra* note 7, at 577.

be gleaned from Moon's own ongoing commitment to increased access to justice, particularly for those most vulnerable. Calvin Pang's report about the Access to Justice Movement in Hawai'i is particularly enlightening: "Getting support from the head of the judiciary was important in a period of notable economic and social changes that exacerbated the grim access to justice picture in Hawai'i, which was never good to begin with."[15] And the connecting thread that links Moon's speeches, actions, and opinions may be his oft-repeated quotation of his father: "[P]ublic service is the rent we pay for the space we occupy on earth."[16]

As the fine articles that constitute this Symposium issue make clear, Chief Justice Moon's long and effective commitment to public service did much more than to pay any rent he might have owed to the community. What primarily stands out about the Moon Court era, however, is that such a duty to perform public service was often transmuted into active intervention by the court on behalf of a public trust. Chief Justice Moon and his colleagues determined that it is largely left to the judiciary to protect and foster communal claims. Such claims may be rooted in past language and traditions that constitute much of law, perhaps at least referred to within the "great outline" of the Hawai'i Constitution. Thus they continue to hold promise for the future.

Much of the difficulty when judges do something like this on behalf of the community, of course, can be linked to conflicting memories about precisely when specific rights and duties originated and what they now ought to entail, perhaps with an eye to the future as well. As Eric Yamamoto and Sara Ayabe point out, however, much of the "activism" of the Moon Court may be seen as an ongoing effort to keep various channels open for other decision makers and for possible future reconciliation of currently conflicting claims.[17] Not always—and surely not always effectively—Hawai'i Supreme Court decisions during the Moon era may usefully be classified as opening and/or keeping open future options. They might even prove to be important stepping stones on the rugged path to restorative justice.

Long ago it was wisely said that the search for justice is ongoing and that it is never done. It is not open to any of us to achieve lasting justice. Nonetheless, our obligation is to begin that quest.[18] Chief Justice Moon and his colleagues undertook this enormous challenge with care and concern and marked success. We are greatly in their debt, through surely there is more rent still to be paid.

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[15] Calvin Pang, *"Paying Rent": The Access to Justice Movement During the Moon Years*, 33 U. HAW. L. REV. 835, 835 (2011).

[16] *Id.*

[17] Yamamoto & Ayabe, *supra* note 5, at 508, 509, 534-35.

[18] Within the Jewish tradition, it is said in Pirkei Avot (Chapters of the Fathers) 2:21: "You are not obligated to complete the task, but neither are you free to desist from it."

Ke Ala Pono — The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions

Melody Kapilialoha MacKenzie*

I. INTRODUCTION

In the fall of 2008, hundreds of Native Hawaiians[1] and their supporters lined the streets near the Hawai'i State Capitol wearing red T-shirts with the words "Kū I Ka Pono"[2] printed across the front and holding signs reading, "Justice for Hawaiians" and "Ceded Lands Are Stolen Lands."[3] The demonstrators were showing their support for a unanimous opinion authored by Chief Justice Ronald T.Y. Moon that placed a moratorium on the sale of state "ceded" lands—a groundbreaking decision that provides insight into the Moon Court's view of Native Hawaiian claims to lands, resources, and sovereignty.

This article examines the decisions of the Hawai'i Supreme Court during the seventeen-year tenure of Chief Justice Moon and the court's role as mediator and interpreter in addressing the claims of the Native Hawaiian community. It suggests that, to a large extent, Hawai'i's people are engaged in a reconciliation process rooted in kānaka maoli or Native Hawaiian values—values that seek balance, harmony, and aloha. The Moon Court has furthered these efforts in two significant ways: by opening the courts to Native Hawaiian claims and by

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[1] In this article, unless otherwise noted, "Native Hawaiian" means "any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." 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, §2, 107 Stat. 1510, 1513 (1993) [hereinafter Apology Resolution].

[2] Kū I Ka Pono means "Stand for Justice."

[3] *See* Lisa Asato, *Youth Uprising—Ceded Lands Case Spurs New Generation of Hawaiian Leaders*, KA WAI OLA, Jan. 2009, at 15, *available at* http://www.oha.org/kwo/2009/01/story01.php; *Groups Oppose Ceded-Land Appeal*, HONOLULU ADVERTISER, Nov. 24, 2008, *available at* http://the.honoluluadvertiser.com/article/2008/Nov/24/br/hawaii81124053.html.

understanding and recognizing the true harm—the emotional and spiritual costs as well as the loss of land and sovereignty—to the Native Hawaiian community.

This article surveys the Moon Court's decisions in three areas impacting Native Hawaiian rights. Necessarily, this can only be a brief summary of the most important cases because the Moon Court decided numerous cases dealing with Native Hawaiian issues.[4] First, the Moon Court built upon and expanded earlier decisions relating to Hawaiian traditional and customary rights. Second, the court proved largely sympathetic to Hawaiian Home Lands beneficiary claims relating to breaches of the Hawaiian Homes Commission Act. Finally, the court fully acknowledged the historical basis for Native Hawaiian claims when deciding controversial issues surrounding the public land trust or "ceded" lands. Jurisdictional and procedural obstacles have often threatened to sound the death knell for otherwise meritorious claims in all of these areas. Based on the significant public interest in addressing Native Hawaiian claims, the constitutional recognition of Native Hawaiian rights, and the court's own commitment to fairness, the Moon Court allowed Native Hawaiians to pursue their claims through the courts.

It would be a mistake to conclude that the Moon Court always ruled in favor of Native Hawaiian interests. Indeed, the court has rebuffed attempts to clarify the public land trust revenues due to the Native Hawaiian community.[5] In a criminal law context, the court also limited Native Hawaiian traditional and customary rights.[6] Nevertheless, it is a fair assessment to say that for the last seventeen years, under the leadership of Chief Justice Moon, the Hawai'i Supreme Court has chosen the path of justice, Ke Ala Pono.

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[4] In addition to the thirteen cases discussed in this article, the Moon Court also decided important water rights and environmental cases that significantly impact the Native Hawaiian community. This is in sharp contrast to the court under Chief Justice Herman T. F. Lum, which issued relatively few opinions on Native Hawaiian issues and has been criticized for the widespread use of non-precedential memorandum opinions. *See* Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992) [hereinafter MacKenzie, *The Lum Court*]. As discussed *infra* Part III, the Lum Court did decide a leading case, *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992), in which Associate Justice Robert G. Klein, writing for a unanimous court, established important principles on standing and sovereign immunity as well as substantive law on Native Hawaiian traditional and customary rights and the State's trust duties relative to the public land trust.

[5] See *infra* Part V for a discussion of *Office of Hawaiian Affairs v. State (OHA I)*, 96 Haw. 388, 31 P.3d 901 (2001), *Office of Hawaiian Affairs v. State (OHA II)*, 110 Haw. 338, 133 P.3d 767 (2006), and *Office of Hawaiian Affairs v. Hawaii State Legislature*, No. 30535, 2010 Haw. LEXIS 184 (Aug. 18, 2010).

[6] See *infra* Part III for a discussion of *State v. Hanapi*, 89 Haw. 177, 970 P.2d 485 (1998).

II. THE HISTORICAL CONTEXT[7]

Hānau ka 'āina, hānau ke ali'i, hānau ke kanaka.
Born was the land, born were the chiefs, born were the common people.[8]

So begins an ancient Hawaiian proverb that describes the inseparable spiritual and genealogical connection between Native Hawaiians and the land and environment. For Native Hawaiians, the land, or 'āina, is not a mere physical reality. Instead, it is an integral component of social, cultural, and spiritual life.[9] Like many indigenous peoples, Native Hawaiians see an interdependent, reciprocal relationship between the gods, the land, and the people.

In stark contrast to the Western notion of privately held property, Hawaiians did not conceive of land as exclusive and alienable, but as communal and shared.[10] The land, like a cherished relative, cared for the Native Hawaiian people, and in return, the people cared for the land.[11] The principle of mālama 'āina (care of the land) is therefore directly linked to conserving and protecting not only the land and its resources, but humankind and the spiritual world as well.[12]

Western colonialism throughout the eighteenth and nineteenth centuries dramatically altered this relationship to the land. Hawaiian lands were divided, confiscated, and sold away.[13] Native Hawaiian cultural practices were barred and ways of life denigrated.[14] Large sugar plantations diverted water from

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[7] Text in this section has appeared in other publications, including Melody Kapilialoha MacKenzie, *Law and the Courts*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE 85 (Craig Howes & Jonathan Kay Kamakawiwo'ole Osorio eds., 2010); Melody Kapilialoha MacKenzie, Susan K. Serrano & Koa Laura Kaulukukui, *A New Kind of Environmental Justice: Indigenous Hawaiians Reclaiming Land and Resources*, 21 NAT. RESOURCES & ENV'T 37, 37 (2007); and NATIVE HAWAIIAN LAW (Melody Kapilialoha MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat eds., Native Hawaiian Rights Handbook 2d ed., forthcoming 2013).

[8] MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS 56 (1983).

[9] DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE 23-26 (2007).

[10] LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 24 (1992); E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT 41 (1972).

[11] KAME'ELEIHIWA, *supra* note 10, at 24.

[12] *Id.*

[13] NATIVE HAWAIIAN RIGHTS HANDBOOK 6-10 (Melody Kapilialoha MacKenzie ed., 1991) [hereinafter HANDBOOK]; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 366-68 (Nell Jessup Newton et al. eds., 2005).

[14] *See, e.g.*, I NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 191-98 (1983) (Hawaiian language); Noenoe K. Silva, *He*

Hawaiian communities.[15] Hawaiians were separated from the land, thereby severing cultural and spiritual connections.

In the Māhele, the Hawaiian Kingdom's mid-nineteenth century conversion to private property, King Kamehameha III set aside more than 1.5 million acres as Government Lands for the benefit of the chiefs and people.[16] The Crown Lands, which had originally been reserved as the King's private lands and made inalienable in 1865, comprised almost a million acres and provided a source of income and support for the Crown.[17] Following the illegal overthrow of the Hawaiian government in 1893 by U.S. military-backed American businessmen[18] and the 1894 establishment of the Republic of Hawai'i, the Government and Crown Lands were merged.[19] In 1898, the Republic "ceded" approximately 1.8 million acres of these lands to the United States through a Joint Resolution of Annexation.[20]

In 1921, the U.S. Congress passed the Hawaiian Homes Commission Act (HHCA)[21] to address the deteriorating social and economic conditions of the Hawaiian people.[22] Congress set aside approximately 203,000 acres of the Government and Crown Lands, designated as Hawaiian Home Lands, for a homesteading program benefitting those of not less than fifty percent Hawaiian ancestry.[23]

Kānāwai E Ho'opau I Na Hula Kuolu Hawai'i: The Political Economy of Banning the Hula, 34 HAWAIIAN J. HIST. 29 (2000) (hula). *See also* Doe v. Kamehameha Schs., 295 F. Supp. 2d 1141, 1150 (D. Haw. 2003) (internal citations omitted) (describing effect of Western influences on Native Hawaiians).

[15] HANDBOOK, *supra* note 13, at 153; D. Kapua'ala Sproat, *Water*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE, *supra* note 7, at 187, 188-90.

[16] See generally KAME'ELEIHIWA, *supra* note 10, for a detailed explanation of the Māhele. The Māhele process "transformed the traditional Land tenure system from one of communal tenure to private ownership on the capitalist model." *Id.* at 8. *See also* MCGREGOR, *supra* note 9, at 35-40.

[17] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 40-42, 89-92, 111-17 (2008).

[18] Apology Resolution, *supra* note 1, "whereas" cls. 5-10, § 1(1), (3), 107 Stat. at 1510-11, 1513.

[19] A provision of the Land Act of 1895 (codified at LAWS OF HAWAII 1895, § 445) defined public lands to include Government and Crown lands. Land Act of 1895, 1895 Haw. Sess. Laws 49-83.

[20] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898).

[21] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921) (formerly codified as amended at 48 U.S.C. §§ 691-718 (1958)) (omitted from codification in 1959) (set out in full as amended at 1 HAW. REV. STAT. 261).

[22] *See infra* Part IV.

[23] Hawaiian Homes Commission Act, 1920, § 208. See generally HANDBOOK, *supra* note 13, at ch. 3 for a discussion of the history and implementation of the HHCA. *See infra* Part IV.

The 1959 Hawai'i Admission Act transferred approximately 1.4 million acres of the Government and Crown Lands, including the HHCA lands, to the State.[24] As a condition of statehood and as a trust responsibility, Hawai'i agreed to incorporate the HHCA into the state constitution and administer the Hawaiian Home Lands.[25] The State was to hold all of the transferred lands, along with their income and proceeds, for one or more of five trust purposes, including benefitting Native Hawaiians, as defined in the HHCA.[26]

In 1978, after more than a decade of activism focused on struggles over land, efforts to halt the U.S. Navy's bombing of the island of Kaho'olawe, and cultural revitalization,[27] the people of Hawai'i amended their constitution to "prescribe[] an idealized, self-sufficient, and environmentally sensitive approach to government."[28] Among the amendments were provisions recognizing the right to a clean and healthful environment[29] and declaring Hawai'i's natural resources to be held in trust by the State for the benefit of the people.[30] Probably the most far-reaching amendments, however, addressed long-standing claims of the Hawaiian community. These amendments were

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[24] Admission Act of 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, 5-6.

[25] Section 4 of the Admission Act provides, in part: "As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State[.]" *Id.* § 4; *see also* Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 336-38, 640 P.2d 1161, 1167-68 (1982). The *Ahuna* court described the genesis of the Hawaiian Homes Commission Act and concluded that the federal government undertook "a trust obligation benefiting the aboriginal people," and that "the State of Hawaii assumed this fiduciary obligation upon being admitted into the Union as a state." *Id.* at 338, 640 P.2d at 1168.

[26] Section 5(f) of the Admission Act provides:

> The lands granted to the State of Hawaii . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended,* for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Admission Act, § 5(f) (emphasis added).

[27] *See* Jonathan Kay Kamakawiwo'ole Osorio, *Hawaiian Issues*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE, *supra* note 7, at 15, 15-21 (discussing the Hawaiian movement and its evolution).

[28] Tom Coffman, *Reinventing Hawai'i*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE, *supra* note 7, at 9, 12.

[29] HAW. CONST. art. XI, § 9.

[30] *Id.* art. XI, § 1.

reparatory—they sought to redress historical claims and to provide resources and a measure of self-determination to Native Hawaiians. They recognized the loss of sovereignty and land resulting from the 1893 illegal overthrow of the Hawaiian Kingdom, and they specifically dealt with three of the areas of law in which the Moon Court has made its most groundbreaking decisions—the traditional and customary rights of Native Hawaiians, the Hawaiian Home Lands trust, and the "ceded" or public land trust.

The 1978 constitutional amendments recognized and protected the traditional and customary practices of ahupua'a tenants.[31] Other amendments sought to strengthen the Hawaiian Home Lands program by ensuring sufficient funding and reaffirming the State's commitment to faithfully carry out the terms of the HHCA.[32] The amendments established an Office of Hawaiian Affairs (OHA), with a board of trustees elected by the Hawaiian people to manage resources and funds, including revenue from the public land trust.[33] Another amendment clarified that the lands designated as part of the public land trust, about 1.2 million acres after separating out the HHCA lands, were held in trust for Native Hawaiians and the general public.[34]

Other amendments mandated that the State promote the study of Hawaiian culture, history, and language and provide for a Hawaiian education program in the public schools.[35] The Hawaiian language was designated as one of two official languages of Hawai'i,[36] and limitations were placed on the doctrine of adverse possession, which played a significant role in the dispossession of Hawaiians from their lands.[37]

In the decades since the enactment of these provisions, Hawai'i courts have been called upon to interpret these amendments, to explicate the terms of the Hawaiian Home Lands and public land trusts, and to give both the trusts and amendments concrete meaning. The Moon Court has not backed away from that responsibility. It has sought reconciliation and healing and, most

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[31] *Id.* art. XII, § 7. An ahupua'a is an economically self-sufficient, pie-shaped unit that runs from the mountaintops down ridges spreading out at the base along the shore. *In re* Boundaries of Pulehunui, 4 Haw. 239, 241-42 (1879). *See also infra* Part III.

[32] HAW. CONST. art. XII, §§ 1-3. *See* Nelson v. Hawaiian Homes Comm'n, 127 Haw. 185, 277 P.3d 279 (2012) (what constitutes "sufficient sums" for Department of Hawaiian Home Lands' administrative and operating expenses is not a political question, but what constitutes "sufficient sums" in relation to development of homestead lots, loans, and rehabilitation projects present nonjusticiable political questions).

[33] *Id.* art. XII, §§ 5-6.

[34] *Id.* art. XII, § 4.

[35] *Id.* art. X, § 4.

[36] *Id.* art. XV, § 4.

[37] *Id.* art. XVI, § 12. See LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 115-19 (1989) and HANDBOOK, *supra* note 13, at 119-22, for discussion of adverse possession in Hawai'i.

importantly, allowed the claims of the Hawaiian people to be fully expressed and heard. In almost all cases, the Moon Court has consciously chosen Ke Ala Pono, the path of justice.

III. TRADITIONAL AND CUSTOMARY RIGHTS

Hawaiian customary practices have been recognized under Hawai'i law since the earliest days of the Hawaiian Kingdom.[38] The conversion in the Māhele process from a communal land tenure system to a fee simple system in the mid-1800s included a procedure by which Native Hawaiian tenants could claim title to their house lots, plus any lands they had under cultivation. These lots are called kuleana—meaning "right, title, portion"[39]—and the law allowing native tenant claims is known as the Kuleana Act.[40] Section 7 of the Kuleana Act, now codified as Hawai'i Revised Statutes section 7-1, provides that "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."[41] The deliberations of the 1850 Privy Council show that

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[38] The Hawai'i Supreme Court noted in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (PASH)* that the Kingdom of Hawai'i courts were specifically authorized to cite and adopt "[t]he reasonings and analysis of the common law, and of the civil law [of other countries] . . . so far as they are deemed to be founded in justice, and *not in conflict with the laws and usages of this kingdom.*" 79 Haw. 425, 437 n.21, 903 P.2d 1246, 1258 n.21 (1995) (citing Act to Organize the Judiciary (Sept. 7, 1847), ch. I, § 4 (emphasis added)). Shortly thereafter, the Kingdom's legislature passed a resolution calling for the preparation of a civil code, which provided that: "The Judges . . . are *bound* to proceed and decide according to equity . . . . To decide equitably, *an appeal is to be made . . . to received usage*, and resort may also be had to the laws and usages of other countries . . . [not in] conflict with the laws and *customs* of this kingdom." *Id.* (quoting CIVIL CODE OF THE HAWAIIAN ISLANDS ch. III, §§ 14, 823 (1859) (emphases added)). These provisions remained in effect until repealed in 1892 and replaced with the predecessor of Hawai'i Revised Statutes section 1-1. *Id.* (citing An Act to Reorganize the Judiciary Department (Nov. 25, 1892), ch. LVII, § 5).

[39] *See* MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 179 (rev. ed. 1986).

[40] Act of August 6, 1850, STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 202-04 (1850).

[41] Section 7-1 states in full:

> 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).

section 7 of the Kuleana Act was added at the insistence of the king, who was concerned that "a little bit of land even with allodial title, if they [the people] were cut off from all other privileges, would be of very little value."[42]

A second basis for traditional and customary rights is found in the Hawaiian usage exception in Hawai'i Revised Statutes section 1-1, which declares the "common law of England, as ascertained by English and American decisions," as the common law of Hawai'i, "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.*"[43] Hawai'i courts have held that since this section is derived from an act approved on November 25, 1892, "Hawaiian usage" means usage that predates November 25, 1892.[44]

In 1978, Hawai'i voters adopted and added Article XII, section 7, to the state constitution, reaffirming traditional and customary Hawaiian practices:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[45]

The committee reports and debates on the amendment indicate that it was intended to be broadly construed and to cover a wide range of customary rights and was not intended to "remove or eliminate any statutorily recognized rights or any rights of native Hawaiians" but to "encompass all rights of native Hawaiians such as access and gathering."[46]

In a series of cases, the Hawai'i Supreme Court has interpreted these three laws in relation to Native Hawaiian access and gathering practices.[47] In the

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[42] 3B Privy Council Record 681, 713 (1850). The Privy Council thus adopted the King's suggestion: "[T]he proposition of the King, which he inserted as the seventh clause of the law, a rule for the claims of the common people to go to the mountains, and the seas attached to their own particular land exclusively, is agreed to[.]" *Id.*

[43] HAW. REV. STAT. § 1-1 (2009) (emphasis added).

[44] State *ex rel.* Kobayashi v. Zimring, 52 Haw. 472, 474-75, 479 P.2d 202, 204 (1970).

[45] HAW. CONST. art. XII, § 7.

[46] Delegates to the 1978 Hawai'i Constitutional Convention proposing this amendment declared: "The proposed new section reaffirms *all* rights customarily and traditionally held by ancient Hawaiians. . . . [B]esides fishing rights, other rights for sustenance, cultural and religious purposes exist. Hunting, gathering, access and water rights . . . [were] an integral part of the ancient Hawaiian civilization and are retained by its descendants." HAWAIIAN AFFAIRS COMM., STANDING COMM. REP. NO. 57, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 637, 640 (1980) (emphasis added).

[47] *See, e.g.*, 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); Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968).

1982 case *Kalipi v. Hawaiian Trust Co.*, Chief Justice William S. Richardson, writing for a unanimous court, held that gathering rights derive from both Hawai'i Revised Statutes sections 7-1 and 1-1.[48] The court stated that pursuant to article XII, section 7 of the constitution, Hawai'i courts are obligated "to preserve and enforce such traditional rights."[49]

The *Kalipi* court also laid out some limitations; in order to assert a right to gather the items enumerated in section 7-1, an ahupua'a tenant must satisfy three conditions: (1) physically reside within the ahupua'a; (2) gather on undeveloped lands within the ahupua'a; and (3) gather for the purpose of practicing Native Hawaiian customs.[50] The court also recognized that section 1-1 ensures that other Native Hawaiian customs and practices not specifically enumerated in section 7-1 may continue, "so long as no actual harm is done thereby."[51] It adopted a balancing test in which "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."[52] Ten years later, in *Pele Defense Fund v. Paty*, the Hawai'i Supreme Court under Chief Justice Herman T.F. Lum[53] held that Native Hawaiian rights protected by article XII, section 7 may "extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[54] The court clarified that although customary rights under section 7-1 are limited to the ahupua'a in which a native tenant lives, section 1-1's "'Hawaiian usage' clause may establish certain customary Hawaiian rights beyond those found in section 7-1."[55]

The Hawai'i Supreme Court has repeatedly emphasized that Native Hawaiians have standing to pursue their claims where their cultural practices are adversely affected. This is exemplified in the first, and some would say the most groundbreaking, of the Moon Court's traditional and customary rights decisions, *Public Access Shoreline Hawaii v. Hawai'i County Planning*

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[48] 66 Haw. 1, 11-13, 656 P.2d 745, 751-52 (1982).

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

[50] *Id.* at 7-9, 656 P.2d at 749-50.

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

[52] *Id.*

[53] The *Pele Defense Fund v. Paty* opinion was written by Associate Justice Robert G. Klein. See generally Kahikino Noa Dettweiler, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 174 (2005), for a discussion of several of the most important Native Hawaiian rights cases decided by Chief Justice William S. Richardson and Associate Justice Robert G. Klein.

[54] 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992).

[55] *Id.* at 618, 837 P.2d at 1270 (citing *Kalipi*, 66 Haw. at 9-10, 656 P.2d at 750).

Commission (PASH),[56] an opinion authored by Associate Justice Robert G. Klein. In *PASH*, developer Nansay Hawaii had applied for a Special Management Area (SMA) permit for a resort development on Hawai'i island, and the shoreline organization Public Access Shoreline Hawaii (PASH) requested a contested case hearing before the Hawai'i County Planning Commission (HPC) to oppose the development.[57] The HPC denied PASH's request and approved the permit.[58] PASH filed suit, alleging that the HPC violated Hawai'i Revised Statutes chapter 91, the Hawaii Administrative Procedure Act.[59] The trial court agreed with PASH, vacated the SMA permit, and ordered the HPC to hold a contested case hearing and to include PASH as a participant.[60] The Intermediate Court of Appeals affirmed with respect to PASH.[61]

On appeal, the Hawai'i Supreme Court first examined whether the circuit court had jurisdiction to consider PASH's appeal. This turned on whether all the requirements of Hawai'i Revised Statutes section 91-14, which allows appeals from a contested case hearing, had been met.[62] The court first found that the proceeding at issue was a contested case hearing because it determined the "rights, duties, and privileges of specific parties" and was "required by law."[63] The court then concluded that the HPC's action was "a final decision and order" such that deferral of review would deprive PASH of adequate relief.[64] A final requirement was that the claimant had followed the applicable agency rules and participated in the contested case hearing.[65] Here, the court found that PASH testified against the grant of the SMA permit at the HPC's public hearing and, pursuant to the HCP's rules, had requested and been denied a formal contested case hearing.[66] The court stated that "[t]he mere fact that PASH was not formally granted leave to intervene in a contested case is not dispositive because it did everything possible to perfect its right to appeal."[67]

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[56] Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (*PASH*), 79 Haw. 425, 429, 903 P.2d 1246, 1250 (1995).

[57] *Id.*

[58] *Id.*

[59] *Id.* at 430, 903 P.2d at 1251.

[60] *Id.*

[61] *Id.* The Intermediate Court of Appeals, however, found that the appeal by another party, Angel Pilago, was appropriately dismissed by the circuit court, explaining that Pilago's acknowledged interest in the proceeding was not a sufficiently "personal" interest "clearly distinguishable from that of the general public." *Id.* (citations omitted).

[62] *Id.* at 431, 903 P.2d at 1252.

[63] *Id.* at 431-32, 903 P.2d at 1252-53.

[64] *Id.* at 433, 903 P.2d at 1254.

[65] *Id.*

[66] *Id.* at 434, 903 P.2d at 1255.

[67] *Id.*

In addition to the above requirements, the claimant's legal interests must have been injured; PASH needed to meet standing requirements.[68] The HPC denied PASH's contested case hearing request because it found that PASH's asserted interests were "substantially similar" to those of the general public.[69] The court began its discussion of standing by chastising the HPC for its "restrictive interpretation of standing requirements."[70] In a footnote, the court stated that:

> The cultural insensitivity demonstrated by Nansay and the HPC in this case—particularly their failure to recognize that issues relating to the subsistence, cultural, and religious practices of native Hawaiians amount to interests that are clearly distinguishable from those of the general public—emphasizes the need to avoid "foreclos[ing] challenges to administrative determinations through restrictive applications of standing requirements."[71]

The court found that PASH had sufficiently demonstrated, through unrefuted testimony, that its members, as Native Hawaiians who exercised traditional and customary rights on undeveloped lands within the relevant ahupua'a, had interests in the SMA permit that were clearly distinguishable from those of the general public.[72]

After disposing of the jurisdictional questions, the court turned to the substantive issues. Ultimately, the court determined that Native Hawaiians retain rights to pursue traditional and customary activities because land patents in Hawai'i confirm only a limited property interest when compared with land patents in other jurisdictions.[73]

Nansay Hawaii did not directly contest that traditional Hawaiian gathering rights, including gathering food and fishing for 'ōpae, or shrimp, were exercised on its land,[74] but Nansay argued that "[w]hen the owner develops land, the gathering rights disappear."[75] The court rejected this argument, holding instead that the HPC was "obligated to protect the reasonable exercise

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[68] *Id.* at 431, 903 P.2d at 1252.

[69] *Id.* at 434, 903 P.2d at 1255.

[70] *Id.*

[71] *Id.* at 434 n.15, 903 P.2d at 1255 n.15 (citations and internal quotation marks omitted; brackets in original).

[72] *Id.* at 434, 903 P.2d at 1255.

[73] *Id.* at 447, 903 P.2d at 1268.

[74] *Id.* at 430 n.6, 903 P.2d at 1251 n.6 (noting that "[a]t the hearing before the [HPC], Nansay did not directly dispute the assertion that unnamed members of PASH possess traditional native Hawaiian gathering rights at Kohanaiki, including food gathering and fishing for '[ō]pae, or shrimp, which are harvested from the anchialline ponds located on Nansay's proposed development site").

[75] Second Supplemental Brief (Opening Brief) for Petitioner-Appellee-Appellant Nansay Hawaii at 19, Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (*PASH*), 79 Haw. 425, 903 P.2d 1246 (1995) (No. 15460).

of traditional and customary rights to the extent feasible under the Hawai'i Constitution and relevant statutes."[76] The court traced the origins of Hawai'i Revised Statutes section 1-1 to an 1847 act of Kamehameha III,[77] allowing the judiciary to adopt common law principles, provided they did not "conflict with the laws and usages of this kingdom."[78] The *PASH* court further stressed, "the precise nature and scope of the rights retained by § 1-1 . . . depend upon the particular circumstances of each case."[79]

The court examined the extent to which section 1-1 preserved customary practices, noting that *Kalipi* specifically refused to decide the "ultimate scope" of traditional rights under that statute.[80] The court also distinguished the doctrine of custom in Hawai'i from English common law in several ways. First, contrary to the "time immemorial" standard, traditional and customary practices in Hawai'i must be established in practice by November 25, 1892.[81] Second, continuous exercise of the right is not required, though the custom may become more difficult to prove without it.[82] The *PASH* court stated that "the right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site."[83]

The court set out a test for the doctrine of custom, requiring that a custom be consistent when measured against other customs,[84] a practice be certain in an objective sense,[85] and a traditional use be exercised in a reasonable manner.[86] Defining the reasonable use requirement, the court further explained that the balance leans in favor of establishing a use in the sense that "even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no 'good legal reason' against it."[87]

While recognizing that in real property matters "the western concept of exclusivity is not universally applicable in Hawai'i[,]" the court addressed

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[76] *PASH*, 79 Haw. at 437, 903 P.2d at 1258 (stating that "the HPC is obligated to protect traditional and customary rights to the extent feasible under the Hawai'i Constitution and relevant statutes").

[77] *Id.* at 437 n.21, 903 P.2d at 1258 n.21.

[78] *Id.*

[79] *Id.* at 438, 440, 903 P.2d at 1259, 1261 (quoting Pele Def. Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247, 1271 (1992)).

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

[81] *Id.* at 447 n.39, 903 P.2d at 1268 n.39.

[82] *Id.* at 441 n.26, 903 P.2d at 1262 n.26 (citation omitted).

[83] *Id.* at 450, 903 P.2d at 1271.

[84] *Id.* at 447, 903 P.2d at 1268 (internal quotation marks omitted).

[85] The court stated, "[A] particular custom is certain if it is objectively defined and applied; certainty is not subjectively determined." *Id.* at 447 n.39, 903 P.2d at 1269 n.39 (internal quotation marks omitted).

[86] *Id.* at 447, 903 P.2d at 1268 (citation and internal quotation marks omitted).

[87] *Id.* at 447 n.39, 903 P.2d at 1268 n.39 (citation and internal quotation marks omitted).

concerns that the ruling could lead to disruption, stating that "the non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances."[88] The court also held that the State has the authority to "reconcile competing interests";[89] thus, "[d]epending on the circumstances of each case, once land has reached the point of 'full development' it *may* be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property."[90] The *PASH* court cautioned, however, that "[a]lthough access is only *guaranteed* in connection with undeveloped lands, and article XII, section 7 [of the Hawai'i Constitution] does not *require* the preservation of such lands, the State does not have the unfettered discretion to regulate the[se] rights . . . out of existence."[91]

The *PASH* court also clarified that descendents of Native Hawaiians who inhabited the islands prior to 1778 "who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1 are entitled to protection regardless of their blood quantum."[92] The *PASH* court declined to decide, however, whether descendants of non-Hawaiian citizens of the Hawaiian Kingdom are entitled to such protection and expressly reserved comment on whether non-Hawaiian members of an 'ohana or extended family may legitimately claim traditional and customary rights protected by state law.[93]

In 1998, in a criminal case, the Hawai'i Supreme Court sought to clarify and perhaps alleviate some of the concerns raised by the *PASH* decision.[94] In *State v. Hanapi*, the court held that "it is the obligation of the person claiming the exercise of a native Hawaiian right to demonstrate that the right is protected."[95]

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[88] *Id.* at 447, 903 P.2d at 1268.

[89] *Id.*

[90] *Id.* at 451, 903 P.2d at 1272 (emphasis added).

[91] *Id.* (emphasis in original); *see also id.* at 441 n.26, 903 P.2d at 1262 n.26 (stating that one of the requirements for custom is that the use or right at issue is "obligatory or compulsory (when established)"). The guidance provided in *PASH* was never applied on remand in that case; the landowner withdrew its permit application and the proceedings were terminated. Kevin Dayton, *Resort Plan Contrasts with Initial Outcry*, HONOLULU ADVERTISER, Oct. 3, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/Oct/03/ln/ln04a.html.

[92] *PASH*, 79 Haw. at 449, 903 P.2d at 1270.

[93] *Id.* at 449 n.41, 903 P.2d at 1270 n.41.

[94] The *PASH* decision brought strong negative responses from private property interests and state lawmakers. Dayton, *supra* note 91. *See generally* D. Kapua Sproat, Comment, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321 (1998); David M. Forman & Stephen M. Knight, *Native Hawaiian Cultural Practices Under Threat*, 1 HAW. B.J. 1 (1998). *See also* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (MIS) Use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339, 354 (2003) (characterizing the *Hanapi* case as a "retreat from the broader language in *PASH*, but . . . a relatively minor one").

[95] 89 Haw. 177, 184, 970 P.2d 485, 492 (1998).

The defendant, Alapa'i Hanapī, lived in the ahupua'a of 'Aha'ino, Moloka'i, on property adjacent to two fishponds.[96] The owner of the adjoining land had graded and filled the area near the ponds, violating federal wetlands regulations.[97] After complaints by Hanapī, the U.S. Army Corps of Engineers allowed the landowner to conduct a voluntary, unsupervised restoration of the property, subject to the oversight of a consultant/archaeologist.[98] Hanapī believed that the landowner's actions desecrated a "traditional ancestral cultural site"[99] and that it was his right and obligation as a Native Hawaiian to perform religious and traditional ceremonies in order to heal the land.[100] Hanapī twice entered the property without incident to observe and monitor the restoration.[101] On a third visit, Hanapī was ordered off the property; Hanapī refused and was charged with second-degree criminal trespass.[102]

At trial, the district court rejected Hanapī's defense of privilege based upon his constitutional rights as a Native Hawaiian.[103] The Hawai'i Supreme Court affirmed Hanapī's conviction.[104] The court recognized that "constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes."[105] The court then set out three minimum requirements to successfully assert a defense based on a constitutionally protected Native Hawaiian right.[106]

First, a defendant must qualify as a Native Hawaiian as defined in *PASH*—a descendant of Hawaiians who inhabited the islands prior to 1778, regardless of blood quantum.[107] Second, a defendant must "establish that his or her claimed right is constitutionally protected as a customary or traditional" Native Hawaiian practice.[108] To establish the existence of a traditional or customary

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[96] *Id.* at 178, 970 P.2d at 486. The fishponds were named Kihaloko and Waihilahila. *Id.*

[97] *See id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 181, 970 P.2d at 489.

[101] *Id.* at 178, 970 P.2d at 486.

[102] *Id.* at 178-79, 970 P.2d at 486-87.

[103] *Id.* at 179-81, 970 P.2d at 487-89.

[104] *Id.* at 185, 188, 970 P.2d at 493, 496.

[105] *Id.* at 184, 940 P.2d at 492.

[106] *Id.* at 185-86, 970 P.2d at 493-94. A recent Hawai'i Supreme Court decision sets out the analysis courts should apply once a defendant has met *Hanapi*'s three minimum requirements. State v. Pratt, 127 Haw. 206, 277 P.3d 300 (2012).

[107] *Hanapi*, 89 Haw. at 186, 970 P.2d at 494.

[108] *Id.* The court noted that, although some customary and traditional Native Hawaiian rights are codified in article XII, section 7 of the Hawai'i Constitution, or in Hawai'i Revised Statutes sections 1-1 and 7-1, "[t]he fact that the claimed right is not specifically enumerated in the Constitution or statutes[] does not preclude further inquiry concerning other traditional and customary practices that have existed." *Id.* (citing Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (*PASH*), 79 Haw. 425, 438, 903 P.2d 1246, 1259 (1995)) (emphasis

practice, there must be an "adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice."[109] This foundation can be laid through testimony of experts or kama'āina witnesses[110] as proof of ancient Hawaiian tradition, custom, and usage.[111] Finally, a defendant must prove that "the exercise of the right occurred on undeveloped or less than fully developed property."[112] The court clarified *PASH* by holding that "if property is deemed 'fully developed,' i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always 'inconsistent' to permit the practice of traditional and customary native Hawaiian rights on such property."[113] The court, however, reserved the question of the status of traditional and customary rights on less than fully developed property.[114]

Two years later, in the 2000 case, *Ka Pa'akai O Ka 'Aina v. Land Use Commission* (*Ka Pa'akai*), the Hawai'i Supreme Court provided an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private [property] interests."[115] This case arose from the State Land Use Commission's (LUC) reclassification of nearly 1010 acres of land in the Ka'ūpūlehu ahupua'a on the island of Hawai'i from conservation to urban use upon application by Ka'upulehu Developments (KD).[116] KD sought to develop a luxury subdivision with upscale homes, a golf course, and other amenities.[117] The plaintiff, Ka Pa'akai O Ka 'Āina, an association of Native Hawaiian organizations, had participated in a contested case hearing on KD's application before the LUC.[118] Ka Pa'akai argued that the traditional and customary gathering rights of its members would be adversely affected by the development.[119] As in *PASH*, the court first examined the jurisdictional requirements, specifically standing, for bringing an appeal under chapter 91 of

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removed).

[109] *Id.* at 187, 970 P.2d at 495.

[110] A kama'āina witness is "a person familiar from childhood with any locality." *In re* Ashford, 50 Haw. 314, 315 n.2, 440 P.2d 76, 77 n.2 (1968) (quoting *In re* Boundaries of Pulehunui, 4 Haw. 239, 245 (1879)). Kama'āina literally means "land child[,]" and refers to one who is "[n]ative-born, one born in a place[.]" PUKUI & ELBERT, *supra* note 39, at 124.

[111] *Hanapi*, 89 Haw. at 187, 970 P.2d at 495.

[112] *Id.* at 186, 970 P.2d at 494 (citing *PASH*, 79 Haw. at 450, 903 P.2d at 1271).

[113] *Id.* at 186-87, 970 P.2d at 494-95.

[114] *Id.* at 187, 970 P.2d at 495 (citing *PASH*, 79 Haw. at 450, 903 P.2d at 1271).

[115] 94 Haw. 31, 46-47, 7 P.3d 1068, 1083-84 (2000).

[116] *Id.* at 34, 7 P.3d at 1071.

[117] *Id.* at 36, 7 P.3d at 1073.

[118] *Id.*

[119] *Id.* at 34-36, 7 P.3d at 1071-73.

the Hawai'i Revised Statutes. In determining that Ka Pa'akai had standing, the Hawai'i Supreme Court recognized that,

> [w]ith regard to native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawaii." . . . Our "fundamental policy [is] that Hawaii's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court."[120]

On the merits, the court held that the LUC improperly delegated its obligations under article XII, section 7, of the Hawai'i Constitution by placing a condition in the reclassification order requiring KD to preserve and protect Native Hawaiian gathering and access rights.[121] The court found this wholesale delegation of responsibility to the developer "was improper and misses the point. These issues must be addressed before the land is reclassified."[122]

The court also held that the LUC's findings and conclusions were insufficient to determine whether it fulfilled its obligation to preserve and protect traditional and customary rights of Native Hawaiians. The court concluded that, as a matter of law, the LUC "failed to satisfy its statutory and constitutional obligations."[123] The court held that the LUC should have, at a minimum, made specific findings and conclusions regarding:

> (1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.[124]

The Moon Court also addressed Native Hawaiian traditional and customary rights in other contexts.[125] In August 2010, just a few weeks before his retirement, Chief Justice Moon authored the majority opinion in the Hawai'i Supreme Court's first case involving iwi kūpuna,[126] or Native Hawaiian

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[120] *Id.* at 42, 7 P.3d at 1079 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 614-15, 837 P.2d 1247, 1268-69 (1992)).

[121] *Id.* at 50, 7 P.3d at 1087.

[122] *Id.*

[123] *Id.* at 48, 7 P.3d at 1085.

[124] *Id.* at 47, 7 P.3d at 1084 (internal footnotes omitted).

[125] Two water use cases, *In re Wai'ola o Moloka'i*, 103 Haw. 401, 83 P.3d 664 (2004), and *In re Kukui (Moloka'i), Inc.*, 116 Haw. 481, 174 P.3d 320 (2007), discussed extensively elsewhere in this issue, illustrate the court's adherence to the *Ka Pa'akai* guidelines.

[126] See generally HANDBOOK, *supra* note 13, at 245-73, for a discussion of Native Hawaiian beliefs and practices, as well as the laws, related to iwi kūpuna.

ancestral remains. In *Kaleikini v. Thielen*, the O'ahu Island Burial Council (OIBC), pursuant to the provisions of Hawai'i's burial law, Hawai'i Revised Statutes chapter 6E, approved a burial treatment plan by landowner General Growth Properties (GGP) allowing the disinterment and relocation of Native Hawaiian burials at GGP's proposed project, Ward Villages Shops.[127] Paulette Kaleikini, a recognized cultural descendant of the iwi kūpuna in question, attempted to challenge the decision of the OIBC and sought to have the iwi preserved in place since a critical tenet of Native Hawaiian traditional and customary practice requires "ensur[ing] that iwi remain undisturbed and . . . receive proper care and respect."[128]

Hawai'i Revised Statutes section 6E-43(c) allows such decisions to "be administratively appealed to a panel composed of three [burial] council chairpersons and three members from [the Board of Land and Natural Resources (BLNR)] as a contested case" pursuant to Hawai'i Revised Statutes chapter 91, the Hawaii Administrative Procedure Act.[129] Kaleikini submitted a written request for a "contested case hearing," claiming that as "a recognized cultural descendant . . . and a possible lineal descendant"[130] of the affected iwi kūpuna, she had the right to a hearing under chapter 6E, its implementing administrative regulations, and article XII, section 7 of the Hawai'i Constitution.[131]

The BLNR chair denied the request for a contested case,[132] and Kaleikini filed two separate actions in state circuit court. The circuit court dismissed the first action for declaratory and injunctive relief seeking to prevent the removal of the iwi; Kaleikini's appeal was stayed as a result of GGP's bankruptcy.[133] The second action was an appeal under chapter 91, seeking review of the denial of Kaleikini's request for a contested case hearing.[134] The circuit court also dismissed Kaleikini's chapter 91 appeal, stating that it lacked jurisdiction because Kaleikini had not participated in a contested case hearing, a prerequisite to judicial review.[135] The circuit court specifically noted the "Catch 22" conundrum because "if you're denied a contested case hearing, and the denial can't be appealed, then there is no way to get judicial review of that. And any agency could improperly deny a contested case hearing."[136]

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[127] 124 Haw. 1, 5-6, 237 P.3d 1067, 1071-72 (2010).
[128] *Id.* at 6, 237 P.3d at 1072.
[129] HAW. REV. STAT. § 6E-43(c) (2009).
[130] *Kaleikini*, 124 Haw. at 7, 237 P.3d at 1073.
[131] *Id.* at 9, 237 P.3d at 1075.
[132] *Id.* at 7, 237 P.3d at 1073.
[133] *Id.* at 10 n.15, 237 P.3d at 1076 n.15.
[134] *Id.* at 10, 237 P.3d at 1076.
[135] *Id.* at 8, 237 P.3d at 1074.
[136] *Id.*

Nevertheless, the circuit court dismissed the case based on a 2006 Hawai'i Supreme Court decision, *Aha Hui Mālama O Kaniakapupu v. Land Use Commission*,[137] which it interpreted as holding that actual participation in a contested case hearing was a prerequisite to appealing an agency decision.[138] The Hawai'i Intermediate Court of Appeals affirmed the dismissal, declaring the case moot.[139]

In the Hawai'i Supreme Court, Kaleikini argued that her case was *not* moot, and that the court should hear her appeal because it presented an issue of public importance and fell within the "'capable of repetition yet evading review' exception to the mootness doctrine."[140] On the merits, she contended that unlike the plaintiff in *Kaniakapupu*, she had requested a contested case hearing but her request had been unlawfully denied.[141] She argued that she was entitled to the contested case hearing because of the language of Hawai'i Revised Statutes section 6E-43(c), the administrative rules implementing chapter 6E, and article XII, section 7 of the Hawai'i State Constitution, all of which protected the traditional and customary rights of Native Hawaiian ahupua'a tenants.[142] The State countered that although section 6E-43(c) did allow a person aggrieved by the decision of a burial council to request a contested case hearing, the administrative rule clarified the statute and provided that a contested case hearing was necessary only if "required by law," and that the BLNR chair had broad discretion to grant or deny such a request.[143]

On August 12, 2010, the Hawai'i Supreme Court ruled in Kaleikini's favor.[144] First, the majority opinion declared that although the case was indeed moot—the iwi had already been removed—it was nevertheless appropriate for the court to decide the case on the merits under the public interest exception to the mootness doctrine.[145] A decision was necessary to answer a legal question of great public importance and to guide public officials in the future.[146] Pointing to the legislative history of Hawai'i's burial law, the court noted that the Legislature specifically stated that "[t]he public has a vital interest in the proper disposition of the bodies of its deceased persons, which is in the nature of a sacred trust for the benefit of all."[147] In addition, the court cited the

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[137] 111 Haw. 124, 139 P.3d 712 (2006).

[138] *Kaleikini*, 124 Haw. at 8, 237 P.3d at 1074.

[139] *Id.* at 11, 237 P.3d at 1077.

[140] *Id.* at 12, 237 P.3d at 1078.

[141] *Id.* at 11, 237 P.3d at 1077.

[142] *Id.* at 17, 237 P.3d at 1083.

[143] *Id.*

[144] *Id.* at 27, 237 P.3d at 1093. Justices Nakayama and Duffy joined the majority opinion, and Justices Acoba and Recktenwald concurred separately in the judgment.

[145] *Id.* at 13, 237 P.3d at 1079.

[146] *Id.* at 12-13, 237 P.3d at 1078-79.

[147] *Id.* at 13, 237 P.3d at 1079.

Legislature's finding that "[N]ative 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."[148] These legislative pronouncements, the court said, "evince a recognition of the public importance of the issue presented here, *i.e.*, 'the process of deciding to remove previously identified Native Hawaiian burial sites.'"[149] Thus, the court concluded that the question presented was of public importance.[150]

The court also recognized that a Native Hawaiian whose "legal interests stem from her cultural and religious beliefs regarding the protection of the iwi"[151] had standing. The court noted:

> Throughout the instant litigation, Kaleikini has averred that her cultural and religious beliefs require her to ensure that the iwi [are] left undisturbed and that the OIBC's decision, allowing GGP to disinter the iwi, has caused her cultural and religious injury. As such, we believe Kaleikini has alleged sufficient facts upon which this court can determine she has standing.[152]

The majority then decided the merits in Kaleikini's favor. They agreed that while the BLNR chair did have a certain level of discretion in deciding whether to grant a petition for a contested case hearing, that discretion was limited to determining whether the petitioner had met the proper *procedural* prerequisites to obtain a hearing.[153] If so, as in the case of Kaleikini who had fulfilled all of the procedural prerequisites, the chair had no discretion to deny the request for a hearing. In reaching this result, the majority opinion relied upon the text of section 6E-43 and the administrative rules implementing that section.[154]

The Moon Court's decision in *Kaleikini* will have a significant impact on the treatment of iwi kūpuna under state law. First, the court not only

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[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* at 26, 237 P.3d at 1092.

[152] *Id.* at 20-21, 237 P.3d at 1086-87.

[153] *Id.* at 21, 237 P.3d at 1087. The court also discussed the holding in *Bush v. Hawaiian Homes Commission* (*Bush I*), 76 Haw. 128, 870 P.2d 1272 (1994), where Hawaiian Home Lands beneficiaries had requested a contested case hearing to challenge agreements between homestead lessees and third-parties for use of homestead land. The court distinguished *Bush I* because the specific language of the implementing rule at issue in *Bush I* did not require that a contested case hearing be held. *Id.* at 18-19, 237 P.3d at 1084-85.

[154] *Id.* at 17, 21, 237 P.3d at 1083, 1087. Justice Acoba concurred in the judgment but, inter alia, would have reached the same result based on the state constitutional provision protecting the traditional and customary rights of Native Hawaiian ahupua'a tenants. *Id.* at 30-31, 237 P.3d at 1096-97 (Acoba, J., concurring). Justice Recktenwald also concurred but believed that the circuit court had misinterpreted *Aha Hui Mālama O Kaniakapupu v. Land Use Commission*, 111 Haw. 124, 139 P.3d 712 (2006). *Id.* at 43, 237 P.3d at 1109 (Recktenwald, J., concurring).

acknowledged the public interest in ensuring the protection of Native Hawaiian traditional and customary rights,[155] but it also specifically recognized the constitutional basis in article XII, section 7 for the protection of iwi kūpuna.[156] Second, as a result of the court's decision, a cultural or lineal descendant concerned about the proposed treatment of iwi will be able to request a contested case hearing to challenge decisions to disinter and relocate iwi kūpuna.[157]

The *Kaleikini* decision, written by Chief Justice Moon himself, provides a fitting closure to his judicial legacy. It illustrates the Moon Court's general approach to Native Hawaiian traditional and customary rights. That approach has been characterized as giving full recognition to Native Hawaiian cultural rights that existed prior to the institution of a fee-simple property rights regime and insuring access to the courts so that those rights can be fully implemented. In *Ka Pa'akai*, the court established specific responsibilities for state agencies to ensure the protection of traditional and customary rights.[158] The court has repeatedly stated, beginning with *PASH* and then with *Ka Pa'akai* and *Kaleikini*, that Native Hawaiian rights are matters of great public importance in Hawai'i and that Native Hawaiians must be allowed to assert their unique interest in exercising cultural rights. Thus, in the area of traditional and customary rights, the direction that Chief Justice Richardson first pointed to in *Kalipi*[159] has been more fully explicated under the guidance of Chief Justice Moon. In broadly construing traditional and customary rights to include not only access and gathering, but also other cultural practices such as the protection of iwi kūpuna and the preservation of resources vital to practitioners, the Moon Court has chosen to continue on Ke Ala Pono, the path of justice.

IV. THE HAWAIIAN HOMES COMMISSION ACT[160]

The Hawaiian Homes Commission Act (HHCA), passed by Congress in 1921, set aside a portion of the Hawaiian Kingdom's Government and Crown lands for Hawaiian homesteading.[161] The contours of the HHCA, however, were based on earlier actions of the Republic of Hawai'i and the United States. Prior to annexation, the Republic had opened up some Government and Crown

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[155] *Id.* at 13, 237 P.3d at 1079.

[156] *Id.* at 26, 237 P.3d at 1092.

[157] *Id.*

[158] Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 45, 7 P.3d 1068, 1082 (2000).

[159] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982).

[160] Some of the text in this section has appeared in HANDBOOK, *supra* note 13, at ch. 1.

[161] HANDBOOK, *supra* note 13, at 43.

lands in a general homesteading program.[162] A 1910 congressional amendment to the Hawai'i Organic Act directed the Territory to open the Government and Crown lands for homesteading in a given area when twenty-five or more qualified homesteaders applied for land.[163] Since many sugar plantation leases on these lands were due to expire during the 1920s and 1930s, sugar growers were afraid that when the leases expired, choice sugar lands would be put into homesteading under the 1910 amendment. Hawai'i's large plantation owners feared that homesteading would destroy their thriving plantations.[164]

During the same period, Hawaiian leaders became alarmed by the rapidly deteriorating social and economic conditions of the Hawaiian people.[165] The high rate of crime and juvenile delinquency as well as increased homelessness within the Hawaiian community made it "evident that the remnant of Hawaiians required assistance to stem their precipitous decline."[166]

These forces converged in 1921 to promote passage of the Hawaiian Homes Commission Act. Congress set aside approximately 203,000 acres of Government and Crown lands to be leased to Native Hawaiians of not less than fifty percent aboriginal blood at a nominal fee for ninety-nine years.[167] The homesteading approach to rehabilitation

> was consistent with long-established American and Hawaiian traditions. It was further reinforced . . . by the suggestion that dispossessed Hawaiians would be returning to the soil, going back to the cultivation of at least a portion of their ancestral lands . . . .[168]

The sugar interests supported the HHCA because it carefully defined the lands that Native Hawaiians could receive,[169] which excluded forest reserves and cultivated sugar cane lands.[170] Most homestead lands were arid and of

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[162] Land Act of 1895, 1895 Haw. Laws 48-83; *see* ROBERT H. HOROWITZ ET AL., PUBLIC LAND POLICY IN HAWAII: AN HISTORICAL ANALYSIS, LEGISLATIVE REFERENCE BUREAU REPORT NO. 5, at 5-15 (1969) (detailed analysis of the Act); VAN DYKE, *supra* note 17, at 188-99 (discussing the 1895 Land Act).

[163] An Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900).

[164] TOM DINNELL ET AL., THE HAWAIIAN HOMES PROGRAM: 1920-1963, LEGISLATIVE REFERENCE BUREAU REPORT NO. 1, at 6 (1964).

[165] *See generally* Davianna Pōmaika'i McGregor, *'Āina Ho'opulapula: Hawaiian Homesteading*, 24 HAWAIIAN J. HIST. 1 (1990).

[166] DINNELL ET AL., *supra* note 164, at 2-3.

[167] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, §§ 203, 207, 208, 42 Stat. 108, 109-11 (1921).

[168] DINNELL ET AL., *supra* note 164, at 7.

[169] *See* McGregor, *supra* note 165, at 14-27.

[170] Hawaiian Homes Commission Act, 1920, § 203, 42 Stat. at 109-10 (1921). Also excluded were lands under a homestead lease, right of purchase lease, or certificate of occupation. *Id.*

marginal value; many were actually lava rock.[171] Moreover, while Hawaiian leaders had originally proposed a bill making all Native Hawaiians eligible for homesteading, the sugar growers, fearful that large numbers would demand lands, maneuvered to have the blood quantum set at fifty percent.[172]

In 1959, when Hawai'i became a state, only 1673 Native Hawaiians had received homesteads, with four house lots to every farm lot.[173] An additional 2200 Native Hawaiians were on the homestead waiting list.[174] Fifty years later, 9748 Native Hawaiians lease 45,566 acres of Hawaiian homestead land while 26,170 Native Hawaiians remain on the waiting list.[175]

Section 4 of the Hawai'i Admission Act required the State to adopt the Hawaiian Homes Commission Act as part of its constitution.[176] Section 4 also provides that the United States must approve any amendments to the Act altering the qualifications for or diminishing the benefits to beneficiaries.[177] Moreover, under the HHCA, Congress retains the power to alter, amend, or repeal any of its provisions.[178] Thus, although primary responsibility for administration of the program was transferred to the State as a condition of statehood, the federal government also retains significant responsibility for the HHCA.

In 1982, Chief Justice William S. Richardson in *Ahuna v. Department of Hawaiian Home Lands* established that the State should be held to the "high

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[171] *See* ALLEN A. SPITZ, LAND ASPECTS OF THE HAWAIIAN HOMES PROGRAM, LEGISLATIVE REFERENCE BUREAU REPORT NO. 1B, at 19-26 (1964).

[172] See KEHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY (2008) for an in-depth analysis and discussion of the blood quantum restrictions of the HHCA. See generally M.M. Vause, The Hawaiian Homes Commission Act, History and Analysis (June 1962) (unpublished M.A. thesis, University of Hawai'i) for a discussion of factors leading to passage of the HHCA and blood quantum limitations.

[173] SPITZ, *supra* note 171, at 17.

[174] 1980-81 DEPT. OF HAWAIIAN HOME LANDS ANN. REP., 'ĀINA HO'OPULAPULA, at 8.

[175] 2009 DEPT. OF HAWAIIAN HOME LANDS ANN. REP. 29 (homestead awards); DEP'T OF HAWAIIAN HOME LANDS APPLICANT SUMMARY AS OF JUNE 30, 2011, at 5 (applicants), *available at* http://www.hawaiianhomelands.org/wp-content/uploads/2011/06/2011-06-30_01-Oahu_Waitlist_153pgs.pdf.

[176] Admission Act of 1959, Pub. L. No. 86-3, § 4, 73 Stat. 4, provides, in part: "As a compact with the United States relating to the management and disposition of Hawaiian home lands, the Hawaiian Homes Commission Act, . . . shall be adopted as a provision of the Constitution of said State . . . ."

[177] Admission Act § 4 provides: "[A]ny amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States."

[178] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 223, 42 Stat. 108, 115 (1921) provides: "The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title."

fiduciary duties normally owed by a trustee to its beneficiaries."[179] The opinion added that the State should be judged by "the most exacting fiduciary standards."[180] 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.[181] Chief Justice Richardson's *Ahuna* opinion and the trust standards he established continue to impact not only Hawaiian Home Lands cases but also those related to the public land trust.[182]

During the tenure of Chief Justice Moon, beneficiaries of the Hawaiian Home Lands trust were able to continue turning to the courts to enforce the HHCA's provisions. The court also allowed beneficiaries who had been involved in a failed administrative process to address individual breach of trust claims to file their claims in state circuit court. Finally, the court more clearly defined the extent of the State's jurisdiction and control over HHCA trust lands.

In the 1995 case *Aged Hawaiians v. Hawaiian Homes Commission*, an unincorporated association of Native Hawaiian beneficiaries over the age of seventy who had been on the homestead pastoral waiting list for decades, some since 1952, sued the Hawaiian Homes Commission (HHC) and the Department of Hawaiian Home Lands (DHHL), the state administrative agency responsible for implementing the HHCA.[183] The Aged Hawaiians sought the opportunity to lease pastoral lands for commercial ranching.[184] Through a series of actions—including adopting a policy granting pastoral lots of no more than 100 acres for subsistence ranching,[185] denying the request for a contested case hearing by one of the original plaintiffs,[186] and adopting a ten-premise guideline for the allocation of pastoral land[187]—the HHC tried to implement a pastoral homestead plan to distribute small pastoral lots.[188] The Aged Hawaiians filed suit under 42 U.S.C. § 1983 and, inter alia, alleged that the HHC, under color of state law, had deprived them of due process rights under the Fourteenth Amendment to the U.S. Constitution by failing to provide them with a reasonable opportunity to obtain a pastoral homestead award large enough to support commercial ranching.[189] After considering this factually and

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[179] 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982).

[180] *Id.* at 339, 640 P.2d at 1169 (quoting Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942)) (emphasis omitted).

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

[182] *See infra* Part V.B.

[183] 78 Haw. 192, 197, 891 P.2d 279, 284 (1995).

[184] *Id.* at 195-97, 891 P.2d at 282-84.

[185] *Id.* at 195-96, 891 P.2d at 282-83.

[186] *Id.* at 196-97, 891 P.2d at 283-84.

[187] *Id.* at 196, 891 P.2d at 283.

[188] *Id.* at 197-98, 891 P.2d at 284-85.

[189] *Id.* at 201, 891 P.2d at 288 (citing to both the HHCA and Hawai'i Revised Statutes

procedurally complex case, the Hawai'i Supreme Court decided that the HHC had violated the Aged Hawaiians' due process rights.[190]

The court first held that beneficiaries of the federal-state compact "contained in the Hawaii Admission Act and [which] incorporates HHCA trust obligations" may bring claims under section 1983.[191] The court stated that the federal-state compact limits the way Hawai'i may manage Hawaiian Home Lands and that "Congress enacted . . . a federal public trust, which by its nature creates a federally enforceable right for its beneficiaries to maintain an action against the trustee in breach of the trust."[192] The court then concluded that "the HHCA and the Admission Act impose a binding obligation on the State"[193] and that "the judiciary is authorized to enforce the relevant terms of the Admission Act and the HHCA in the instant case."[194]

After determining that the Aged Hawaiians could sue under 42 U.S.C. § 1983, the court turned to the merits of the due process claim. The court noted that a fundamental requirement for a successful due process claim is the deprivation of a property interest.[195] The court concluded that HHCA beneficiaries on the homestead waiting list are entitled to homestead awards; that a "property interest" includes benefits that one is entitled to receive by statute; and that the Aged Hawaiians' claims were based on valid property interests.[196]

The court then reviewed the specific procedures required to satisfy due process, balancing: (1) the private interest affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.[197] The court concluded that the balance of interests tilted in favor of the beneficiaries based on "the procedural infirmities that have already taken place"[198] and determined that beneficiaries on the pastoral waiting

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chapter 91).

[190] *Id.* at 195, 213, 891 P.2d at 282, 300.

[191] *Id.* at 213, 891 P.2d at 300.

[192] *Id.* at 206, 891 P.2d at 293 (quoting Price v. Akaka (*Akaka II*), 3 F.3d 1220, 1225 (9th Cir. 1993)) (internal quotation marks omitted).

[193] *Id.* at 208, 891 P.2d at 295.

[194] *Id.* at 208-09, 891 P.2d at 295-96.

[195] *Id.* at 211, 891 P.2d at 298 (citing Pele Def. Fund v. Puna Geothermal Venture, 77 Haw. 64, 68, 881 P.2d 1210, 1214 (1994)).

[196] *Id.* at 211, 891 P.2d at 298.

[197] *Id.* at 212, 891 P.2d at 299 (citing Kernan v. Tanaka, 75 Haw. 1, 22-23, 856 P.2d 1207, 1219-20 (1993)).

[198] *Id.*

list were entitled to contested case hearings to consider their applications for pastoral lot awards of sufficient acreage for commercial ranching activities.[199]

The court concluded that the Aged Hawaiians were entitled, as a matter of law, to summary judgment on their due process claims because the HHC had failed to adequately consider the Aged Hawaiians' acknowledged desire for land sufficient to engage in commercial ranching.[200] Although beneficiaries on the pastoral wait list were "not entitled to 'economic units' *per se*," the court determined that they must be given the "opportunity to seek such an award prior to the implementation of a pastoral homestead lot award plan."[201]

In another complex case, *Bush v. Watson*, the Hawai'i Supreme Court ruled that the practice of allowing Hawaiian Home Lands lessees to lease their homestead lands to non-Hawaiians violated the HHCA.[202] From 1980 to 1992, non-Hawaiian farmers entered into third-party agreements (TPAs) with Native Hawaiian lessees on Moloka'i, where the non-Hawaiian third parties contracted to use the lessees' crop acres for farming or pastoral purposes in return for monthly payments ranging from $120 to $200.[203] Four Native Hawaiian beneficiaries filed suit pursuant to 42 U.S.C. § 1983, seeking a declaration that the TPAs approved by the HHC were contrary to the HHCA and therefore illegal.[204]

Before determining the legality of the TPAs, the court addressed three jurisdictional challenges: standing, claim preclusion/res judicata, and sovereign immunity.[205] Finding that "standing barriers should be lowered in cases of public interest under our jurisdiction," the court applied the three-part "injury-in-fact" test from *Pele Defense Fund v. Paty*.[206] The court held that appellants

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[199] *Id.* at 213, 891 P.2d at 300.

[200] *Id.*

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

[202] Bush v. Watson (*Bush II*), 81 Haw. 474, 487, 918 P.2d 1130, 1143 (1996). In *Bush v. Hawaiian Homes Commission* (*Bush I*), 76 Haw. 128, 870 P.2d 1272 (1994), the Hawai'i Supreme Court held that it lacked jurisdiction to hear an appeal by homestead beneficiaries who challenged TPAs through the Hawaii Administrative Procedure Act, chapter 91 of the Hawai'i Revised Statutes, because the beneficiaries had not "participated" in a contested case hearing even though the beneficiaries had requested a contested case hearing. *Id.* at 134, 870 P.2d at 1278. In *Bush I*, the court reviewed whether there was a statutory, rule-based, or constitutionally-mandated requirement for a contested case hearing and determined that there was no such requirement. *Id.* at 134-36, 870 P.2d at 1278-80. The court left open the possibility of challenging the HHCA's approval of the TPAs through other means. *Id.* at 137, 870 P.2d at 1281; *see also* Kaleikini v. Thielen, 124 Haw. 1, 18-19, 237 P.3d 1067, 1084-85 (2010) (discussing the *Bush I* holding).

[203] *Bush II*, 81 Haw. at 477, 918 P.2d at 1133.

[204] *Id.* at 477-78, 918 P.2d at 1133-34.

[205] *See id.* at 479-82, 918 P.2d at 1135-38.

[206] *Id.* at 479, 918 P.2d at 1135 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 594, 837 P.2d 1247, 1258 (1992)). The test requires that (1) the plaintiff suffer an actual or threatened injury

adequately established grounds for standing because "the HHC's approval of the TPAs has injured trust beneficiaries by allowing non-Hawaiian third parties to acquire large parcels of homestead lots[,] . . . [thereby] unduly burden[ing] the Appellants' commercial farming interests."[207] Secondly, "these injuries [were] traceable to the HHC's approval of the TPAs," and finally, "invalidation of the TPAs would allow the Appellants to pursue commercially viable farming efforts."[208]

Next, the court examined whether the beneficiaries' claims were precluded by parallel federal litigation[209] raising identical challenges to the TPAs.[210] The court found that the federal litigation did not preclude the beneficiaries' claims[211] because the federal case did not address the allegation that the TPAs violated the HHCA, did not reach the merits of the dispute, and did not involve the same parties or their privities.[212] Consequently, appellants' claims were not barred by res judicata.[213]

In examining the State's sovereign immunity defense, the court again turned to *Pele Defense Fund v. Paty*,[214] stating that "[i]f the relief sought against a state official is *prospective* in nature, then the relief *may be allowed* regardless of the state's sovereign immunity . . . ."[215] Finding that there would be "no direct and unavoidable effect on the state treasury"[216] and that voiding the TPAs would not render the State liable to the contracting parties since each TPA contained an indemnity provision protecting DHHL from liability,[217] the court held that sovereign immunity did not bar the beneficiaries' claims.[218]

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resulting from the defendant's wrongful conduct; (2) the injury is fairly traceable to the defendant's actions; and (3) a favorable decision would likely provide relief for the injury. *Id.*

[207] *Id.* at 479, 918 P.2d at 1135.

[208] *Id.*

[209] Han v. U.S. Dep't of Justice, 45 F.3d 333 (9th Cir. 1995).

[210] *Bush II*, 81 Haw. at 478-79, 918 P.2d at 1134-35 (citing Han v. U.S. Dep't of Justice, 824 F. Supp. 1480 (D. Haw. 1993), *aff'd*, 45 F.3d 333 (9th Cir. 1995)).

[211] *Id.* at 480, 918 P.2d at 1136.

[212] *Id.* The court found the HHC's argument that *Han* should be preclusive because Appellants Bush and Kahae participated as amici in the appeal to the Ninth Circuit unpersuasive because they did not "control the course of the proceedings" nor were "any of the plaintiffs in *Han* representative of any of the Appellants in the instant case." *Id.* at 480-81, 918 P.2d at 1136-37.

[213] *See id.* at 481, 918 P.2d at 1137.

[214] 73 Haw. 578, 609-10, 837 P.2d 1247, 1266-67 (1992) (applying *Ex parte* Young, 209 U.S. 123 (1908)).

[215] *Bush II*, 81 Haw. at 481, 918 P.2d at 1137 (quoting *Pele Def. Fund*, 73 Haw. at 609-10, 837 P.2d at 1266) (emphasis added).

[216] *Id.*

[217] *Id.* at 482, 918 P.2d at 1138. In making this finding, the court expressly declined to adopt the federal courts' "narrow view" that a claim for relief based on past illegal action is necessarily "retrospective," as such an interpretation would pose an "onerous burden on

After addressing all of the jurisdictional issues, the court turned to the merits. The appellants alleged that the TPAs violated section 208(5)[219] of the HHCA, which prohibits lessees from transferring or holding their leasehold for the benefit of anyone except a Native Hawaiian beneficiary and prohibits lessees from subleasing their parcels.[220] The State argued that the TPAs were mere licenses, which did not create property interests.[221]

The court noted it was clear that "compared with ordinary leaseholders, Hawaiian homestead lessees do not possess all of the 'sticks in the bundle of rights commonly characterized as property.'"[222] Looking to cases decided by the territorial courts for guidance,[223] the court found the specific terms and nature of the agreement should be closely examined to determine "whether it

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potential claimants." *Id.* at 482 n.9, 918 P.2d at 1138 n.9. Instead, the court focused its inquiry on whether the relief sought for a past violation of law was "tantamount to an award of damages" or would merely have an "ancillary" effect on the state treasury. *Id.* at 481, 918 P.2d at 1137.

[218] *Id.* at 483, 918 P.2d at 1139.

[219] Under this provision, a lessee does not possess the right to "transfer to, or otherwise hold for the benefit of, any another person . . . except a native Hawaiian or Hawaiians, and then only upon the approval of the department . . . [or to] sublet the [lessee's] interest in the tract or improvements thereon." *Id.* at 484, 918 P.2d at 1140. Moreover, pursuant to Hawai'i Administrative Rules (H.A.R.) section 10-3-35, lessees are prohibited from "entering into any contract, joint venture, agreement or other arrangement of any sort with a third person on lands covered by the lessee's lease for the cultivation of crops or the raising of livestock without the approval of the HHC." *Id.*

[220] *Id.*

[221] *Id.* at 482-83, 918 P.2d at 1138-39.

[222] *Id.* at 484, 918 P.2d at 1140 (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)). The court found that although some of the relevant agreements were discussed in *Bush v. Hawaiian Homes Commission* (*Bush I*), 76 Haw. 128, 136, 870 P.2d 1272, 1280 (1994), that court *only* determined that due process does not require a hearing in a request for approval of a TPA because such proceedings do not involve the potential deprivation of any "property interest" held by the lessee under the HHCA and H.A.R. *Bush II*, 81 Haw. at 484, 918 P.2d at 1140. The court did not, however, effect a "definitive interpretation" of TPAs, nor were its findings in *Bush I* equivalent to a finding that TPAs approved by the HHC do not convey property interests. *Id.*

[223] *Bush II*, 81 Haw. at 485, 918 P.2d at 1141. The court looked to a similar case, *Territory v. Tsunekichi*, 23 Haw. 813 (1917), in which a lessee was charged with unlawfully removing sugar cane from his homestead by allowing a milling company to enter and, for a fee, remove sugar cane, subject to a mortgage between the lessee and the sugar company. *Bush II*, 81 Haw. at 485, 918 P.2d at 1141. That court considered the agreement to be an "executory contract," but it did not reflect intent to transfer title, and thus did not constitute an illegal mortgage of the lessee's interest. *Id.* The court also noted *In re Henderson*, 21 Haw. 104 (1912), in which the territorial supreme court reversed a circuit court's order directing issuance of a land patent to the lessee because he had illegally assigned a portion of his interest in the land to a sugar company by entering into an agreement. *Id.* at 485-86, 918 P.2d at 1141-42.

complies with statutory restrictions."[224] In examining the nature of the TPAs, the court noted that it would not be limited by the name the parties have given the agreement and that authority exists for construing a "mere license" as an "interest in land."[225] The court ultimately found that the TPAs transferred "at least a portion of the lessees' extant interests in their homesteads," and provided a "right of entry (allowing non-Hawaiian third parties to cultivate crops and raise livestock on homestead lands)"[226] that was repugnant to the HHCA.[227]

The Hawai'i Supreme Court's 2006 ruling in *Kalima v. State*[228] is another example of the Moon Court's rejection of jurisdictional barriers in order to ensure access to the courts and, ultimately, a measure of justice for Native Hawaiians. In 1999, three individual plaintiffs[229] in the *Kalima* case brought a class action lawsuit against the State and state officials on behalf of 2721 claimants and beneficiaries of the Hawaiian Home Lands trust,[230] alleging breaches of trust from August 21, 1959, when Hawai'i was admitted as a state, to June 30, 1988.[231] The plaintiffs argued that the State's mismanagement of the trust resulted in actual damages to individual beneficiaries; their claims included: "(1) mismanagement of the extensive waiting list; (2) mishandling of the plaintiffs' applications; (3) preference policies regarding eligibility requirements; and (4) the awarding of raw lands lacking infrastructure."[232]

As part of the State's attempt to "address criticisms of the Hawaiian [H]ome [L]ands program and provide redress to its beneficiaries,"[233] the 1988 Hawai'i State Legislature passed Act 395,[234] providing a limited waiver of sovereign immunity for trust beneficiaries to pursue claims for trust breaches arising after July 1, 1988.[235] Although the Act also gave beneficiaries the right to sue retroactively,[236] due to the potential impact on the state treasury, the Governor

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[224] *Bush II*, 81 Haw. at 486, 918 P.2d at 1142.

[225] *Id.*

[226] *Id.* at 487, 918 P.2d at 1143.

[227] *Id.*

[228] 111 Haw. 84, 137 P.3d 990 (2006).

[229] The individual plaintiffs were Leona Kalima, Dianne Boner, and Joseph Ching. Ching passed away during the course of litigation and was represented in the appeal by Raynette Nalani Ah Chong, special administrator of Ching's estate. *Id.* at 94, 137 P.3d at 1000.

[230] *Id.* at 86, 137 P.3d at 992.

[231] *Id.*

[232] *Id.*

[233] *Id.* at 88, 137 P.3d at 994.

[234] Act of June 17, 1988, No. 395, 1988 Haw. Sess. Laws 942 (codified as amended at HAW. REV. STAT. ch. 673 (1993 & Supp. 2010)).

[235] *Kalima*, 111 Haw. at 88, 137 P.3d at 994.

[236] *Id.*

was allowed to propose a resolution of such claims.[237] As a result, the 1991 Legislature passed Act 323, codified as Hawai'i Revised Statutes chapter 674, which established a panel to receive and review the claims of individual trust beneficiaries arising between statehood and June 30, 1988,[238] and set forth deadlines for beneficiaries' claims.[239]

In 1997, in its first major substantive report on claims to the Governor and the Legislature,[240] the panel stated that 2752 claimants had filed a total of 4327 claims.[241] The panel categorized about sixty-seven percent of the total claims as "waiting list claims"—claims alleging an unreasonably long wait for a homestead award.[242] The panel had made final decisions on 172 claims, finding 165 of those claims meritorious and recommending approximately $6.7 million in damages.[243] The panel also requested a two-year extension to review the rest of the claims.[244]

The State Administration and Legislature, however, questioned the panel's damages formula and wanted to review all of the claims together before awarding any damages.[245] Thus, the Legislature did not act on the claims, but passed Act 382 establishing a "Working Group"[246] to "determine a formula and

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[237] *Id.*

[238] *Id.* at 90, 137 P.3d at 996. The panel was required to:

> [R]eceive, review, and evaluate the merits of an individual beneficiary's claim, and to submit a summary of the findings and an advisory opinion regarding the merits of each claim filed with the Panel, including an estimate of the probable award of actual damages or recommended corrective action to the 1993 and 1994 Legislatures.

Id. at 89, 137 P.3d at 995 (citing H. CONF. COMM. REP. NO. 64, *in* 1991 H. JOURNAL, at 801 (Haw. 1991)).

[239] *Id.* at 89, 137 P.3d at 995. Claimants were required to: (1) submit all claims to the panel by August 31, 1993; (2) file a written notice with the panel that the claimant does not accept legislative action on his or her claim by October 1, 1994; and (3) file an action in circuit court by September 30, 1996. *Id.* at 90, 137 P.3d at 996. Due to delays in naming panel members, the 1993 Legislature added two years to the initial claims filing deadline and extended other deadlines by three years. *Id.* Hence, the new deadline for filing claims with the panel was August 31, 1995. *Id.* The new deadline for filing written notices with the panel rejecting legislative action was set at October 1, 1997. *Id.* The new deadline for a claimant to file a suit in circuit court was set at September 30, 1999. *Id.* The Legislature also gave the panel more time to submit its final report, extending the deadline from 1994 to 1997. *Id.*

[240] *Id.* at 91, 137 P.3d at 997.

[241] *Id.* Of these claims, 3931 were accepted for investigation, 396 were closed, and "601 claims were concluded and in various stages of disposition." *Id.*

[242] *Id.* The panel categorized forty-two percent of claims as only "waiting list claims." *Id.* An additional twenty-five percent were claims that were "waiting list claims with other issues," including blood quantum determinations. *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.* at 92, 137 P.3d at 998. Members of the Working Group included the State Attorney

any criteria necessary to qualify and resolve claims" filed under chapter 674.[247] Act 382 gave the panel two more years to review claims[248] and also specified that its passage did not trigger a claimant's right to sue.[249] After months of meetings, a majority of the Working Group proposed a formula eliminating sixty percent of the claims, most of which were waiting list claims.[250] In response, several claimants filed suit, and a state circuit court struck down portions of Act 382 as violating the claimants' due process rights.[251]

After the circuit court's decision, the only portions of Act 382 that remained in effect extended the panel's life and required a final report to the 1999 Legislature, set an October 1, 1999 deadline for claimants to reject legislative action on their claims, and extended the deadline to file an action in court to December 31, 1999.[252]

The panel reported to the 1999 Legislature that it had completed forty-seven percent of all claims[253] and recommended cumulative damages totaling almost $16.5 million.[254] At the panel's request, the 1999 Legislature agreed to extend the panel's life by another year, but then-Governor Ben Cayetano vetoed the legislation.[255]

The panel's final report to the Legislature in late 1999 indicated that it had reviewed fifty-three percent of all claims[256] and recommended damages of a little over $1.5 million for sixty-nine newly reported claims.[257] The panel had also switched its focus from reviewing claims to notifying claimants of the October 1, 1999 notice-filing deadline.[258] By the deadline, the panel had received written notices in 2592 claims,[259] including one from the Native Hawaiian Legal Corporation, a public interest law firm advocating for Native Hawaiians, on behalf of all claimants who had not yet filed notices.[260]

General, the Director of Budget and Finance, the Chair of the Hawaiian Homes Commission, and the panel chair.

[247] *Id.* (internal quotation marks omitted).

[248] *Id.* The panel then had until 1999 to review the claims.

[249] *Id.*

[250] *Id.*

[251] *Id.* The circuit court also enjoined Working Group members from "taking any further action in determining the formula for compensation." *Id.*

[252] *Id.*

[253] *Id.* at 92-93, 137 P.3d at 998-99.

[254] *Id.* at 93, 137 P.3d at 999.

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.* The three individual plaintiffs in *Kalima v. State* also filed a complaint in federal district court on September 30, 1999, alleging, inter alia, violations of equal protection and due process. *Id.* at 93 n.12, 137 P.3d at 999 n.12 (citing Kalima v. Cayetano, No. CV 99-00671

On December 29, 1999, the plaintiffs[261] filed an action in circuit court, alleging, inter alia, that chapter 674 gave them a right to sue for damages caused by the State's breaches of trust.[262] The State argued that chapter 674 created a limited waiver of sovereign immunity and that the waiver had either "expired or lapsed before the conditions or prerequisites of the waiver were satisfied."[263] Ruling on the plaintiffs' motion for partial summary judgment, the circuit court determined that it had jurisdiction and that the plaintiffs had exhausted their administrative remedies, timely commenced their action in court, and were "aggrieved individual claimants," as defined in chapter 674.[264] The court held that the plaintiffs had a right to pursue their claims and had fulfilled all the prerequisites to do so; additionally, the court determined that the State had waived its sovereign immunity.[265]

The State appealed,[266] and on June 30, 2006, the Hawai'i Supreme Court affirmed.[267] The court began its analysis by detailing the procedures set forth in chapter 674.[268] Since chapter 674 established a process to resolve claims for past breaches of trust, the court believed that the entire chapter was remedial in nature and should be construed liberally.[269] The court additionally determined,

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HG-LEK (D. Haw. 1999)). The district court, however, eventually dismissed the case without prejudice. *Id.*

[261] While all the plaintiffs filed claims with the panel before the 1995 deadline, the plaintiffs were at various stages of the administrative process. *Id.* at 94, 137 P.3d at 1000. The panel had already adjudicated and processed the claims of 418 plaintiffs, but the Legislature had not provided these claimants any relief. *Id.* at 94 n.13, 137 P.3d at 1000 n.13. Raynette Ah Chong, Administrator of the Estate of Joseph Ching, represented this group. *Id.* Fifty-three plaintiffs, represented by Dianne Boner, had received advisory opinions from the panel, but these opinions had not yet been submitted to the Legislature. *Id.* Lastly, 2250 plaintiffs, represented by Leona Kalima, had filed their claims with the panel, but had not yet received an advisory opinion. *Id.*

[262] *Id.*

[263] *Id.* at 95, 137 P.3d at 1001.

[264] *Id.* at 96, 137 P.3d at 1002.

[265] *Id.* at 95-96, 137 P.3d at 1001-02. Moreover, the circuit court ruled that a 1995 law exempting the chapter 674 process from a global settlement of trust claims constituted an agreement binding the State and that plaintiffs could thus sue the State for breach of contract under Hawai'i Revised Statutes section 661-1. *Id.* at 96, 137 P.3d at 1002.

[266] *Id.* at 97, 137 P.3d at 1003. The State challenged the circuit court's finding that the State had waived its sovereign immunity for damages, breach of trust, and breach of contract, as well as the circuit court's rejection of the State's alternative argument that the plaintiffs' right to sue had expired or lapsed. *Id.*

[267] *Id.* at 107, 137 P.3d at 1013. The Hawai'i Supreme Court determined, however, that the circuit court erred when it granted the plaintiffs "the right to sue for breach of contract" under Hawai'i Revised Statutes chapter 661. *Id.* at 112, 137 P.3d at 1018.

[268] *Id.* at 98-100, 137 P.3d at 1004-06.

[269] *Id.* at 100, 137 P.3d at 1006.

however, that since the right-to-sue provision in chapter 674 was "part and parcel of a waiver of sovereign immunity," it should be strictly interpreted.[270]

The court first considered whether the plaintiffs' claims were barred by sovereign immunity.[271] The parties agreed that section 674-16 was "a specific waiver of the State's sovereign immunity and a consent to be sued for money damages for breaches of trust occurring between August 21, 1959 and June 30, 1988."[272] They also agreed that a claimant must have first complied with chapter 674's procedural requirements before gaining the right to sue.[273] The parties disagreed, however, "on the conditions of that waiver and whether the plaintiffs [had] met all of Chapter 674's requirements."[274] To evaluate the merits of these arguments, the court examined whether the plaintiffs had met all the requirements of chapter 674's waiver of immunity,[275] including whether the plaintiffs were "aggrieved individual claimant[s]."[276]

The State argued that individual claimants must have completed the entire administrative process before gaining the right to sue.[277] The plaintiffs countered that the statute only required (1) timely filing with the panel; (2) timely notice rejecting legislative action on claims; and (3) timely filing in circuit court.[278] The State insisted that the plaintiffs' claims were untimely because panel review and legislative 'action' upon each claim were "additional conditions precedent to the right to sue that were not completed prior to the statutory deadlines."[279]

The Hawai'i Supreme Court rejected the State's arguments, holding that both panel review and action by the Legislature were timely completed.[280] The court reasoned that the panel conducted an initial review to determine which of the 4327 timely filed claims to close or accept.[281] It then reviewed the accepted claims once more, and each claim that passed the investigation stage moved on to a final review and "determination of its probable merit and award of damages and/or corrective action."[282] Hence, the pending claims were the

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[270] *Id.*

[271] *Id.* at 100-01, 137 P.3d at 1006-07.

[272] *Id.* at 101, 137 P.3d at 1007.

[273] *Id.*

[274] *Id.*

[275] *Id.* In considering how it would review the statutory waiver of sovereign immunity, the court determined that "a statutory waiver of sovereign immunity must be clear and unequivocal and must be strictly construed." *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.* at 102, 137 P.3d at 1008.

[279] *Id.*

[280] *Id.* at 102-06, 137 P.3d at 1008-12.

[281] *Id.* at 103-04, 137 P.3d at 1009-10.

[282] *Id.*

subject of an "on-going review process."[283] The court concluded that "[a]t the very least, we believe the accepted-claims were 'reviewed' each time the Panel prepared and submitted a report to the Legislature."[284]

The court next addressed "whether the legislature 'acted' upon each claim reported by the panel in its Final Report, thereby triggering the plaintiffs' right to sue" under chapter 674.[285] The State argued that according to the plain language and the legislative history of section 674-17, legislative action did not result from the Legislature's decision to *defer* action.[286] The court found that the legislative history and statutory construction of chapter 674 supported the conclusion that "the legislature's 'deferral' of its consideration of the Panel's recommendations after expiration of the statutory deadlines . . . was effectively . . . a denial of all claims, and, therefore an 'action' upon each claim."[287] The court explained that the State Senate, throughout the legislative process, had pushed for claimants to have a right to sue in court.[288] Even though an administrative step was added to the claims process, "the ultimate decision rested with the claimants as to whether the resolution of their claim by the administrative process was acceptable."[289] If the court required the Legislature "to do some affirmative 'act,' then the Legislature's 'deferral' of its actions until the applicable deadlines had passed would nullify [the judicial process] of the statute, leaving the plaintiffs with no remedy whatsoever."[290] The court deemed this result "absurd" in light of the purpose of the statute and the labors of the Legislature to meet this purpose.[291] The court reasoned that the Legislature desired to give claimants the right to sue, or else it would have expressly stated limitations in chapter 674 "and [would] not [have] left the choice to accept legislative relief in the hands of the claimants."[292]

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[283] *Id.* at 104, 137 P.3d at 1010. According to the court, there was an ongoing review process because: "[F]or purposes of providing a status report to the legislature, the pending accepted-claims were necessarily required to be reviewed in order to report them (1) in an appropriate category, *e.g.*, 'hearings pendings,' [sic] 'settlement negotiations,' 'on remand to hearings officer,' etc. or (2) formally submit them with the appropriate recommendations." *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.* at 105, 137 P.3d at 1011. The court had pointed out earlier that chapter 674 did not define "action," nor did it provide an "inclusive time period for any type of 'action,' other than the ultimate deadline of December 31, 1999, when a claimant must bring suit or be forever barred." *Id.* at 104-05, 137 P.3d at 1010-11.

[288] *See id.* at 105, 137 P.3d at 1011.

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.* The court also ruled that the waiver of sovereign immunity was not postponed until the governor examined the effect of the claims. *Id.*

The court acknowledged that the plaintiffs preserved their rights by timely filing notice rejecting legislative action and then filing suit before the October 1, 1999 statutory deadline.[293] The plaintiffs had met both conditions of panel "review" and legislative "action" required for "aggrieved individual claimant" status under the law.[294] Thus, the State's waiver of sovereign immunity was not extinguished, and the plaintiffs had a right to sue under chapter 674.[295]

Importantly, the court did not adopt a strict and narrow interpretation of the waiver of sovereign immunity. Rather, it interpreted the waiver in light of the chapter's overall remedial purpose. Indeed, the court appeared disturbed by the State's contentions that beneficiaries would have no recourse to the courts after fully participating in the administrative process. Thus, the court ensured that the Hawaiian Home Lands beneficiaries would at least have their claims heard after years of waiting not only on the DHHL waiting list, but also for a resolution to their breach of trust claims.

The Moon Court also decided two cases addressing the applicability of state law on Hawaiian Home Lands, generally finding that state health, safety, and welfare laws apply if they do not significantly affect use of the land for homesteading purposes. In *State v. Jim*, the court held that section 206 of the HHCA, which provides that the Governor's power over state lands does not extend to Hawaiian Home Lands, does not preclude the enforcement of state and county criminal laws on those lands.[296] The court interpreted section 206 to mean that the Governor cannot treat Hawaiian Home Lands like other state lands because they "cannot serve purposes at odds with the trust purposes," but this limitation "was never intended to limit the police power of the State."[297] The court acknowledged that the HHCA was designed to "rehabilitate the indigenous Hawaiians by facilitating their access to farm and homestead lands."[298] In reading the limitation in section 206 with this purpose in mind, the court concluded that "[t]he exercise of the State's inherent police power does not necessarily conflict with the responsibility to manage and dispose of these trust lands."[299] Although acknowledging that the "HHCA does not

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[293] *Id.* at 106, 137 P.3d at 1012.

[294] *Id.* The court also addressed the State's alternative argument that Hawai'i Revised Statutes section 674-17 was a "statute of repose" prohibiting the plaintiffs' claims filed in court after the *notice filing deadline* of October 1, 1999. The court's determination, however, that the plaintiffs had met the "Panel review and action by the legislature" prerequisites of Hawai'i Revised Statutes section 674-17(b) negated the defendants' argument. *Id.* at 106-07, 137 P.3d at 1012-13.

[295] *Id.* at 107, 137 P.3d at 1013.

[296] 80 Haw. 168, 171-72, 907 P.2d 754, 757-58 (1995).

[297] *Id.* at 171, 907 P.2d at 757.

[298] *Id.* (quoting Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216 (9th Cir. 1978)).

[299] *Id.*

expressly authorize the DHHL or any other entity to execute the laws on Hawaiian [H]ome [L]ands,"[300] the court concluded that the State has legislative authority with respect to Hawaiian Home Lands, even though Congress retains certain rights to alter, amend, or repeal the HHCA.[301]

In *Kepo'o v. Watson*, the Hawai'i Supreme Court considered whether Hawai'i's environmental impact statement (EIS) law[302] requirements apply to Hawaiian Home Lands.[303] In answering this question, the court determined that: Hawaiian Home Lands constitute "state lands"; the HHCA, although originally enacted by Congress, is a part of the Hawai'i Constitution so that federal preemption was not an issue; and, most importantly, Hawai'i's environmental protection law does not conflict with the HHCA.[304] Addressing the argument that the EIS law conflicts with the HHCA, the court stated that "police power regulations apply to Hawaiian [H]ome [L]ands, and executive officials may enforce them, as long as these regulations do not significantly affect the land."[305] The court reasoned that as an environmental law, the EIS requirement was also a police power regulation not significantly affecting the land, but instead involved "procedural and informational requirements" with only incidental effects on the land.[306] The court distinguished the incidental effects of the EIS statute from other laws, such as executive orders removing lands from the trust or county zoning ordinances that restrict DHHL in the use of trust land.[307] Accordingly, the EIS statute does not "affirmatively require DHHL to use the land for any particular purposes."[308] The court believed that the EIS law merely imposed a procedural requirement that ultimately served the best interest of trust beneficiaries.[309]

The Moon Court's decisions on the Hawaiian Home Lands trust have demonstrated a true regard for the rights of beneficiaries. The court in *Aged*

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[300] *Id.*

[301] *Id.* at 172, 907 P.2d at 758.

[302] HAW. REV. STAT. ch. 343 (1993).

[303] 87 Haw. 91, 95, 952 P.2d 379, 383 (1998).

[304] *Id.* at 98, 952 P.2d at 386.

[305] *Id.* at 99, 952 P.2d at 387 (citing State v. Jim, 80 Haw. 168, 907 P.2d 754 (1995)). The court also discussed Attorney General Opinion No. 95-05, which had concluded that state and federal endangered species laws imposing civil and criminal penalties apply to Hawaiian Home Lands. *Id.* In footnote 9, the court noted that the "Attorney General's opinions are highly instructive but are not binding upon this court. Thus, although we find the particular opinions cited in this decision to be persuasive in relation to the present case, we are not *required* to follow them." *Id.* at 99 n.9, 952 P.2d at 387 n.9 (emphasis in original).

[306] *Id.*

[307] *Id.* at 101-02, 952 P.2d at 389-90.

[308] *Id.* at 101, 952 P.2d at 389.

[309] *Id.* at 100, 952 P.2d at 388.

Hawaiians[310] and *Bush v. Watson*[311] recognized that beneficiaries on the waiting list have a "property interest" protectable under due process, held the State to the specific terms of the HHCA, and insured that beneficiary voices were heard. Similarly, in *State v. Jim*[312] and *Kepo'o v. Watson*,[313] the court struck a balance that showed a concern for beneficiaries but was also entirely consistent with the federal delegation to the State of responsibility for implementing the HHCA. In *Kalima*,[314] a unanimous decision authored by Chief Justice Moon, the court gave full meaning to the terms of a law that was originally meant to resolve long-standing trust breaches.[315] Instead of reading the act narrowly to preclude claims and protect the State from potentially high damages claims, the court recognized the remedial purpose of the law and the fact that the claimant beneficiaries had done everything possible to perfect their claims. In relation to the Hawaiian Home Lands trust, the Moon Court has continued on the path of justice, Ke Ala Pono, first charted by Chief Justice William S. Richardson, holding the State to the highest standards in dealing with trust beneficiaries.

V. THE PUBLIC LAND TRUST[316]

Prior to 1978, the State had interpreted section 5(f) of the Admission Act[317] to require only that the proceeds and income from trust lands be used for the fulfillment of any *one* of the five trust purposes; trust proceeds were primarily directed toward public education.[318] At the 1978 Constitutional Convention, however, the Hawaiian Affairs Committee sought to clarify and implement the Admission Act's trust language as it relates to Native Hawaiians.[319] As a result, three new sections were added to the constitution, fundamentally altering the State's role in implementing section 5(f)'s trust language.

Article XII, section 4 of the Hawai'i Constitution specified that the lands granted to the State by section 5(b) of the Admission Act, with the exception of

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[310] Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Haw. 192, 891 P.2d 279 (1995).

[311] 81 Haw. 474, 918 P.2d 1130 (1996).

[312] 80 Haw. 168, 907 P.2d 754 (1995).

[313] 87 Haw. 91, 952 P.2d 379 (1998).

[314] Kalima v. State, 111 Haw. 84, 137 P.3d 990 (2006).

[315] *Id.* at 98-101, 137 P.3d at 1004-07.

[316] Some text in this section has previously appeared in other publications, including MacKenzie, *The Lum Court*, *supra* note 4, and Melody Kapilialoha MacKenzie, *The Ceded Lands Trust*, *in* HANDBOOK, *supra* note 13, at 26.

[317] Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, 5-6.

[318] LEGISLATIVE AUDITOR, FINAL REPORT ON THE PUBLIC LAND TRUST, AUDIT REPORT NO. 86-17, at 14 (Dec. 1986).

[319] *See generally* HAWAIIAN AFFAIRS COMM. REP. NO. 59 *and* COMM. OF THE WHOLE REPORT NO. 13, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 643, 1017 (1980).

Hawaiian Home Lands, were to be held by the State as a public trust for two beneficiaries: Native Hawaiians[320] and the general public.[321] Another section established the Office of Hawaiian Affairs (OHA), to be governed by a nine-member board of trustees and to hold assets in trust for Native Hawaiians and Hawaiians.[322] A final section ensured that OHA's trust assets would include a pro rata portion of the income and proceeds from lands identified in article XII, section 4.[323]

A. Public Land Trust Revenues

Native Hawaiians have not been successful, either legislatively or through the courts, in gaining a consistent and unambiguous answer to what constitutes a pro rata share of the public land trust revenues. Although the 1978 constitutional amendments provide that OHA should receive a pro rata share of the income and proceeds from the trust, the Hawai'i Supreme Court has thus far declined to judicially protect that right, instead relying on the legislative

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[320] The Constitutional Convention structured the Office of Hawaiian Affairs (OHA) as the entity to receive and administer a share of the public land trust funds designated in section 5(f) for the betterment of the conditions of Native Hawaiians, as defined in the HHCA. *See id.* The HHCA defines Native Hawaiians as those of not less than half aboriginal Hawaiian ancestry. Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 201(a), 42 Stat. 108, 108 (1921). The OHA amendment names two beneficiaries of the OHA trust—Native Hawaiians (those with fifty percent or more Hawaiian ancestry) and Hawaiians (those with any quantum of Hawaiian ancestry). HAW. CONST. art. XII, § 5; HAW. REV. STAT. § 10-2 (2009). OHA's public land trust funds have largely been utilized to benefit the Native Hawaiian community as a whole. *See* Day v. Apoliona, 616 F.3d 918, 924-25 (9th Cir. 2010) (determining that *federal law* does not require the OHA trustees to use section 5(f) trust funds solely for the benefit of Native Hawaiians of fifty percent or more Hawaiian ancestry; those funds can be utilized for any of the five trust purposes). Moreover, the *Day v. Apoliona* court held that the OHA trustees have broad discretion to decide how to serve those purposes. *Id.* at 926-27.

[321] HAW. CONST. art. XII, § 4 provides:

> PUBLIC TRUST. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

[322] *Id.* art. XII, § 5.

[323] *Id.* art. XII, § 6 provides, in part:

> The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, *including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians* . . . .

(Emphasis added).

process to resolve these difficult questions.[324] This may be an indication of the Moon Court's concern for the potential impact on the state treasury as well as its willingness to defer to the legislative branch. Even in these decisions, however, the Moon Court consistently emphasized that the State's obligation to Native Hawaiians is firmly rooted in the Hawai'i Constitution.

Soon after OHA's creation in 1978, the 1980 State Legislature set OHA's share of the public land trust proceeds and income at twenty percent.[325] Even after that enactment, however, disputes over the classification of specific parcels of land as ceded or non-ceded, questions as to whether section 5(f) contemplates gross or net income, and problems in defining "proceeds" plagued the State and hampered OHA's efforts to provide benefits to the Native Hawaiian community.[326] In 1983 and 1984, the OHA trustees filed two suits, seeking clarification of the law setting OHA's pro rata share at twenty percent.[327] In 1987, the Hawai'i Supreme Court in *Trustees of the Office of Hawaiian Affairs v. Yamasaki* dismissed OHA's claims based on the political question doctrine, finding the issues "'to be of a peculiarly political nature and therefore not meet for judicial determination.'"[328]

In 1990, OHA and the State reached a settlement of the trust revenue dispute, eventually embodied in Act 304,[329] defining both the trust res and trust revenues. Act 304 segregated revenue from trust lands into two categories—sovereign and proprietary revenue.[330] Act 304 defined sovereign revenue, which was not subject to the OHA trust provision, as the revenue generated as an exercise of governmental or sovereign power.[331] The sovereign revenue category included personal and corporate income taxes, general excise taxes, fines collected for violations of state law, and federal grants or subsidies.[332] Proprietary revenue, which was subject to the OHA trust provision, was

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[324] See *infra* discussion of *Office of Hawaiian Affairs v. State* (*OHA I*), 96 Haw. 388, 31 P.3d 901 (2001), *Office of Hawaiian Affairs v. State* (*OHA II*), 110 Haw. 338, 133 P.3d 767 (2006), and *Office of Hawaiian Affairs v. Hawaii State Legislature*, No. 30535, 2010 Haw. LEXIS 184 (Aug. 18, 2010).

[325] Act of June 16, 1980, No. 273, 1980 Haw. Sess. Laws 525 (codified as amended at HAW. REV. STAT. § 10-13.5 (2009)).

[326] *See* LEGISLATIVE AUDITOR, *supra* note 318, at 109 (indicating that if one category of disputed lands had been included in the trust, revenues to OHA would have increased by $1.7 million a year).

[327] Trs. of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 165-166, 737 P.2d 446, 453 (1987). The court consolidated the two cases for hearing and disposition. *Id.* at 167, 737 P.2d at 454.

[328] *Id.* at 175, 737 P.2d at 458 (quoting Colegrove v. Green, 328 U.S. 549, 552 (1946)).

[329] Act of July 3, 1990, No. 304, 1990 Haw. Sess. Laws 947.

[330] *Id.* § 3, 1990 Haw. Sess. Laws at 948-49.

[331] *Id.*

[332] *Id.*

defined as the income generated from the use or disposition of the public trust lands.[333] Included in this category were rents, leases, and licenses for the use of trust lands, minerals, and runway landing fees.[334] In addition, Act 304 defined revenue as those generated by activities from "the actual use" of trust lands.[335]

Although Act 304 appeared to settle many of the OHA entitlement issues, not all issues had been resolved.[336] OHA returned to state court in 1994 seeking an accounting and restitution of a pro rata portion of disputed public land trust revenues.[337] The disputed revenues included lease payments from Honolulu International Airport's duty-free concession agreements, including payments based on receipts from the Waikīkī duty-free store (DFS), and other proceeds and rents.[338] On a motion for partial summary judgment, the circuit court found in favor of OHA and denied the State's motion to dismiss the action.[339] The State appealed.

While the case was on appeal to the Hawai'i Supreme Court, Congress passed the 1998 "Forgiveness Act," waiving repayment of past diversions from airport revenues made for the betterment of Native Hawaiians and forbidding any further payments.[340] The Forgiveness Act specifically stated that nothing in its terms should be construed to affect trust obligations or state statutes defining the obligations to Native Hawaiians.[341]

In the 2001 case, *Office of Hawaiian Affairs v. State* (*OHA I*), the Hawai'i Supreme Court first determined that Act 304 required that airport revenues, including concessionaire rent and fees, be paid to OHA.[342] The court examined the plain language of Act 304's definition of revenue as including rents derived from any lease resulting from the actual use of trust lands.[343] The court

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[333] *Id.*

[334] *Id.* § 3, 1990 Haw. Sess. Laws at 949.

[335] *Id.*

[336] Paragraph 7 of the agreement between OHA and the Office of State Planning (OSP), which represented the State in the negotiations, acknowledges that the settled amount "does not include several matters regarding revenue which OHA has asserted is due to OHA and which OSP has not accepted or agreed to." Memorandum of Understanding at 9 (April 28, 1993) (on file with author).

[337] Office of Hawaiian Affairs v. State (*OHA I*), 96 Haw. 388, 392, 31 P.3d 901, 905 (2001).

[338] OHA sought its pro rata share of revenues from "(1) Waikiki Duty Free receipts (in connection with the lease of ceded lands at the Honolulu International Airport); (2) Hilo Hospital patient services receipts; (3) receipts from the Hawai'i Housing Authority and the Housing Finance and Development Corporation for projects situated on ceded lands; and (4) interest earned on withheld revenues." *Id.*

[339] *Id.* at 388, 31 P.3d at 901.

[340] Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, § 340(b)-(c), 111 Stat. 1425, 1448 (1998).

[341] *Id.* § 340(d), 111 Stat. at 1449.

[342] *OHA I*, 96 Haw. at 395, 31 P.3d at 908.

[343] *Id.*

carefully analyzed the agreement between DFS and the State, concluding that the rent paid was for the "actual use" of the airport premises.[344]

Having found in OHA's favor on the major underlying claim, the court then considered whether there was a conflict between the Forgiveness Act's prohibition *against* payment from airport revenues and Act 304's requirement that airport revenues be paid to OHA.[345] OHA argued that the savings clause in the Forgiveness Act required the State to pay the airport revenue from another fund.[346] The savings clause stated, "Nothing in this Act shall be construed to affect any . . . statute . . . that define[s] the obligations of [the State] to . . . Native Hawaiians . . . in connection with ceded lands, except to make clear that airport revenues may not be used to satisfy such obligations."[347] The court rejected OHA's argument, concluding that "the savings clause provides that state statutes shall not be interfered with, except where those statutes provide for payment of airport revenues to satisfy the State's obligations. Because Act 304 obligates the State to pay airport revenues to OHA in this case, the savings clause cannot 'save' Act 304."[348]

OHA also pointed to state law providing OHA trustees with the power to "manage, invest, and administer . . . all income" received by the office equivalent to that pro rata portion[349] derived from the ceded lands and another provision that contained similar language[350] to argue that the State had the ability to pay OHA "equivalent" amounts.[351] The court made short shrift of this argument, concluding that an express and clear statement by the Legislature was required—a statement not found in Act 304 or its legislative history—to "appropriate" funds from other sources to OHA.[352]

Act 304 contained a non-severability clause, stating that any provision held to be in conflict with federal law would invalidate the entire act.[353] The non-severability clause also provided that if Act 304 was invalidated, the immediately preceding version of state law on OHA's entitlement would be reinstated.[354] The court held that Act 304 was invalid, and the prior state law, a law already found to have no judicially discoverable and manageable standards

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[344] *Id.*

[345] *Id.* at 397, 31 P.3d at 910.

[346] *Id.*

[347] *Id.* (citing Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, § 340, 111 Stat. 1425, 1448 (1998)).

[348] *Id.*

[349] HAW. REV. STAT. § 10-5(1) (1993).

[350] Hawai'i Revised Statutes section 10-13(b), as amended by Act 304, also used similar "equivalent to" language and was cited in *OHA I*, 96 Haw. at 394, 31 P.3d at 907.

[351] *OHA I*, 96 Haw. at 398, 31 P.3d at 911.

[352] *Id.* at 398-99, 31 P.3d at 911-12.

[353] Act of July 3, 1990, No. 304, § 16, 1990 Haw. Sess. Laws 947, 953.

[354] *Id.*

in the 1987 *Yamasaki* case, was automatically reinstated.[355] The court then determined that the case presented a non-justiciable political question.[356]

Although it invalidated Act 304, the court acknowledged that the State's obligation to Native Hawaiians is firmly established in the state constitution, stating that "it is incumbent upon the legislature to enact legislation that gives effect to the rights of native Hawaiians to benefit from the ceded lands trust."[357]

In 2003, OHA again brought suit, contending that Act 304 constituted a contract between the State and OHA that the State had breached.[358] OHA also argued that the State breached its fiduciary duties by not challenging the Federal Aviation Administration memorandum leading to the passage of the Forgiveness Act and invalidation of Act 304, and by failing to inform OHA of these relevant facts.[359] In *Office of Hawaiian Affairs v. State* (*OHA II*), the Hawai'i Supreme Court held that there was no language in Act 304 evidencing a legislative intent to create a contract.[360]

In reviewing OHA's claim that the State had breached its trust duty to deal impartially with beneficiaries and to inform them of its decisions regarding actions in response to the federal government's position on airport revenues, the court found that under the proper circumstances, OHA could have brought the breach of trust claims[361] under Hawai'i Revised Statutes chapter 673, which waives the State's sovereign immunity for such claims.[362] The court

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[355] *OHA I*, 96 Haw. at 399, 31 P.3d at 912.

[356] *Id.* at 401, 31 P.3d at 914.

[357] *Id.* Immediately after the Hawai'i Supreme Court's decision, the State stopped all trust land revenue payments to OHA. *See* Debra Barayuga, *OHA Sues to Resume Land Revenues*, HONOLULU STAR-BULLETIN, July 22, 2003, *available at* http://archives.starbulletin.com/2003/07/22/news/story5.html. Soon after Governor Linda Lingle took office in 2003, she issued an executive order restoring trust land revenue payments to OHA. Executive Order 03-03 (February 11, 2003) (on file with author). The 2003 Hawai'i State Legislature appropriated funds for back payments to OHA for the revenue that was discontinued after the *OHA I* decision. Act of April 23, 2003, No. 34, 2003 Haw. Sess. Laws 46.

[358] Office of Hawaiian Affairs v. State (*OHA II*), 110 Haw. 338, 346-47, 133 P.3d 767, 775-76 (2006).

[359] *Id.* at 355, 133 P.3d at 784.

[360] *Id.* at 354, 133 P.3d at 783.

[361] *Id.* at 356, 133 P.3d at 785.

[362] HAW. REV. STAT. § 673-1 (1993) provides:

(a) The State waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions from its agents, officers or employees in the management and disposition of trust funds and resources of:

. . .

(2) the native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act;

And shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for punitive damages.

determined, however, that OHA failed to follow the notice requirements of the law.[363] The court also rejected OHA's argument that the two-year statute of limitations did not apply.[364] The court found that OHA did not fall within the law's exception for state entities since, under Hawai'i law, OHA is entitled to sue, and did in fact sue in OHA's corporate capacity, *not* as a state entity.[365]

Although finding OHA's breach of trust claims barred, the court reiterated its earlier call in *OHA I* for the Legislature to implement the trust provisions of the Hawai'i Constitution. Indeed, the court quoted from U.S. Senator Daniel Inouye's speech during Senate floor debates on the Federal Forgiveness Act:

> The airports continue to sit on ceded lands, the State's obligation to compensate OHA for the use of the land upon which the airports sit should also continue . . . . In light of the unique history of Hawaii's ceded lands and the obligations that flow from these lands for the betterment of the Native Hawaiian people, I believe that this is more than a fiscal matter, this is a fiduciary matter—one of trust and obligation . . . .[366]

In June 2010, in an original action in the Hawai'i Supreme Court, OHA asked the Hawai'i Supreme Court to require the 2011 Legislature to clarify the amount of past due "ceded lands" funding that should be transferred to OHA.[367] Two months later, the Hawai'i Supreme Court denied the request,[368] stating that OHA had failed to demonstrate that it had "a clear and indisputable right" to relief.[369] To have that right to relief, OHA would have had to establish that the Legislature's action on the issue would be "ministerial" in nature; in other words, the law prescribing the Legislature's duty would have had to set forth the duty "with such precision and certainty as to leave nothing to the exercise of discretion or judgment."[370]

The State contended that Hawai'i Revised Statutes section 673-9, which provides that chapter 673 "shall not apply to suits in equity or law brought by or on behalf of [OHA] in which the matters in controversy involve the proportionate share of ceded land or special fund revenues allocated to [OHA] by the legislature," barred OHA's suit. *OHA II*, 110 Haw. at 358, 133 P.3d at 787. The Moon Court held, however, that the action did not involve the proportionate share of OHA's revenues, since that amount had been set by the Legislature. *Id.* The court determined that the "damages resulting [are] from the State's breach of trust duties and do not require a determination of OHA's proportionate share of revenues." *Id.*

[363] *OHA II*, 110 Haw. at 358-59, 133 P.3d at 787-88.

[364] *Id.*

[365] *Id.* at 359-60, 133 P.3d at 788-89.

[366] *Id.* at 366, 133 P.3d at 795.

[367] Petition for Writ of Mandamus, Office of Hawaiian Affairs v. Haw. State Legislature, No. 30535 (June 2, 2010) (on file with author).

[368] Office of Hawaiian Affairs v. Haw. State Legislature, No. 30535, 2010 Haw. LEXIS 184, at *1 (Aug. 18, 2010).

[369] *Id.*

[370] *Id.* at *2.

In 2006, the Legislature set the interim revenue to be transferred to OHA from the public land trust as $15.1 million annually beginning with the 2005-06 fiscal year and authorizing a one-time payment of $17.5 million for prior underpayments.[371] OHA continues to receive only $15.1 million per year in lieu of the twenty percent pro rata share established by earlier law.[372] Nevertheless, in a positive development and after several failed attempts, in 2012 all claims for back revenue, from the date of OHA's establishment in 1978 through June 30, 2012, were settled through the State's conveyance of 10 parcels of mostly waterfront property in Kaka'ako, Honolulu, to OHA.[373] Thus, in the area of trust revenues, the Moon Court's unambiguous recognition of the State's constitutional responsibilities combined with its deferral to the legislative branch have begun to yield substantial benefit to OHA and its beneficiaries.

B. Moratorium on the Alienation of the Public Land Trust[374]

The contours of the State's fiduciary responsibility in relation to the public land trust or "ceded" lands have not been well defined by the state or federal courts. The Hawai'i Supreme Court, however, was given the opportunity to more clearly delineate the trust duties in a 2008 case, *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i (HCDCH I)*.[375] In this landmark decision addressing Hawai'i's contested relationship with the United States, the significance of 'āina to the Native Hawaiian people, and the meaning of apology and reconciliation, the Moon Court placed a moratorium on the sale or transfer of trust lands until the Native Hawaiian community's unrelinquished claims to those lands could be resolved.

The case began in 1994, when the Housing Finance and Development Corporation (HFDC),[376] a state-created corporation established to ensure low-

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[371] Act of June 7, 2006, No. 178, 2006 Haw. Sess. Laws 702. Act 178 also contained a disclaimer clause stating, "[n]othing in this Act shall resolve or settle, or be deemed to acknowledge the existence of, the claims of native Hawaiians to the income and proceeds" of a pro rata portion of the public land trust. *Id.* § 7.

[372] *Id.* § 2.

[373] The settlement is embodied in Act of April 11, 2012, No. 15, 2012 Haw. Sess. Laws 24.

[374] An earlier version of some of the material in this section can be found in an article written by 2008 William S. Richardson School of Law graduate Moanikeala Crowell Colon entitled *Ho'oholo Imua—Towards Reconciliation?* in KA HE'E (Summer 2008) and is used with permission. The article is available at http://www2.hawaii.edu/~nhlawctr/article5-4.htm (last visited Mar. 3, 2011).

[375] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*HCDCH I*), 117 Haw. 174, 177 P.3d 884 (2008).

[376] *Id.* at 187, 177 P.3d at 897 (noting that the original agency involved in the action was the Housing Finance and Development Corporation (HFDC)). In 1997, the Legislature

income housing development, was in the process of transferring two parcels of trust lands—one at La'i 'Ōpua on Hawai'i island and another at Leiali'i on Maui—to private developers for residential housing.[377] Transfers of trust lands had occurred before, but this was the first proposed transfer after Congress' passage of the 1993 Apology Resolution[378] and similar state legislation recognizing the Hawaiian community's potential claims to the trust lands.[379]

In the Apology Resolution, Congress apologized to the Native Hawaiian people for the overthrow of the Kingdom of Hawai'i with the participation of agents and citizens of the United States and expressed its "commitment to acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people."[380] Congress specifically recognized that the Government, Crown, and public lands of Hawai'i were taken without the consent of or compensation to the Native Hawaiian people or their sovereign government and that "the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States."[381]

Based on the state legislation and the Apology Resolution, in 1994 OHA and four individual plaintiffs sued the HFDC board members and state officials to stop the transfer of the lands.[382] In *HCDCH I*, the plaintiffs sought to enjoin the State from alienating the two parcels or any lands from the trust.[383] Alternatively, the plaintiffs sought a declaration that transferring or selling trust lands would not limit future claims by Native Hawaiians to the lands.[384]

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consolidated HFDC and the Hawai'i Housing Authority into the Housing and Community Development Corporation of Hawai'i (HCDCH); in 2006, the Legislature divided HCDCH into two separate agencies. *HCDCH I*, 117 Haw. at 187-88 n.9, 177 P.3d at 897-98 n.9. Since this action commenced before these legislative changes, the court used the designation HFDC throughout its opinion and this article will follow the same convention. *See id.*

[377] *Id.* at 187-88, 177 P.3d at 897-98 (discussing the history of the parcels). The La'i 'Ōpua parcel was subsequently transferred to the Department of Hawaiian Home Lands. *Id.* at 181 n.4, 177 P.3d at 891 n.4. *See also* Andrew Gomes, *Liliuokalani Trust Objects to Big Isle Housing Project*, HONOLULU STAR-ADVERTISER, Nov. 5, 2010, *available at* http://www.staradvertiser.com/business/businessnews/20101105_Liliuokalani_trust_objects_to_Big_Isle_housing_project.html.

[378] Apology Resolution, *supra* note 1, Pub. L. No. 103-150, 107 Stat. 1510.

[379] *See infra* text accompanying notes 429-30.

[380] Apology Resolution, *supra* note 1, § 1(4), 107 Stat. at 1513.

[381] *Id.* "whereas" cl. 29, 107 Stat. at 1512.

[382] The OHA plaintiffs filed a complaint in the First Circuit Court on November 4, 1994, and the individual plaintiffs filed a complaint in the Second Circuit Court on November 9, 1994. *HCDCH I*, 117 Haw. at 188 n.12, 177 P.3d at 898 n.12. When the First Amended Complaint was filed in August 1995, the individual plaintiffs and their claims were added to those of the OHA plaintiffs in the First Circuit action. *Id.*

[383] *Id.* at 188, 177 P.3d at 898.

[384] *Id.* at 181, 177 P.3d at 891.

In 2002, the trial court issued a lengthy opinion determining that the plaintiffs' claims were barred by a number of jurisdictional and other defenses, including sovereign immunity, waiver and estoppel, and justiciability considerations—specifically, political question, ripeness, and the mandate against advisory opinions.[385] The trial court also concluded that the State had the express authority to alienate trust lands.[386]

OHA argued, among other things, that the State could not alienate trust lands because of its trust responsibilities to the Native Hawaiian people and its duty to address and resolve their pending claims.[387] In his 2008 unanimous decision, Chief Justice Ronald T.Y. Moon gave substance to the State's commitment to reconciliation with the Native Hawaiian community by prohibiting the State from alienating trust lands until the claims of the Native Hawaiian people to those lands had been resolved.[388]

As in other cases involving Native Hawaiian claims, the Hawai'i Supreme Court first addressed a number of procedural and jurisdictional issues. The court first reviewed the State's contention that, based on a memorandum opinion issued in a 1998 case, *Ewa Marina*,[389] the plaintiffs were collaterally estopped from re-litigating the issue of the State's power to alienate ceded lands from the trust. In *Ewa Marina*, a case in which OHA was a party, the court indicated that the State had the authority to sell ceded lands if such a sale promoted a valid public purpose and the revenues generated were used for the trust purposes set forth in section 5(f) of the Admission Act.[390] The parties in *Ewa Marina*, however, had not raised or briefed the issue of the sale of ceded lands because the case dealt with the grant of a Conservation District Use Area (CDUA) permit.[391] The Hawai'i Supreme Court noted that the issue in the *Ewa Marina* case was not identical to the issue raised in *HCDCH I*.[392] Moreover, whether an injunction should be issued was not essential to the final judgment in *Ewa Marina* because there, the court only needed to determine whether the State had violated its fiduciary duties by issuing the CDUA.[393]

The court then addressed the contention that the plaintiffs' claims relating to the Leiali'i parcel were barred by sovereign immunity because title to the parcel had already been transferred to HFDC and, under applicable law, was no longer

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[385] *Id.* at 189, 177 P.3d at 899.

[386] *Id.*

[387] *Id.* at 188, 177 P.3d at 898.

[388] *Id.*

[389] Trs. of Office of Hawaiian Affairs v. Bd. of Land & Natural Res. (*Ewa Marina*), No. 19774, 87 Haw. 471, 959 P.2d 841 (Mar. 12, 1998).

[390] *HCDCH I*, 117 Haw. at 196, 177 P.3d at 906.

[391] *Id.*

[392] *Id.*

[393] *Id.* at 197, 177 P.3d at 907.

public land.[394] Thus, the State argued, it would have to expend funds to return the parcel to the trust; moreover, HFDC had already spent $31 million improving the parcel.[395] Citing the *Pele Defense Fund v. Paty* case, the court stated that it had adopted a rule that makes an important distinction between prospective and retrospective relief:

> *If the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state's sovereign immunity. This is true even though accompanied by a substantial ancillary effect on the state treasury.* However, relief that is tantamount to an award of damages for a past violation of law, even though styled as something else, is barred by sovereign immunity.[396]

The court reviewed cases where it determined that sovereign immunity barred a particular claim as well as those in which sovereign immunity was not a bar because the effect on the state treasury, if any, would be "ancillary."[397] Applying those cases to the plaintiffs' claims related to the Leiali'i parcel, the court recognized that the $31 million HFDC had spent developing infrastructure on the property was significant.[398] Nevertheless, the court believed that sovereign immunity was not a bar to the plaintiffs' claims because the benefit of those improvements would inure to the State and the plaintiffs were not asking that the $31 million be returned to them, or even to the State.[399] Thus, the court characterized the effect on the state treasury as substantial but "ancillary."[400]

The court next turned to the doctrines of waiver and estoppel in relation to the Leiali'i parcel. The circuit court had determined that OHA and the individual plaintiffs had waived their right to contest the land sale because of their actions and inactions between 1987, when HFDC first proposed use of the Leiali'i parcel for low-income housing development, and 1994, when the plaintiffs filed suit.[401] The Hawai'i Supreme Court determined, however, that the plaintiffs, although aware of the potential sale of the parcel since at least 1989, did not have knowledge of the United States' admissions and the full extent of the Native Hawaiian claim to the ceded lands until the adoption of the Apology Resolution and related state legislation in 1993.[402] Since a waiver

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394 *Id.*

395 *Id.*

396 *Id.* at 198, 177 P.3d at 908 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 608-10, 837 P.2d 1247, 1266 (1995) (emphasis in original) (citations, ellipses, footnotes, and internal quotation marks omitted)).

397 *Id.* at 198-99, 177 P.3d at 908-09.

398 *Id.* at 200, 177 P.3d at 910.

399 *Id.*

400 *Id.*

401 *Id.*

402 *Id.* at 202, 177 P.3d at 912.

requires a knowing or intentional relinquishment of a right or claim, the court determined that the plaintiffs had not waived their right to seek an injunction on the sale of the Leiali'i parcel.[403] Similarly, in addressing whether the plaintiffs were estopped from seeking an injunction because they had failed to object to the sale earlier and, in OHA's case, had undertaken negotiations for OHA's pro rata share of revenue from the sale, the court found it significant that "equitable estoppel requires proof that one person willfully caused another person to erroneously believe a certain state of things, and that person reasonably relied on this erroneous belief to his or her detriment."[404] Here, the court concluded, it was not until the Apology Resolution was signed into law that the plaintiffs' claims "regarding the State's explicit fiduciary duty to preserve the corpus" of the trust arose and thus, it was not until that time that the plaintiffs' claims could have been actionable.[405]

The court then disposed of several important jurisdictional issues related to the ceded lands in general, as opposed to the Leiali'i parcel in particular. The circuit court had determined that sovereign immunity barred the plaintiffs' injunction request because the State had not consented to be sued "in a lawsuit contesting the validity of its title to the ceded lands."[406] In addition, the circuit court had examined the effect of the plaintiffs' claim for relief, characterizing it as "depriving the State of control over public lands . . . [which] is the 'functional equivalent of a quiet title action,' . . . barred by sovereign immunity."[407] The Hawai'i Supreme Court, however, saw a distinction between an action asking the court to transfer the lands to the plaintiffs' possession, which is clearly analogous to a quiet title action, and this case, in which the plaintiffs sought an injunction barring the "future alienation" of trust lands until their unrelinquished claims could be resolved.[408] As such, the court concluded that the plaintiffs' claims were prospective in nature and not barred by sovereign immunity.[409]

The court then turned to the State's contention that the claim was not "ripe." The court examined the two prongs of the ripeness doctrine, which it characterized as "peculiarly" a matter of timing:[410] (1) whether the issue is fit for judicial resolution because the issue is primarily legal, needs no further

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[403] *Id.*

[404] *Id.* at 203, 177 P.3d at 913 (quoting Potter v. Haw. Newspaper Agency, 89 Haw. 411, 419, 974 P.2d 51, 59 (1999)).

[405] *Id.*

[406] *Id.* at 204, 177 P.3d at 914.

[407] *Id.*

[408] *Id.* at 206, 177 P.3d at 916.

[409] *Id.*

[410] *Id.*

factual development, and involves a final agency action; and (2) the potential hardship to the plaintiffs if the court does not act.[411]

The court concluded that the plaintiffs' request for an injunction was ripe for adjudication.[412] In addressing the first prong, the court noted that the plaintiffs were not seeking a determination as to whether Native Hawaiians are entitled to ownership of the lands, but merely "a determination [on] whether an injunction is appropriate to allow for a resolution of their claims without further diminishment of the trust res."[413] In the court's view, there was "no doubt that the issuance of an injunction involves a legal question."[414] Moreover, the court indicated, the record demonstrated that there was no need for further factual development.[415] With regard to the Leiali'i parcel, the parcel had been transferred to HFDC so a final agency action had been taken.[416] "[A]lthough 'final agency action' with regard to the ceded lands in general ha[d] yet to be taken," the court found that the very nature of the plaintiffs' requested relief dictated that a judicial decision regarding an injunction was appropriate.[417] Regarding the second prong, the potential hardship to the plaintiffs, the court emphasized that "[o]nce the ceded lands are alienated from the public lands trust, they [would] be lost forever" and would not be "available to satisfy the unrelinquished claims of [N]ative Hawaiians."[418] The court concluded that "the loss of the land itself entails a much greater injury 'than possible financial loss.'"[419]

In rejecting the State's contention that the case presented a non-justiciable political question, the court distinguished the underlying claim for return of the ceded lands with the plaintiffs' request for an injunction to preserve the lands until a political resolution could be reached.[420] The court stressed that the plaintiffs did not seek a judicial resolution of the underlying claim for the lands, but instead asked for protection of trust assets while the political branches resolved the dispute.[421] The court concluded that "[t]his modest goal is well within the domain of the judiciary[.]"[422]

On the merits, the court's decision was grounded in its interpretation of the 1993 Apology Resolution, as well as Hawai'i laws recognizing the claims of

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411 *Id.* at 207, 177 P.3d at 917.
412 *Id.* at 209, 177 P.3d at 919.
413 *Id.* at 208, 177 P.3d at 918.
414 *Id.*
415 *Id.*
416 *Id.*
417 *Id.*
418 *Id.*
419 *Id.*
420 *Id.*
421 *Id.*
422 *Id.* at 210, 177 P.3d at 920.

the Native Hawaiian people to the lands. The court rejected the State's position that the Apology Resolution was a mere policy statement, declaring that the Apology Resolution had the force of law because it resulted from legislative deliberations.[423] The court concluded that while the Apology Resolution did not require that trust lands be transferred to the Native Hawaiian people, it did recognize their unrelinquished claims to the lands.[424]

Moreover, the court reasoned, the Apology Resolution and analogous state legislation implicated the State's fiduciary duty to preserve the trust lands until the claims of the Native Hawaiian community are resolved.[425] Relying on its earlier explication of the State's trust duties in *Ahuna v. Department of Hawaiian Home Lands*[426] and *Pele Defense Fund v. Paty*,[427] the court stated that "[s]uch 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.'"[428]

Although the court relied on the Apology Resolution for its factual determinations, the court separately grounded its decision in Hawai'i law. The court specifically pointed to Acts 354 and 359, both passed in 1993, in which the State Legislature recognized that "the indigenous people of Hawai'i were denied . . . their lands" and made other findings similar to those of the Apology Resolution.[429] The court also found support for its decision in a 1997 law, Act 329, designed to clarify the proper management of lands in the public land trust, and another 1993 law, Act 340, requiring that the island of Kaho'olawe be held in trust and transferred to a sovereign Native Hawaiian entity in the future.[430]

The court summed up:

> In this case, Congress, the Hawai'i state legislature, the parties, and the trial court all recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and (4) once any ceded lands are alienated from the public land trust, they will be gone forever.[431]

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[423] *Id.* at 191, 177 P.3d at 901.

[424] *Id.* at 192, 177 P.3d at 902.

[425] *Id.* at 210, 177 P.3d at 920.

[426] 64 Haw. 327, 640 P.2d 1161 (1982).

[427] 73 Haw. 578, 837 P.2d 1247 (1992).

[428] *HCDCH I*, 117 Haw. at 195, 177 P.3d at 905 (quoting *Ahuna*, 64 Haw. at 339, 640 P.2d at 1169).

[429] *Id.* at 193-94, 177 P.3d at 903-04 (quoting Act of July 1, 1993, No. 359, § 1(9), 1993 Haw. Sess. Laws 1009, 1010).

[430] *Id.* at 194, 177 P.3d at 904.

[431] *Id.* at 213, 177 P.3d at 923.

The court then turned to whether a permanent injunction should be issued, stating, "without an injunction, any ceded lands alienated from the public lands trust will be lost and will not be available for the future reconciliation efforts."[432] Significantly, the court recognized that money reparations in lieu of the lands themselves would not be an adequate remedy because of the inextricable bond between the Native Hawaiian people and the land or 'āina.[433]

Ultimately, the court found that the plaintiffs had met all the requirements for an injunction "pending final resolution of native Hawaiian claims through the political process."[434] The court sent the case back to the trial court with instructions to issue an order granting an injunction prohibiting the defendants from selling or otherwise transferring the specific lands involved and any other lands from the public land trust until the claims of Native Hawaiians to the trust lands have been resolved.[435]

The State sought review by the U.S. Supreme Court, arguing that the Hawai'i court's decision cast a cloud on the State's title to the trust lands and contravened both the 1898 Joint Resolution of Annexation and the 1959 Admission Act.[436] In *Hawaii v. Office of Hawaiian Affairs*, the United States Supreme Court, in a unanimous 2009 opinion, reversed and remanded.[437] The Court first determined that a federal question existed, pointing out that the

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[432] *Id.* at 214, 177 P.3d at 924.

[433] *Id.* The court stated, "Although an argument could be made that monetary reparations would be the logical remedy for such loss, we are keenly aware—as was Congress—that 'the health and well-being of the native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.'" *Id.* (citation omitted and emphasis removed).

[434] *Id.* at 218, 177 P.3d at 928.

[435] *Id.*

[436] Initially, the State's petition for certiorari contended that the Apology Resolution was merely an expression of policy and that by construing the federal government's apology "to impair Hawaii's sovereign prerogatives, the Hawaii Supreme Court badly misconstrued congressional intent and raised grave federalism concerns." Petition for Writ of Certiorari at 3, Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009) (No. 07-1372), 2008 WL 1934869 at *3. Subsequently, in briefing on the merits, the State argued, among other things:

> The [Hawai'i Supreme C]ourt enjoined any sales of the ceded lands on the theory that title might actually belong not to the State, but to "the Native Hawaiian people." But that legal theory runs headlong into the Newlands Resolution, which vests absolute and unreviewable title in the United States; the Organic Act of 1900, which confirms the extinguishment of any Native Hawaiian or other claims to the ceded lands; and the Admission Act of 1959, which transfers to the State the same absolute title previously held by the United States. This body of federal law forecloses any competing claims to the ceded lands, such as those respondents present here. It similarly bars any judicial remedy that, like this injunction, is premised on the possible validity of such competing claims.

Brief for Petitioner at 19, Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009) (No. 07-1372), 2008 WL 5150171 at *19.

[437] 129 S. Ct. 1436, 1445 (2009).

Hawai'i court's opinion was replete with language that linked its reasoning and judgment to the Apology Resolution, thus making it impossible to deny "that the decision below rested on federal law."[438]

Next, the Court turned to the Apology Resolution's two substantive provisions and examined their effect on Hawai'i's command over public trust land transfers. In the first provision, contained in section one, Congress "acknowledges the historical significance" of the overthrow's centennial, "recognizes and commends" reconciliatory efforts, "apologizes to Native Hawaiians" for their loss of independence, "expresses its commitment to acknowledge the ramifications of the overthrow," and "urges the President of the United States" to do the same.[439] According to the Court, this was a mere declaration of political sentiment;[440] the "conciliatory or precatory" language was not language that "Congress uses to create substantive rights—especially those that are enforceable against the co-sovereign States."[441]

Similarly, the Court found the second substantive provision, contained in section three of the resolution, to be without any force.[442] This provision declares that nothing in the Resolution is "intended to serve as a settlement of any claims against the United States."[443] The Hawai'i Supreme Court characterized the section as a "congressional recognition—and preservation—of claims *against Hawaii*."[444] Under this interpretation, the provision was believed to serve as the basis for reconciliation and the eventual initiation of a settlement process with Native Hawaiians.[445] The U.S. Supreme Court rejected this reasoning, finding "no justification for turning an express disclaimer of claims against one sovereign into an affirmative recognition of claims against another."[446]

In addition to these two provisions, the Apology Resolution opens with thirty-seven "whereas" clauses, and the U.S. Supreme Court took issue with the Hawai'i court's conclusion that these clauses demonstrated Congress' acknowledgement of the continuity of Native Hawaiian claims to the trust lands.[447] The U.S. Supreme Court believed that the clauses could not "bear the weight that the lower court placed on them."[448] They had no "operative effect," and in the absence of such, "a court has no license to make [clauses] do what

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[438] *Id.* at 1443.

[439] Apology Resolution, *supra* note 1, § 1, 107 Stat. at 1513.

[440] *Hawaii*, 129 S. Ct. at 1443-44.

[441] *Id.* at 1443.

[442] *Id.* at 1443-44.

[443] Apology Resolution, *supra* note 1, § 3, 107 Stat. at 1514.

[444] *Hawaii*, 129 S. Ct. at 1444 (emphasis in original).

[445] *See id.*

[446] *Id.*

[447] *See HCDCH I*, 117 Haw. 174, 191, 177 P.3d 884, 901 (2008).

[448] *Hawaii*, 129 S. Ct. at 1444.

[they were] not designed to do."[449] Second, the clauses did not alter any of the State's rights and obligations.[450] Any legislative intent to do so would need to be "clear and manifest," and the Resolution lacked any indication "that Congress intended to amend or repeal . . . rights and obligations" that the State acquired under the Admission Act.[451] Finally, the Court had misgivings about retroactively "clouding" the State's title to land it purportedly acquired in absolute fee in 1959.[452] Doing so "would raise grave constitutional concerns," and the Court was unwilling to extend that much influence to the "whereas" clauses.[453]

The U.S. Supreme Court's decision faulted the Hawai'i Supreme Court for its interpretation of the Apology Resolution,[454] but standing alone, the ruling did not lift the moratorium on trust land transfers. Although the Apology Resolution did not ultimately bring any enforceable means for redress, the Hawai'i Supreme Court also rested its opinion on state law, which arguably could be enough to preserve the injunction. Thus, the U.S. Supreme Court remanded the case, acknowledging that it lacked "authority to decide questions of Hawaiian law."[455]

In May 2009, OHA, three of the individual plaintiffs, and the State reached an agreement to dismiss the lawsuit without prejudice, contingent on the enactment of proposed legislation.[456] Eventually signed into law that year as Act 176,[457] the legislation requires a two-thirds approval by the Legislature for the sale or gift of public trust and other lands.[458] Land exchanges continue to require a two-thirds disapproval of either house or majority disapproval by the entire Legislature.[459] In addition, Act 176 calls for specific details on any sale, gift, or exchange of public trust land to be set forth in a resolution with notice to OHA as well as the Legislature.[460]

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[449] *Id.*

[450] *Id.*

[451] *Id.* at 1445.

[452] *Id.*

[453] *Id.*

[454] *Id.* at 1444-45.

[455] *Id.* at 1445.

[456] Settlement Agreement, *HCDCH I*, 117 Haw. 174, 177 P.3d 884 (2008) (on file with author).

[457] Act 176's legislative history is available at http://www.capitol.hawaii.gov/session2009/lists/measure_indiv.aspx?billtype=SB&billnumber=1677 (last visited Mar. 15, 2011).

[458] Act of July 13, 2009, No. 176, § 2, 2009 Haw. Sess. Laws 705, 706-07.

[459] *Id.* § 3.

[460] *Id.* § 2 (codified at HAW. REV. STAT. § 171-64.7) (Supp. 2010)), § 3 (codified at HAW. REV. STAT. § 171-50(c) (Supp. 2010)). In 2011, Act 176 was amended to require State agencies to specify whether a parcel they propose to alienate is part of the public land trust. Act of June 27, 2011, No. 169, § 1, 2011 Haw. Sess. Laws 579, 579-80.

Although Act 176 set up a procedure allowing the State to transfer trust lands, it also created a barrier to adjudication for the only plaintiff who did not settle with the State. In *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i (HCDCH II)*,[461] Jonathan Kay Kamakawiwo'ole Osorio continued to pursue his appeal after remand from the U.S. Supreme Court.[462] Although the Hawai'i Supreme Court could no longer rely on the Apology Resolution, the court in *HCDCH I* had also cited specific state laws as support for the moratorium.[463]

On July 15, 2009, two days after Act 176 became law, the State moved to dismiss Osorio's claims.[464] The State argued that Osorio lacked standing, that the case was not yet ripe for adjudication, and that Osorio sought an advisory opinion.[465] The Hawai'i Supreme Court ruled that Osorio had standing to sue but that Act 176 rendered his claims no longer ripe for adjudication.[466]

Osorio was able to establish his right to sue based on his status as a member of the general public and his rights as a Hawaiian.[467] Section 5(f) of the Admission Act names the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act, as one of the trust purposes.[468] Since the HHCA definition of "Native Hawaiian" is tied to a fifty percent Hawaiian ancestry requirement, the State argued that Osorio, who is Native Hawaiian but not an eligible beneficiary under the HHCA definition, was not a beneficiary of the section 5(f) trust.[469] Therefore, according to the State, Osorio could not bring a claim on behalf of Native Hawaiians or allege an injury in fact for a duty owed to Native Hawaiians.[470]

The court rejected this argument, holding that Osorio could bring a claim as a member of the general public.[471] The court explained that article XII, section

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[461] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*HCDCH II*), 121 Haw. 324, 219 P.3d 1111 (2009).

[462] *Id.*

[463] *Id.* at 328, 219 P.3d at 1115.

[464] *Id.*

[465] *Id.* at 326, 219 P.3d at 1113.

[466] *Id.* at 339, 219 P.3d at 1126. Having found that that the case was not ripe, the court did not consider the advisory opinion issue. *Id.* at 339 n.13, 219 P.3d at 1126 n.13.

[467] *Id.* at 335, 219 P.3d at 1122.

[468] *Id.* at 329, 219 P.3d at 1116.

[469] *Id.*

[470] *Id.*

[471] *Id.* at 332, 219 P.3d at 1119. The State also seemed to argue that since Osorio stated that he was Hawaiian, rather than Native Hawaiian, and he claimed that his rights as a Hawaiian were "separate and distinct from those of the general public," he could not bring a claim "under article XII, section 7 [sic] as a member of the general public." *Id.* at 333, 219 P.3d at 1120. The court, however, was not convinced, asserting that the State "mischaracterize[d] Osorio's position," *id.*, and that it would be "absurd and contrary to this court's rules of constitutional interpretation" to hold that Hawaiians, who are not specifically delineated as beneficiaries in

4[472] of the Hawai'i Constitution states that both Native Hawaiians[473] *and* the general public are beneficiaries of trust lands.[474] Following an earlier case on standing,[475] the court held that Osorio had established standing as a member of the general public by showing that he suffered an injury in fact and that "a multiplicity of suits may be avoided by allowing [him] to sue to enforce the State's compliance with [section] 5(f) trust provisions."[476] Osorio's injury in fact derived from his status as a member of the general public and trust beneficiary with a "particular and threatened injury" based on his Hawaiian cultural and religious connection to the land.[477] Additionally, Osorio showed that his cultural injuries were traceable to the State's actions in alienating public trust lands; once the lands were "alienated from the public lands trust . . . [they would] be lost forever."[478] Furthermore, the court concluded that an injunction would be favorable to Osorio and provide relief to him as a member of the general public.[479]

Consistent with prior decisions lowering standing barriers in cases of public interest, the court also determined that a multiplicity of suits could be avoided by allowing Osorio to sue to enforce compliance with the section 5(f) trust provisions.[480] Quoting *Pele Defense Fund v. Paty*, the court acknowledged that "unless members of the public [(like Osorio, who happens to be Hawaiian)] and [N]ative Hawaiians, as beneficiaries of the trust, have standing, the State would

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section 7 [sic], cannot sue for breach of trust. *Id.* at 335, 219 P.3d at 1122. Osorio's status as a Hawaiian and having special rights as a Hawaiian did not exclude him from also being considered as a member of the general public "for the purposes of bringing suit under article XII, section 7 [sic]." *Id.* (emphasis omitted).

[472] Although the court referred to article XII, section 7 of the state constitution, it actually quotes from article XII, section 4.

[473] Previous case law had already established that Native Hawaiians as defined in the HHCA have a right to sue to enforce the § 5(f) trust provision. *HCDCH II*, 121 Haw. at 332, 219 P.3d at 1119 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 592 n.8, 837 P.2d 1247, 1257 n.8 (1992) ("The [United States Court of Appeals for the] Ninth Circuit has consistently held that native Hawaiians and native Hawaiian groups have standing to bring claims to enforce the trust provisions of the Admission Act."); Price v. Hawaii, 939 F.2d 702, 706 (9th Cir. 1991) ("[P]ersons in the position of these appellants do have standing to challenge the use of section 5(f) lands."); Price v. Akaka, 928 F.2d 824, 826 (9th Cir. 1990) (stating that Native Hawaiians can make allegations sufficient to show that there is an injury in fact even though legitimate section 5(f) uses might not necessarily benefit Native Hawaiians)).

[474] *HCDCH II*, 121 Haw. at 333, 219 P.3d at 1120.

[475] Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982).

[476] *HCDCH II*, 121 Haw. at 335, 219 P.3d at 1122.

[477] *Id.* at 334, 219 P.3d at 1121.

[478] *Id.*

[479] *Id.* at 333, 219 P.3d at 1120.

[480] *Id.* at 335, 219 P.3d at 1122 (citing Pele Def. Fund v. Paty, 73 Haw. 578, 594, 837 P.2d 1247, 1258 (1992)).

be free to dispose of the trust res without the citizens of the State having any recourse."[481]

The court, however, determined that Osorio's claims were not ripe; that is, based on a controversy that is concrete and needs no further factual development.[482] After discussing at length the process established by Act 176,[483] the court concluded that since no land sale had been approved, "it would be appropriate to first allow the legislature to exercise the power reserved to it in Act 176 before this court determines whether such exercise of power is or is not a violation of the State's fiduciary duties."[484]

The Moon Court's public land trust decisions may appear confusing—the court decided the OHA revenue cases against Native Hawaiian interests, but only *after* determining in *OHA I* that OHA was clearly entitled to a share of revenues from airport concessionaires operating on trust lands. As suggested earlier, these decisions may have had more to do with concerns about the state treasury and deference to the legislative branch than Native Hawaiian rights. Moreover, in the revenue cases, the court explicitly pointed to the state constitutional mandate and the responsibility of the Legislature to give meaning to that mandate.[485]

Chief Justice Moon's unanimous *HCDCH I* opinion, a remarkable decision, demonstrated a deep understanding of Hawai'i's history and culture, and the importance of the trust lands to the Native Hawaiian community. Even though the U.S. Supreme Court repudiated the Hawai'i court's reliance on the Apology Resolution, *HCDCH I* was also grounded in Hawai'i trust law and, as indicated in *HCDCH II*, has continuing viability. Moreover, *HCDCH II* recognized that a Native Hawaiian member of the general public who does not meet the HHCA blood quantum limitation nevertheless suffers actual harm through the alienation of trust lands. In the *HCDCH* decisions, the Moon Court, relying on Chief Justice Richardson's *Ahuna* case and Associate Justice Klein's *Pele Defense Fund* decision, walked farther on the path of justice than any other Hawai'i court.

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[481] *Id.* (quoting *Pele Def. Fund*, 73 Haw. at 594, 837 P.2d at 1258).

[482] Citing its decision in *HCDCH I*, the court explained that for ripeness, "the court must look at the facts as they exist today in evaluating whether the controversy before us is sufficiently concrete to warrant our intervention." *Id.* at 336, 219 P.3d at 1123.

[483] *Id.* at 337-38, 219 P.3d at 1124-25.

[484] *Id.* at 339, 219 P.3d at 1126. The court thus dismissed the case without prejudice. *Id.*

[485] Office of Hawaiian Affairs v. State (*OHA I*), 96 Haw. 388, 400, 31 P.3d 901, 913 (2001); Office of Hawaiian Affairs v. State (*OHA II*), 110 Haw. 338, 366, 133 P.3d 767, 795 (2006). Indeed, the Legislature's 2012 action to settle the issue of back revenues due OHA indicates that the Legislature took the Moon Court's admonition to heart. *See* Act of April 11, 2012, No. 15, 2012 Haw. Sess. Laws 24.

VI. CONCLUSION

Chief Justice Moon's seventeen-year tenure on the Hawai'i Supreme Court has had a lasting impact on Native Hawaiians. The Moon Court opened the doors of the judiciary to the Native Hawaiian people and gave recognition to the historical claims of the Native Hawaiian community to lands, natural and cultural resources, and ultimately, sovereignty. The major decisions authored by Chief Justice Moon in the last five years of his tenure—*Kalima*, *HCDCH I*, *HCDCH II*, and *Kaleikini*—show a strong and growing recognition of the role the courts play in bringing about reconciliation and healing in society. The Moon Court walked the path of justice, Ke Ala Pono, and set a solid course toward reconciliation.

Controversies over trust lands, natural and cultural resources, and sovereignty will continue to challenge the people of Hawai'i in the coming years, and Hawai'i's courts will be called upon to address those controversies. To reconcile Hawai'i's past with its future, to bring about balance, harmony and aloha, and to hold us together as a community, the Hawai'i Supreme Court must continue to travel the path of justice.

Courts in the "Age of Reconciliation": *Office of Hawaiian Affairs v. HCDCH*

Eric K. Yamamoto* and Sara D. Ayabe**

I. THE OVERVIEW

To heal the persisting wounds of historic injustice,[1] governments, communities, and civil and human rights groups throughout the world are shaping redress initiatives around some form of reconciliation. Many of the initiatives are salutary.[2] All are fraught with challenges.

In Asia, Japan reluctantly faces continuing demands from victims of its World War II military atrocities.[3] Following the abolition of racial apartheid in South Africa, in order to rebuild the country, the new government-centered Truth and Reconciliation Commission pursued reconciliation between those perpetrating human rights violations and those badly harmed—a formal process

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We appreciate Troy Andrade's valuable assistance in reviewing the section on Native Hawaiian history. We are indebted to Susan Serrano for her insightful research and incisive analysis in co-authoring with Professor Yamamoto an amicus brief to the U.S. Supreme Court in the OHA case. We have drawn upon that brief in crafting this article.

[1] Eric K. Yamamoto & Ashley Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to Native Hawaiian-United States and Indigenous Ainu-Japan Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5 (2009).

[2] There are two prominent recent precursors to contemporary redress efforts. In Europe, German, French, and Swiss banks paid reparations to Holocaust survivors and their heirs for misappropriating assets of Jewish bank account holders during World War II. HOLOCAUST RESTITUTION (Michael Bazyler & Rodger P. Alford eds., 2006). In the United States, the President apologized to Japanese Americans wrongfully incarcerated during World War II, and Congress conferred $20,000 in individual reparations and established a program of public education. ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2d ed. forthcoming) (manuscript on file with authors) [hereinafter YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION].

[3] As recently as September 13, 2010, Japanese Foreign Minister Katsuya Okada apologized to former U.S. prisoners of war for their mistreatment and abuse at the hands of the Imperial Army during World War II. *See* Masami Ito, *Okada Apologizes for U.S. POWs' Treatment*, THE JAPAN TIMES, Sept. 14, 2010, *available at* http://search.japantimes.co.jp/cgi-bin/nn20100914a3.html; Kristl K. Ishikane, *Korean Sex Slaves' Unfinished Journey for Justice: Reparations from the Japanese Government for the Institutionalized Enslavement and Mass Military Rapes of Korean Women During World War II*, 29 U. HAW. L. REV. 123 (2005).

of truth-telling, confessions, amnesty and reparation.[4] Timor Leste's Parliament organized a similar commission[5] to address the atrocities by Indonesian soldiers during Indonesia's twenty-year occupation of East Timor,[6] with a focus on the sexual violence against East Timor women.[7] Indeed, in this "Age of Reconciliation,"[8] initiatives proliferate across the globe. Formal reconciliation projects mark the landscape in Peru,[9] Colombia,[10] Chile,[11] El Salvador,[12] Argentina,[13] Rwanda,[14] Cambodia,[15] and Sierra Leone.[16] And on

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[4] *See generally* Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155 (2004); Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. MEM. L. REV. 367 (2003); Marianne Geula, *South Africa's Truth Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57 (2000); Tama Koss, Comment, *South Africa's Truth and Reconciliation Commission: A Model For the Future*, 14 FLA. J. INT'L L. 517 (2002); Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63 (1997); Eric K. Yamamoto & Susan K. Serrano, *Healing Racial Wounds? The Final Report of South Africa's Truth and Reconciliation Commission, in* WHEN SORRY ISN'T ENOUGH 492 (Roy Brooks ed., 1998); Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 4 (1997).

[5] The Commission is known as the Commission for Reception, Truth and Reconciliation in Timor-Leste or CAVR (the Portuguese acronym). *Post-CAVR Technical Secretariat*, CAVR, www.cavr-timorleste.org/en/index.htm (last visited Feb. 22, 2011).

[6] For a discussion of the reconciliation process in Timor Leste, formerly known as East Timor, see generally Cheah Wui Ling, *Forgiveness and Punishment in Post-Conflict Timor*, 10 UCLA J. INT'L L. & FOREIGN AFF. 297 (2005).

[7] *See* Galuh Wandita et al., *Learning to Engender Reparations in Timor-Leste: Reaching out to Female Victims, in* WHAT HAPPENED TO THE WOMEN?: GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS 284 (Ruth Rubio-Marín ed., 2006).

[8] Yamamoto & Obrey, *supra* note 1, at 32.

[9] *See generally* Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development*, 10 YALE HUM. RTS. & DEV. L.J. 141 (2007); Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51 (2007).

[10] In 2006, Colombia's National Commission for Reparation and Reconciliation (CNRR) issued its Mission Statement explaining the goal of "healing the wounds" against the unique challenges of carrying out "a policy of truth, justice, and reparation in the middle of the conflict." National Commission for Reparation and Reconciliation—CNRR, Mission Statement (2006), *available at* http://www.cnrr.org.co/contenido/09i/spip.php?article7.

[11] Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile, in* THE HANDBOOK OF REPARATIONS 55, 56 (Pablo De Greiff ed., 2006).

[12] Alexander Segovia, *The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Noncompliance, in* THE HANDBOOK OF REPARATIONS, *supra* note 11, at 154, 156.

[13] Nunca Más (Never Again): Report of CONADEP (National Commission on the Disappearance of Persons) — 1984, *available at* http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm.

[14] Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L.

foreign terrain, micro- or community-based reconciliation processes are gaining traction.[17]

In the United States, too, the federal and state governments, as well as various private organizations, are organizing reparatory justice efforts in a variety of settings—efforts that extend beyond singular payments of monetary compensation. African Americans are pursuing reparatory justice for slavery and Jim Crow segregation through lawsuits and lobbying state and local governments.[18] Mexican Americans filed a class action lawsuit and are now seeking legislative reparations and an apology from several states and the federal government for their coercive "deportation" of thousands of Mexican Americans and legal resident Mexican immigrants during the Great Depression in order to open jobs for white workers.[19] Japanese Latin Americans—abducted by the United States during World War II and held hostage in U.S. internment camps as bargaining chips with Japan—advocate for the same Presidential apology and reparations payments received by former Japanese

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239, 251 (2008).

[15] David Cohen, *"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future*, 43 STAN. J. INT'L L. 1, 27 (2007).

[16] *Id.* at 11. For a discussion of other reconciliation initiatives, see PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS (2011) (documenting forty truth commissions in operation from 1974 to 2009).

[17] Following the Indonesian occupation of East Timor, the government's Commission for Reception, Truth and Reconciliation established separate "Community Reconciliation Procedures" to enable villages to handle non-serious criminal and civil disputes. Patrick Burgess, *Community Reconciliation in East Timor: A Personal Perspective*, *in* PATHWAYS TO RECONCILIATION—BETWEEN THEORY AND PRACTICE 139, 143 (Philips Rothfield et al. eds., 2008). A presiding panel from a village comprised of local leaders from churches, women's groups, youth committees, and other groups heard testimony and, according to reconciliation principles, shaped acknowledgements and apologies and facilitated agreements on reparations payments and community service. *Id.* at 144. The community reconciliation process filled a vacuum, "providing the only contact with any process of justice for most people." *Id.* at 147.

[18] *See generally* Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (2006); Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45 (2004); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003); Charles J. Ogletree, Jr., *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEM. L. REV. 245 (2003); Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13 (2004); Robert Westley, *Many Billions Gone: Is It Time to Reconsider The Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998).

[19] Eric L. Ray, *Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations*, 37 U. MIAMI INTER-AM. L. REV. 171, 171 (2005); Wendy Koch, *U.S. Urged to Apologize for 1930s Deportations*, USA TODAY, Apr. 4, 2006, *available at* http://www.usatoday.com/news/nation/2006-04-04-1930s-deportees-cover_x.htm.

American internees.[20] Filipino World War II veterans who fought for the United States are seeking promised veterans' benefits some sixty-five years later.[21] Native Hawaiians[22] and Native Americans—two indigenous groups displaced from homelands, stripped of political power, and partially robbed of cultural identity—seek to reclaim land, restore self-governance, and rebuild culture through reconciliation initiatives with federal and state governments.[23] Private organizations are also engaged. The United Church of Christ Hawai'i Conference and its national counterpart undertook a multi-faceted four-year reconciliation process with Native Hawaiian churches and the larger Native Hawaiian community for the denomination's participation in the overthrow of the Hawaiian nation 100 years earlier.[24]

The stakes are high, both for those experiencing persisting harms and for society itself.[25] The wounds of injustice persist over time.[26]

> First, the harms of serious discrimination and violence are not isolated abstract ideas but are found in people's "lived experiences," grounded in their "everyday lives." Second, those experiences are not only "very painful and stressful in the immediate situation . . . but also have a cumulative impact on particular individuals, their families, and their communities." The harms of injustice are

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[20] *See* Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard For International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 B.C. L. REV. 275 (1998); Eric K. Yamamoto, *Reluctant Redress: The United States' Kidnapping and Internment of Japanese Latin Americans*, *in* MARTHA MINOW, BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 132, 136 (Nancy L. Rosenblum ed., 2003).

[21] *Filipino-American WWII Vets Seek Equal Benefits*, SF GATE, Feb. 21, 2011, *available at* http://articles.sfgate.com/2011-02-21/news/28617677_1_filipino-american-veterans-filipino-soldiers-speier; Oliver Teves, *Philippine WWII Veterans Seek Equality From US*, USA TODAY, Sept. 24, 2008, *available at* http://www.usatoday.com/news/world/2008-09-24-1315739951_x.htm.

[22] In this article, the term "Native Hawaiian" refers to "all persons descended from the Polynesians who lived in the Hawaiian Islands when Captain James Cook arrived in 1778." *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 1 n.1 (2008). The term "Kānaka Maoli" is also used to describe the indigenous people of Hawai'i. *See id.*

[23] *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); William C. Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002-2003); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS J. 47 (2008).

[24] ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 61-71, 214-35 (1999) [hereinafter YAMAMOTO, INTERRACIAL JUSTICE].

[25] *See* JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE 16 (1994) (describing findings on the ways deeply embedded discrimination generates economic and psychological harms that carry across generations).

[26] Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 40 (2007).

"stored not only in individual memories but also in family stories and group recollections" over time.[27]

Indeed, experiences of injustice shape people's life perspectives. Those experiences "generate a picture of a fundamentally unjust society, where hard work and achieved status are inadequate protection against those with power and privilege."[28]

Efforts to heal injustice present numerous challenges. Both domestically and internationally, reconciliation initiatives encounter stubborn obstacles: political opposition, economic recession, government foot-dragging, and internal group dissension.[29] Aggrieved people criticize government apologies when reparatory action fails to follow words of contrition. Aborigines' anger at Australia's refusal to consider reparations after the government's apology to the "stolen generations" of children is but one example.[30] Indigenous peoples' frustration at Canada's delayed implementation of its reconciliation initiative to redress the forced assimilation of aboriginal children in abusive white residential schools is another.[31] Even reconciliation efforts that steadily progress face major hurdles.[32]

More specifically, and the focal point of this article: After a lengthy process that generates a multiparty reconciliation initiative, what happens when a government's unilateral action on key aspects of the initiative threatens to

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[27] *Id.* at 40 (quoting FEAGIN & SIKES, *supra* note 25, at 15-16). Professor Jonathan Osorio describes the historic injustice to Native Hawaiians as "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." JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 3 (2002).

[28] Yamamoto, Kim & Holden, *supra* note 26, at 40.

[29] *See generally* Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008); Eric K. Yamamoto & Brian Mackintosh, *Redress and the Salience of Economic Justice*, OXFORD FORUM ON PUBLIC POLICY, no. 4 (2010).

[30] *See* Tim Johnston, *Australia Apologizing to Aborigines*, N.Y. TIMES, Nov. 3, 2008, *available at* http://www.nytimes.com/2008/02/13/world/asia/13iht-13aborigine-copy.9995732.html. For a discussion of Australia's halting reconciliation initiative with its indigenous population, see Barbara Ann Hocking & Margaret Stephenson, *Why the Persistent Absence of a Foundational Principle?: Indigenous Australians, Proprietary and Family Reparations*, *in* REPARATIONS FOR INDIGENOUS PEOPLES 477, 477-522 (Federico Lenzerini ed., 2008).

[31] *See* Bradford W. Morse, *Indigenous Peoples of Canada and Their Efforts to Achieve True Reparations*, *in* REPARATIONS FOR INDIGENOUS PEOPLES, *supra* note 30, at 271, 275-76. *See also* Jennifer J. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 27 U. TORONTO L.J. 253 (2002).

[32] *See* Yamamoto & Mackintosh, *supra* note 29 (describing progress and obstacles in Peru's and South Africa's reconciliation initiatives).

undermine the government's reconciliation commitment? Is that simply political reality? Or might courts of law enforce the underpinnings of that commitment? Put another way: Is reconciliation merely new-age talk with no legal effect? Or when a legislature and an executive branch commit to reconciliation, will courts enforce key aspects of that commitment? The answer to the latter question is yes . . . under certain circumstances.

This is why Chief Justice Ronald Moon's[33] 2008 opinion in *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii* (*OHA v. HCDCH*)[34] is path-forging. That unanimous opinion[35] addresses what those circumstances might be and lays the groundwork for possible future enforcement of integral aspects of reconciliation commitments, including the State of Hawai'i's commitment to Native Hawaiians. In broader view, the pronouncements of the Hawai'i Supreme Court (the Court)[36] in *OHA v. HCDCH* underscore a government's—any government's—accountability for its public reconciliation promises.

Briefly stated, in *OHA v. HCDCH*, the State's high court cited the State's commitment to reconciliation with Native Hawaiians as a primary reason for imposing a freeze on the State's sale of former native lands now held in trust.[37] For the first time, a court in the United States imposed major legal consequences onto a government's reconciliation commitment.[38] In essence, the Hawai'i Supreme Court determined that the State cannot intone "reconciliation" to garner good graces and then, when politically convenient, undermine promised reparatory action. It identified the origins of the State's commitment—including the Hawai'i Constitution, multiple acts by the Hawai'i Legislature, and executive branch pronouncements—and cited these collective laws and pronouncements as a primary legal basis for enjoining the State's sale of trust lands until the State and Hawaiian peoples' representatives resolve Hawaiians' "unrelinquished claims" to those lands.[39] The Court's injunction

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[33] Chief Justice Moon served as Chief Justice of the Hawai'i Supreme Court from 1993 until he retired in August 2010. The current Chief Justice Mark Recktenwald succeeded Chief Justice Moon as head of the Hawai'i Supreme Court.

[34] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 177 P.3d 884 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).

[35] Justice Steven Levinson, Justice Paula Nakayama, Justice Simeon Acoba, and Circuit Court Judge Derrick Chan (in place of Justice James Duffy) joined in the opinion.

[36] This article's usage of "Court" with a capital "C" as a short-hand reference to the Hawai'i Supreme Court is meant to elevate the state high court and the path-forging significance of its ruling for local, national, and international audiences. The few references to the U.S. Supreme Court in this article are clearly designated as such.

[37] *See OHA*, 117 Haw. at 192, 177 P.3d at 902.

[38] Research on Lexis and Westlaw revealed no other federal or state court decision.

[39] *See infra* Part IV.B.2. This part of the article draws from Brief for Equal Justice Society

did not settle these political claims. Rather, it preserved the object at the heart of one of those claims for political negotiations.

The Hawai'i Supreme Court grounded its decision in state and federal law, citing both the 1993 Congressional Apology Resolution (Apology Resolution)[40] and related state legislation.[41] Although the U.S. Supreme Court later reversed and vacated the Hawai'i court's ruling because of its reliance on federal law,[42] the U.S. Supreme Court left open the question of whether there were adequate state law grounds to enforce the State's reconciliation commitment.[43] As intimated in Chief Justice Moon's opinion, and as we elaborate below, independent and adequate state law grounds do support the Hawai'i Supreme Court's initial ruling.[44] The State, through its three branches of government and its voting citizenry, acknowledged the historic injustice and committed the State to reparatory justice through reconciliation,[45] including political negotiations over the return of ceded lands. The U.S. Supreme Court's reversal, therefore, does not undercut the import of the Moon opinion: a state's own commitment to reconciliation to redress the persistent harms of injustice creates, in some situations, legally enforceable obligations.

This is why the Hawai'i Supreme Court's opinion in *OHA v. HCDCH* is broadly significant—the opinion provides a conceptual and legal framework for those involved in redress initiatives in Hawai'i, the continental United States, and beyond. This is especially important given the reconciliation concept's ubiquity, elasticity, and susceptibility to shifting political and economic forces.[46]

To assist in our assessment of the *OHA v. HCDCH* opinion, we draw upon an analytical approach to reconciliation initiatives. That approach, developed by Professor Yamamoto, is *Social Healing Through Justice*.[47] It identifies

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et al. as Amici Curiae Supporting Respondents, Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009) (No. 07-1372), 2009 WL 247667.

[40] 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) [hereinafter Apology Resolution].

[41] *See OHA*, 117 Haw. at 195, 177 P.3d at 905.

[42] Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).

[43] *Id.* at 1445.

[44] *See infra* Part IV.B.2.

[45] *See infra* Part IV.B.2.

[46] Yamamoto & Obrey, *supra* note 1, at 30-37.

[47] This approach first emerged in Professor Yamamoto's book on interracial justice, which focused in part on a multidisciplinary approach to redressing historic injustice. *See* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24. This framework was updated and refined in two subsequent articles. *See* Yamamoto, Kim & Holden, *supra* note 26; Yamamoto & Obrey, *supra* note 1. Other scholars have advanced theories of reparations. *See, e.g.*, TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION (Elazar Barkan & Alexander Karn eds., 2006);

social healing as the deeper aim of most redress efforts in established democracies,[48] links words of healing to reparatory acts, and elaborates upon both the substance and process of reconciliation. The approach engages a redress framework embracing the "Four Rs" of *Social Healing Through Justice*: *recognition*, *responsibility*, *reconstruction*, and *reparation*. These Four Rs offer guides for both shaping and later assessing reconciliation initiatives.[49]

For this shaping and assessing, historical context matters. To provide that context for Chief Justice Moon's *OHA v. HCDCH* opinion, Part II of this article briefly describes the historical background for the litigation and court ruling. Part III analyzes the opinion itself, highlights the Hawai'i Supreme Court's identification of the State's commitment to reconciliation with Native Hawaiians, and explains events following the Court's decision. With *Social Healing Through Justice* in mind, Part IV examines the broader impact of the decision for reparatory initiatives here and abroad.

II. THE SETTING

A. Hawai'i's Indigenous People[50]

The State's commitment to reconciliation is rooted in Native Hawaiians' special connection to Hawaiian lands.[51] After King Kamehameha unified the

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ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2006); ALFRED L. BROPHY, REPARATIONS PRO AND CON (2006); JOHN DAWSON, HEALING AMERICA'S WOUNDS (1994); NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION (1993); POLITICS AND THE PAST (John Torpey ed., 2003). *See also* AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000); Martha C. Nussbaum, Symposium, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997); Martha C. Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21 (2007). For a more detailed discussion of reparations theory and practice, see Yamamoto, Kim & Holden, *supra* note 26, at 15-39.

[48] Yamamoto & Obrey, *supra* note 1, at 27.

[49] *Id.* at 33.

[50] This section provides a brief overview of the historical events that generated the impetus for reconciliation with Native Hawaiians. For more complete discussions, see TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAI'I (1998); MICHAEL DOUGHERTY, TO STEAL A KINGDOM: PROBING HAWAIIAN HISTORY (1992); LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEĀ LA E PONO AI? (1992); OSORIO, *supra* note 27; NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004); and HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I (1999).

[51] Professor Lilikalā Kame'eleihiwa provided a succinct history of Native Hawaiians' special connection to the land to the Hawaii Advisory Committee to the U.S. Commission on Civil Rights:

From time immemorial, Native Hawaiians have had a special genealogical relationship to

islands, Native Hawaiians thrived on a unique communal land tenure system, a self-sustaining economy, a stable political order, and a sophisticated language, culture, and religion.[52] The Hawaiian principle of "caring for the land" organized and guided Hawaiian society.[53] At the time of English Captain Cook's contact with Hawai'i in 1778, the Native Hawaiian population flourished at around 800,000.[54]

Western contact triggered changes that permanently scarred this indigenous landscape. Foreign diseases decimated the Native Hawaiian population. Missionaries catalyzed the demise of traditional religion.[55] American businessmen pushed for the adoption of Western laws in ways that advanced their economic interests.[56] Internationally, Britain, France, and the United States valued Hawai'i for its strategic military locale.[57] King Kamehameha III addressed the threat of a foreign power takeover and the loss of Hawaiian land in part through the transformation of the Hawaiian Kingdom into a constitutional monarchy in 1840.[58]

> the Hawaiian islands. Born from the mating of Earth Mother Papa and Sky Father Wākea, we're the Hawaiian islands the Hawaiian people. That's the definition of native. We are from the land 100 generations ago. As such we have an ancient duty to love, cherish, and cultivate our beloved grandmother, the land. The study of stewardship is called mālama 'āina, where land is not for buying and selling, but for the privilege of living upon. And in the reciprocal relationship, when we Native Hawaiians care for and cultivate the land, she feeds and protects us.

Haw. Advisory Comm. to the U.S. Comm'n on Civil Rights, Reconciliation at a Crossroads: The Implications of the Apology Resolution and *Rice v. Cayetano* for Federal and State Programs Benefiting Native Hawaiians 27 (2001), *available at* http://www.usccr.gov/pubs/sac/hi0601/hawaii.pdf [hereinafter Hawaii Advisory Committee] (quoting Dr. Lilikalā Kame'elehiwa, Statement Before the Hawai'i Advisory Committee to the U.S. Commission on Civil Rights: The Impact of the Decision in *Rice v. Cayetano* on Entitlements 29-30 (Sept. 29, 2000) (transcript)).

[52] Apology Resolution, *supra* note 40, 107 Stat. 1510. For a discussion of the traditional land tenure system, see Melody K. MacKenzie, *Historical Background, in* NATIVE HAWAIIAN RIGHTS HANDBOOK 3, 3-6 (Melody K. MacKenzie ed., 1991) [hereinafter MacKenzie, *Historical Background*]; Davianna McGregor, *An Introduction to the Hoa'āina and Their Rights*, 1 HAWAIIAN J. HIST. 30 (1996); and VAN DYKE, *supra* note 22, at 11-18.

[53] *See generally* DAVIANNA POMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE (2007); *see also* Mililani B. Trask, *Historical and Contemporary Hawaiian-Self Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 78 (1991).

[54] *See* KAME'ELEIHIWA, *supra* note 50, at 20.

[55] *See* VAN DYKE, *supra* note 22, at 21-22.

[56] MacKenzie, *Historical Background*, *supra* note 52, at 5-6 (describing the transition from the traditional Hawaiian land tenure system to one based on Western concepts of property law); *see also* NOEL J. KENT, HAWAI'I: ISLANDS UNDER THE INFLUENCE (1993).

[57] VAN DYKE, *supra* note 22, at 30.

[58] *Id.*

The King agreed to laws that he believed would secure Native Hawaiian control over much of Hawai'i's land in the event of a foreign invasion.[59] The 1848 Māhele (division) began the conversion of Hawai'i's indigenous communal land tenure system to a Western fee simple system for the express purpose of creating indigenous Hawaiian land ownership.[60] Three classes of individuals were entitled to land awards: the Mō'ī (king), the Ali'i (chiefs) and the maka'āinana (native tenants).[61] Kamehameha III divided the land he received into two parts—one part he retained for himself, which later became the Crown Lands; the other part he set aside as Government Lands for the benefit of his Kingdom's people.[62] Despite Kamehameha III's reservations about foreign landowners, American and former American businessmen later pressured the King to allow Westerners to acquire fee title. For a variety of economic and political reasons, within fifty years of the Māhele, former American missionaries and American-related businesses gained control over most of Hawai'i's non-Crown and non-Government Lands.[63]

The calculated efforts of Westerners to control the Hawaiian Islands also permeated the political sphere. Businessmen pushed King Kalākaua and the U.S. Congress to execute the 1875 Reciprocity Treaty that gave the United States military control over Pearl Harbor in exchange for eliminating U.S. tariffs on Hawai'i sugar and pineapple.[64] The Hawaiian League, a group of non-Hawaiian businessmen, then pressured Kalākaua into signing what is now called the "Bayonet Constitution."[65] The new constitution transferred much of the King's authority to these businessmen and disenfranchised the Hawaiian people.[66] Upon succeeding to the throne, Queen Lili'uokalani planned to scuttle the new constitution and return control to the monarchy.[67]

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[59] *See* JON J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848, at 25 (1958) ("The king was deeply concerned over the hostile activities of the foreigners in the Islands. He did not want his lands to be considered public domain and subject to confiscation by a foreign power in the event of a conquest.").

[60] *See generally* KAME'ELEIHIWA, *supra* note 50 (describing the 1848 Māhele and the transformation of the communal land system to a privatized one). *See also* GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 126 (1974). The King consented to the original Māhele conditioned upon the exclusion of foreign land ownership. *Id.*

[61] *See* VAN DYKE, *supra* note 22, at 40.

[62] *See id.* at 50-51.

[63] *See* MacKenzie, *Historical Background*, *supra* note 52, at 9-10; KAME'ELEIHIWA, *supra* note 50, at 298-306; VAN DYKE, *supra* note 22, at 51.

[64] *See* DEP'T OF THE INTERIOR & DEP'T OF JUSTICE, REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS: FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY 23 (2000) (quoting H.R. EXEC. DOC. No. 1 at 39-41 (1894)).

[65] *See* OSORIO, *supra* note 27, at 238-41.

[66] *See id.* at 238-49; Trask, *supra* note 53, at 79; VAN DYKE, *supra* note 22, at 145-49.

[67] *See* VAN DYKE, *supra* note 22, at 151.

In 1893, however, backed by the U.S. military and diplomatic personnel, a small group of American and former American businessmen,[68] calling themselves the "Committee of Safety,"[69] overthrew the sovereign Hawaiian nation.[70] The ensuing provisional government established the Republic of Hawai'i in 1894, and the Republic claimed title to all Government and Crown Lands.[71] A contentious debate over U.S. annexation erupted. Then-U.S. President Grover Cleveland described the American-supported coup as "an Act of War" against an internationally-recognized sovereign and supported restoration of the Hawaiian nation.[72]

In 1896, newly-elected President William McKinley reversed course. As part of its colonial expansion in the Pacific in 1898, the United States annexed Hawai'i.[73] The annexation occurred "without the consent of or compensation to the indigenous people of Hawaii or their sovereign government who were thereby denied . . . their lands and ocean resources."[74] The Republic "ceded" the 1.75 million acres of former Government and Crown Lands to the United States.[75] Against the vehement protests of the former Queen and most of her constituents,[76] the United States acquired Hawai'i as a territory.

Sixty years of near-absolute Western control over Hawai'i's economy, politics, and social life ensued. The white "oligarchy,"[77] with support from Congress, the military, and presidential appointments, controlled the lands, the

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[68] COFFMAN, *supra* note 50; VAN DYKE, *supra* note 22, at 162.

[69] *See* DEP'T OF THE INTERIOR & DEP'T OF JUSTICE, *supra* note 64, at 26-27.

[70] *See, e.g.*, MacKenzie, *Historical Background*, *supra* note 52, at 10-12; VAN DYKE, *supra* note 22, at 151-71.

[71] MacKenzie, *Historical Background*, *supra* note 52, at 13. Queen Lili'uokalani was forced to abdicate her throne after the Republic of Hawai'i established itself. *Id.* While imprisoned in her own palace, the Queen lamented, "[i]t had not entered our hearts to believe that these friends and allies from the United States . . . would ever . . . seize our nation by the throat, and pass it over to an alien power." LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 368 (1898).

[72] GROVER CLEVELAND, PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. No. 47, at VI (1893).

[73] For a discussion of the historical events leading up to Hawai'i's annexation, see COFFMAN, *supra* note 50.

[74] 42 U.S.C. § 11701(11) (2006). The vehicle of a Joint Resolution was apparently an invalid means of annexation. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring a treaty and vote of Congress for annexation). Some therefore argue that Hawaiian sovereignty has never extinguished, and the United States is an occupying force. David Keanu Sai, The American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State (Dec. 2008) (unpublished Ph.D. dissertation, University of Hawai'i) (on file with authors).

[75] VAN DYKE, *supra* note 22, at 213.

[76] *See* SILVA, *supra* note 50, at 123-130.

[77] *See* FRANCINE DU PLESSIX GRAY, HAWAII: THE SUGAR-COATED FORTRESS (1972) (describing the oligarchy that controlled Hawai'i for the first half of the century).

economy, the ethnic make-up, and the politics of the islands.[78] The United States' colonization of Hawai'i tore at the fabric of Native Hawaiian life.[79] Indeed, by 1920, in creating the Hawaiian Homelands Program,[80] Congress designated Native Hawaiians "a dying race."[81]

The international trend toward decolonization[82] and the Democratic revolution in Hawai'i in the mid-20th century brought further change to the islands.

> The unionization of plantation and dockworkers and the return of Japanese Americans from World War II energized a growing Hawai'i Democratic Party. With an expanded Asian American political presence, the invigorated Democratic Party legislatively unseated the white Republican oligarchy that had controlled politics and the economy for sixty years. Democrats and Republicans, along with some Native Hawaiians, then pushed for statehood.[83]

The 1959 State Admission Act transferred a majority of ceded lands[84]—1.4 million acres of the 1.75 million acres—from the federal government to the State of Hawai'i in trust,[85] in part for "the betterment of the conditions of native Hawaiians."[86]

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[78] *See id.*

[79] *See generally* OSORIO, *supra* note 27. For statistics on Native Hawaiians' socio-economic status today, see Hawaii Advisory Committee, *supra* note 51, at 12-18.

[80] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921).

[81] H.R. REP. NO. 66-839, at 2 (1920).

[82] The U.N. Charter in 1945 brought the principles of "equal rights and self-determination of peoples" to the forefront of international discourse. U.N. Charter art. 1, para. 2. General Assembly Resolution 1514, voted in favor by eighty-nine states and none against in 1960, stressed that "[i]mmediate steps shall be taken, in . . . Non-Self-Governing Territories . . . to transfer all powers to the peoples of those territories . . . in accordance with their freely expressed will and desire . . . in order for them to enjoy complete independence and freedom." Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), ¶ 5, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 at 66 (Dec. 14, 1960). Hawai'i had been on the United Nations' list of colonized territories eligible for independence until statehood. Despite the United Nations' preference for non-self-governing territories becoming independent, the plebiscite denied Hawaiians the option of voting for independence.

[83] YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION, *supra* note 2; *see generally* LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY (1984); LAWRENCE H. FUCHS, HAWAII PONO: AN ETHNIC AND POLITICAL HISTORY (1997).

[84] Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

[85] VAN DYKE, *supra* note 22, at 257-58.

[86] Hawaii Admission Act, § 5(f), 73 Stat. at 5.

B. The Commitment to Reconciliation

From African American civil rights movements and indigenous peoples' human rights movements worldwide emerged a Hawaiian cultural renaissance and intense grassroots political organizing for the restoration of sovereignty and return of homelands. After years of education and agitation and with the support of key religious and political leaders,[87] the United States finally acknowledged the harms of American colonization. The extraordinary 1993 Apology Resolution[88] apologized for the United States' participation in the 1893 "illegal overthrow" [89] of the Hawaiian nation and committed the United States to reconciliation to repair the resulting devastation.[90]

In the Apology Resolution, Congress acknowledged that the Republic of Hawai'i ceded lands belonging to the Kingdom of Hawai'i "without the consent of or compensation to the Native Hawaiian people . . . or their sovereign government"[91] and that "the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States."[92] Congress further acknowledged that "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land."[93] Congress then expressed its "commitment to acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for *reconciliation* between the United States and the Native Hawaiian people."[94] Paralleling Congress' actions, the State of Hawai'i endorsed what amounted to a reconciliation initiative that spanned all three branches of government and its voting populace.[95]

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[87] President William Clinton signed the Apology Resolution into law in November 1993. Apology Resolution, *supra* note 40, 107 Stat. 1510.

[88] *Id.*

[89] *Id.* "whereas" cl. 19, 107 Stat. at 1512.

[90] *Id.* § 1, 107 Stat. at 1513.

[91] *Id.* "whereas" cl. 25, 107 Stat. at 1512.

[92] *Id.* "whereas" cl. 29, 107 Stat. at 1512.

[93] *Id.* "whereas" cl. 32, 107 Stat. at 1512.

[94] *Id.* § 1, 107 Stat. at 1513 (emphasis added).

[95] *See infra* Parts III.A, IV.B.2.a.

C. The Litigation[96]

In 1994, the Housing Finance and Development Corporation (HFDC) and the State initiated the transfer of two parcels of ceded lands to private developers for residential housing.[97] This marked the first proposed transfer of ceded lands after the 1993 Apology Resolution and similar state legislation.[98] The Office of Hawaiian Affairs (OHA)[99] intervened in the sale and demanded a disclaimer from HFDC that preserved any future Hawaiian government claims to the ceded lands.[100] HFDC refused.[101]

OHA then filed suit against HFDC (later renamed the Housing and Community Development Corporation of Hawai'i (HCDCH)),[102] its board members, and the Governor to stop the transfer. Thereafter, Pia Thomas Aluli, Jonathan Kamakawiwo'ole Osorio, Charles Ka'ai'ai and Keoki Maka Kamaka Ki'ili also filed suit, and the state circuit court consolidated the two lawsuits.[103] Collectively, the plaintiffs sought to enjoin the State from selling the two specific parcels of ceded lands and any other ceded lands.[104]

The circuit court's opinion acknowledged the factual and historical bases for Native Hawaiian claims to ceded lands, as described earlier, but ultimately denied the request for injunctive relief. The court determined that jurisdictional and other defenses—including sovereign immunity, waiver and estoppel, and

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[96] This section is drawn substantially from an essay by Moanike'ala Crowell, published in the Ka He'e Summer 2008 newsletter of the Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law, University of Hawai'i. *See* Moanike'ala Crowell, *Ho'oholo I Mua—Towards Reconciliation? Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i*, KA HE'E (Ka Huli Ao Ctr. for Excellence in Native Hawaiian Law, William S. Richardson Sch. of Law, Univ. of Haw.), Summer 2008, *available at* http://www2.hawaii.edu/~nhlawctr/article5-4.htm.

[97] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 180, 177 P.3d 884, 890 (2008).

[98] *See id.* at 187, 177 P.3d at 897.

[99] For a discussion of the Office of Hawaiian Affairs (OHA), see *infra* Part IV.B.2.a.

[100] *OHA*, 117 Haw. at 187, 177 P.3d at 897.

[101] The Court explained that "HFDC declined to honor OHA's requested disclaimer because 'to do so would place a cloud on [the] title, rendering title insurance unavailable to buyers in the Leali'i [sic] project.'" *Id.* (internal citations omitted in original).

[102] "In 1997, the legislature consolidated HFDC with the Hawai'i Housing Authority and the rental housing trust fund into the Housing and Community Development Corporation of Hawaii (HCDCH)." *Id.* at 187 n.9, 177 P.3d at 897 n.9.

[103] *See id.* at 188 n.12, 177 P.3d at 898 n.12.

[104] Alternatively, the plaintiffs sought either a declaration that the defendants were not permitted to sell or transfer ceded lands from the public land trust or, if the defendants prevailed, a declaration that transferring or selling ceded lands would not limit future claims by Native Hawaiians to those lands. *Id.* at 188, 177 P.3d at 898.

justiciability—barred the plaintiffs' claims.[105] The court also concluded that the State possessed the express authority to alienate ceded lands under the Admission Act, the Hawai'i State Constitution, and state legislation.[106] It adopted the reasoning of Attorney General Opinion 95-3[107] that "[t]he Admission Act § 5(f) expressly acknowledges that ceded or public lands may be alienated when it refers to 'the proceeds from the sale or other disposition of such lands.'"[108] From this executive branch opinion and the state constitutional provisions and ordinary trust law principles,[109] the court essentially determined that as long as the State used the proceeds from the disposition of ceded lands to further Native Hawaiian interests, one of the 5(f) trust purposes, the State would not breach its trust obligation.[110]

III. THE HAWAI'I SUPREME COURT AND A TIME OF RECKONING

A. The Court's 2008 OHA v. HCDCH *Opinion*

The Hawai'i Supreme Court vacated the circuit court judgment and remanded.[111] A unanimous Court determined that neither the cited statutory language nor ordinary property and trust law principles governed, and it ruled in favor of OHA and the four individual plaintiffs.[112] Chief Justice Moon's opinion for the Court recognized the historical basis for the plaintiffs' claims, citing to the U.S. Apology Resolution and state laws, and determined that the commitment to reconciliation with Native Hawaiians prevented the State from doing what it could otherwise legally do—sell trust lands for fair value and pay proceeds into the trust.

The Court found governmental commitments to reconciliation in both federal and state law. The Court construed the federal 1993 Apology Resolution to be more than a policy statement. In the Court's view, "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the

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[105] *Id.* at 189, 177 P.3d at 899 (referencing opinion by then-Circuit Court Judge Sabrina McKenna).

[106] *See* Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., Civ. No. 94-0-4207, slip op. at 89 (Haw. 1st Cir. Dec. 5, 2002).

[107] *Id.* at 82.

[108] *Id.* at 84 (quoting Op. Att'y Gen. 95-3 (1995)).

[109] *Id.* at 89.

[110] *Id.* at 92-94.

[111] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 218, 177 P.3d 884, 928 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S.Ct. 1439 (2009).

[112] The Hawai'i Supreme Court also disposed of each procedural and jurisdictional issue. *See id.* at 197-211, 177 P.3d at 907-21.

native Hawaiian people are determined to preserve, develop, and transmit to future generations."[113] The Court determined that the Apology Resolution did not itself require the State to restore the ceded lands to Native Hawaiians.[114] Rather, it contemplated a process of reconciliation between Native Hawaiians and the federal and state governments that encompassed those land claims.[115] As the Court highlighted, the Apology Resolution "serves as the *foundation* (or starting point) for reconciliation, including the future settlement of the plaintiffs' unrelinquished [land] claims."[116]

The Court bolstered its conclusion through an assessment of state law. It acknowledged that Hawai'i's people "clarified the State's trust obligation to native Hawaiians"[117] through ratification of the 1978 constitutional amendment that created OHA. As elaborated later in this article,[118] OHA's creation marked an important milestone for Native Hawaiian claims to self-governance and land restoration. Hawai'i's populace through its constitution had established a vehicle for reparatory action that for the first time "provide[d] for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base."[119]

The Court also scrutinized related state legislation that echoed the federal Apology Resolution. As detailed later, according to the Court, the analogous state acts gave rise to the State's fiduciary duty to preserve the ceded lands pending political resolution of Native Hawaiian land claims.[120] The Court explained 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."[121]

Specifically, the Court pointed to Act 354 in which the Hawai'i Legislature acknowledged that many Native Hawaiians and others view the 1893 overthrow to have been an illegal act by the United States.[122] Act 354 also contemplated some form of land reparation—"*many native Hawaiians believe that the lands taken without their consent should be returned* and if not, *monetary reparations* made, and that they should have the right to sovereignty, or the right to self-determination and self-government as do other native American

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[113] *Id.* at 191, 177 P.3d at 901.

[114] *Id.* at 192, 177 P.3d at 902.

[115] *Id.*

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

[117] *Id.* at 182, 177 P.3d at 892.

[118] *See infra* Part IV.B.2.a.

[119] STANDING COMM. REP. NO. 59, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 644 (1980).

[120] *OHA*, 117 Haw. at 193, 177 P.3d at 903.

[121] *Id.* at 195, 177 P.3d at 905 (quoting Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161, 1169 (1982)).

[122] *Id.* at 193, 177 P.3d at 903.

peoples."[123] Additionally, Act 354 recognized the Legislature's "*continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians.*"[124] The Court also found that in Act 359, the Legislature made findings similar to those expressed in the Apology Resolution. That legislation, entitled "A Bill for an Act Relating to Hawaiian Sovereignty," acknowledged that "the indigenous people of Hawai'i were denied . . . their lands."[125]

Linking Native Hawaiian land claims to "lasting reconciliation," the Court quoted from Act 329. That Act clarified responsibility for management of public trust lands and observed that "*lasting reconciliation so desired by all people of Hawai'i is possible only if it fairly acknowledges the past while moving into Hawaii's future.*"[126] Equally significant, Act 340 acknowledged that "the island of Kaho'olawe is of significant cultural and historic importance to the native people of Hawai'i" and required that Kaho'olawe be held in trust and transferred to a sovereign Native Hawaiian entity in the future.[127]

With these laws in mind, the Hawai'i Supreme Court determined that the consolidated plaintiffs met the three-prong test for a permanent injunction.[128] The plaintiffs' legal claim was meritorious; the State's sale of ceded lands during the reconciliation process would irreparably harm Native Hawaiians, and the larger public interest in reconciliation supported the ban on the sale.[129] The Court therefore held that the State possessed a fiduciary duty to preserve the ceded lands as an integral part of the reconciliation process. In sum, the Court highlighted:

> (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future *reconciliation* between the state and the native Hawaiian people is contemplated, and, (4) once any ceded lands are alienated from the public lands trust, they will be gone forever.[130]

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[123] *Id.* (first emphasis in original; second emphasis added).

[124] *Id.* (quoting Act of July 1, 1993, No. 354, § 1, 1993 Haw. Sess. Laws 999, 999-1000) (emphasis added).

[125] *Id.* (quoting Act of July 1, 1993, No. 359, § 1, 1993 Haw. Sess. Laws 1009, 1010).

[126] *Id.* at 194, 177 P.3d at 904 (emphasis in original) (quoting Act of July 1, 1997, No. 329, § 1, 1997 Haw. Sess. Laws 956, 956).

[127] *Id.* (quoting Act of June 30, 1993, No. 340, § 1, 1993 Haw. Sess. Laws 803, 803).

[128] The court determined that the appropriate test for a permanent injunction is: "(1) whether the plaintiff has prevailed on the merits; (2) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (3) whether the public interest supports granting such an injunction." *Id.* at 212, 177 P.3d at 922.

[129] *Id.* at 218, 177 P.3d at 928.

[130] *Id.* at 213, 177 P.3d at 923 (emphasis added).

In particular, the Court emphasized that OHA and the Hawaiian claimants would suffer irreparable damage without injunctive relief—ceded lands would be "gone forever."[131] Monetary payments in lieu of the ceded lands would not suffice because of the intimate cultural and spiritual bond between Native Hawaiians and those lands.[132]

The Court also determined that an injunction would serve the public's interest in reconciliation, enabling the populace to "fairly acknowledge[] the past while moving into Hawaii's future."[133] The Court ended its opinion by quoting the Hawai'i Legislature—"lasting reconciliation [is] desired by all people of Hawaii."[134]

B. An Epilogue

Proponents of Native Hawaiian rights lauded the Hawai'i Supreme Court's unanimous decision. Celebration soon abated when then-Governor Linda Lingle's administration petitioned the U.S. Supreme Court for a writ of certiorari and the Court accepted review. After noting jurisdiction,[135] the U.S. Supreme Court reversed on the ground that the 1993 U.S. Apology Resolution itself did not provide a legal basis for enjoining the State from alienating ceded lands.[136] The Court, however, acknowledged that it did not have jurisdiction to

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[131] *Id.*

[132] *Id.* at 214-17, 177 P.3d at 924-27.

[133] Act of June 30, 1997, No. 329, § 1, 1997 Haw. Sess. Laws 956, 956.

[134] *OHA*, 117 Haw. at 216, 177 P.3d at 926 (quoting Act of June 30, 1997, No. 329, § 1).

[135] Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436, 1442-43 (2009). OHA and the other private plaintiffs in the suit argued that the case did not raise a federal question because the Hawai'i Supreme Court's decision rested on state law and urged the U.S. Supreme Court to dismiss for lack of jurisdiction. *Id.* at 1442. The U.S. Supreme Court explained that it has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.* at 1442 (quoting Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)).

[136] *Id.* at 1445. The U.S. Supreme Court examined whether "the Apology Resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer the lands that the United States held in absolute fee and granted to the State of Hawaii, effective upon its admission into the Union." *Id.* at 1443 (internal citations and alteration marks omitted). The U.S. Supreme Court examined the two substantive provisions of the Apology Resolution and concluded that they functioned as conciliatory statements. *Id.* at 1443-44. Turning its attention to the "whereas" clauses that preface the Apology Resolution, the Court rejected the Hawai'i Supreme Court's conclusion that they conclusively established Congress's recognition that the Native Hawaiian people have unrelinquished claims over ceded lands. *Id.* at 1444-45. Accordingly, the U.S. Supreme Court held that the substantive provisions and "whereas" clauses of the Apology Resolution as a matter of federal law did not strip the State of its sovereign authority to alienate ceded lands. *Id.* at 1445.

decide whether an adequate state law basis existed to enjoin the State from selling ceded lands.[137] The U.S. Supreme Court explained that it has "no authority to decide questions of Hawaiian [i.e., state] law or to provide redress for past wrongs except as provided for by federal law."[138]

After the U.S. Supreme Court decision, OHA, all but one of the private plaintiffs,[139] and the State of Hawai'i settled their contentious dispute.[140] Those parties agreed to dismiss the lawsuit without prejudice conditioned on the passage of special legislation[141] requiring a two-thirds majority vote by both legislative chambers before ceded lands could be sold or transferred.[142] The settlement agreement became effective when the 2009 Legislature passed Senate Bill 1677 and Governor Lingle signed it into law as Act 176.[143]

All parties, except plaintiff Jonathan Osorio, thereafter filed a joint motion seeking dismissal of the plaintiffs' appeal without prejudice, and the Hawai'i Supreme Court granted the motion.[144] The State also filed a motion to dismiss Osorio's appeal.[145] The Court held that Osorio had standing to sue and pursue an appeal but that his asserted claims were no longer "ripe" for adjudication because the Legislature, under Act 176, had not approved the sale of any ceded lands.[146] The fifteen-year legal dispute came to a close. OHA Chair Haunani Apoliona and Attorney General Mark Bennett expressed in a joint statement that "[w]e can now concentrate on working together on matters we all believe are crucially important to Hawaii."[147]

Yet, even with the legislation, many difficulties lay ahead for participants to the State-Hawaiian reconciliation initiative.

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[137] *Id.* at 1445.

[138] *Id.* The U.S. Supreme Court thereafter remanded the case for further proceedings not inconsistent with its opinion. *Id.*

[139] Plaintiff Jonathan Kamakawiwo'ole Osorio did not join the settlement agreement. Settlement Agreement, Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 117 Haw. 174, 177 P.3d 884 (2008).

[140] *Id.*

[141] The parties conditioned the settlement upon passage of S.B. No. 1677. *Id.*

[142] *Id.*

[143] Act of July 13, 2009, No. 176, 2009 Haw. Sess. Laws 705.

[144] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 121 Haw. 324, 327 n.1, 219 P.3d 1111, 1114 n.1 (2009).

[145] *Id.* at 326, 219 P.3d at 1113.

[146] *Id.* at 339, 219 P.3d at 1126.

[147] Gordon Y.K. Pang, *State, OHA, 3 Plaintiffs Settle Ceded Lands Suit*, HONOLULU ADVERTISER, May 6, 2009, *available at* http://the.honoluluadvertiser.com/article/2009/May/06/ln/hawaii905060377.html.

IV. A LIMITED BUT SIGNIFICANT JUDICIAL ROLE IN THE RECONCILIATION PROCESS

A. A Social Healing Through Justice Approach to Reconciliation Initiatives

The Hawai'i Supreme Court's *OHA v. HCDCH* decision revealed the Court's clear-eyed grasp of the historic injustice and the centrality of ceded lands to the reconciliation process. But how do we assess the judiciary's role in the reconciliation process, particularly for Native Hawaiians and the people of Hawai'i, as well as for other reconciliation initiatives in the United States and beyond?

As mentioned, the *Social Healing Through Justice* framework is one approach for guiding and critiquing reconciliation initiatives.[148] It draws upon aspects of prophetic theology, social psychology, sociolegal studies, political theory, economics, indigenous healing practices,[149] and law.[150] From these diverse disciplines, the approach identifies four commonalities that inform the dynamics of the kind of justice that fosters healing for both harmed individuals and society itself.[151]

> The first is the embrace of the equivalent of the South African social idea of "ubuntu": all are members of the polity, and injury to one harms the entire community; therefore healing the injured is the responsibility of all. The second is that repair must occur in two realms simultaneously—the individual (micro) and the institutional (macro). Participation in the process must be widespread, and all must see a benefit. The third commonality is that there must be material change in the socioeconomic conditions underlying reconstructed group relationships—otherwise, the dangers of "empty apologies," "all words and no action," "false grace," or a "failure of reconciliation."[152]

Distilling these insights, the fourth commonality is reflected in a redress framework that accounts for integral stages of or dimensions to genuine reconciliation. This redress framework encompasses the "Four Rs" of *Social*

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[148] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 172-209; Yamamoto & Obrey, *supra* note 1, at 28-37.

[149] One of the indigenous healing practices drawn upon is ho'oponopono. *See* E. VICTORIA SHOOK, HO'OPONOPONO: CONTEMPORARY USES OF A HAWAIIAN PROBLEM-SOLVING PROCESS (1985).

[150] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 154-67 (discussing in depth these disciplines' insights on group healing).

[151] Yamamoto & Obrey, *supra* note 1, at 33.

[152] *Id.* at 32 (internal citations omitted).

Healing Through Justice: *recognition*, *responsibility*, *reconstruction*, and *reparations*.[153]

The first R, *recognition*, encompasses acknowledgement of persisting socioeconomic and psychological injuries.[154] It involves understanding how individuals, because of their group identity, continue to suffer pain, anger, shame, or material deprivation from historical injustice.[155] The *recognition* dimension also involves sociolegal inquiry. It prompts everyone to scrutinize the historical roots for the present-day conflicts and to decode stock stories embodying cultural stereotypes that seemingly legitimated the injustice.[156] Finally, the *recognition* dimension examines institutional barriers to egalitarian relationships—the organizational structures that embody discriminatory policies or denials of self-determination.[157]

The next R, *responsibility*, entails an assessment of wrongdoing and the acceptance of responsibility for resulting harms.[158] The inquiry examines the ways in which those with power over the aggrieved group may have abused their power and excluded others from full participation in the polity.[159] An acceptance of responsibility for healing is not limited to those who directly inflicted the harm, but may extend to others who were complicit in or who benefitted from the subjugation—all with an eye toward repairing the damage and building the community anew.[160]

The *recognition* of grievances and acceptance of *responsibility* for initiating the reparatory process are key starting points. But something more is needed to heal deep-seated wounds. That something is addressed by the third, and performative, R: *reconstruction*.[161] This dimension to social healing focuses on building a new productive relationship through apologies, forgiveness, and a reallocation of political and economic power.[162] It entails restructuring the institutions (including laws) that triggered the injustice.

Encompassing more than mere payments of money, the fourth R, *reparations*, also includes restitution, rehabilitation, community restructuring,

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[153] *Id.* at 33.

[154] For a complete discussion of what recognition entails, see YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 175-85.

[155] Yamamoto & Obrey, *supra* note 1, at 33; YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 175-85. *See also* Jonathan R. Cohen, *Coping With Lasting Social Injustice*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 259, 273 (2007).

[156] Yamamoto & Obrey, *supra* note 1, at 33.

[157] *See* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 184.

[158] *Id.* at 185.

[159] *Id.*

[160] *Id.* at 189.

[161] *Id.* at 190.

[162] Yamamoto & Obrey, *supra* note 1, at 34.

and political education.[163] The general aim of reparations, then, is to proactively repair the significant multi-faceted damage.[164] Depending on the harms, reparations may include "the restoration of property, rebuilding of culture, economic development, and medical, legal, or . . . financial support for individuals and communities in need."[165]

The first two Rs, *recognition* and *responsibility*, entail words, often in the form of acknowledgments, apologies, and commitments. The latter two Rs, *reconstruction* and *reparations*, entail actions that fulfill verbal commitments and foster comprehensive sustained healing. When government and groups endeavor to craft a reconciliation initiative, inquiries into *recognition*, *responsibility*, *reconstruction*, and *reparations* illuminate the kind of justice that is likely to foster long-term social healing.[166]

The Four Rs also reveal why reconciliation initiatives sometimes struggle. Even if governments engage the first two Rs, recognition and responsibility, action in the form of reconstruction and reparations does not always follow. Common refrains emerge—governments plead financial incapacity or simply fail to make acting on redress promises a priority.[167] Or, in the case of Governor Lingle's administration, the executive may be supportive of several aspects of reconciliation[168] but decide that the state's other interests take precedence over the particular matter at hand.

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[163] *Id.* *See also* Pablo De Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 11, at 451, 452-53.

[164] De Greiff, *supra* note 163, at 455. Scholars advocate reparations programs that focus on the specific needs and desires of those harmed. *See* Carlton Waterhouse, *The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparation Programs*, 31 U. PA. J. INT'L L. 257 (2009).

[165] Yamamoto & Obrey, *supra* note 1, at 35.

[166] *See* Bradford, *supra* note 23 (applying the Four Rs to Native American reparations); Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 61 (2005) (employing the Four Rs for assessing treatment of Black Native Americans); Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21 (2005) (integrating Four Rs analysis into assessments of Native American and Native Hawaiian justice) .

[167] *See* Yamamoto & Mackintosh, *supra* note 29, at 3.

[168] Governor Lingle's administration initially provided strong support for the congressional Akaka Bill. The bill attempted to "establish[] a process within the framework of federal law for Native Hawaiians to reorganize a governing body to engage in a government-to-government relationship with the United States." Press Release, Senator Daniel Akaka, Native Hawaiian Recognition Bill Introduced (July 20, 2000), *available at* http://akaka.senate.gov/press-releases.cfm?method=releases.view&id=fa21e3d4-aa7e-4dc3-a223-9c66a7906a2d. Governor Lingle wrote to a Republican Senator: "It is a very simple matter of justice and fairness that Native Hawaiians receive the same treatment that America's other indigenous people enjoy." Gordon Y.K. Pang, *Lingle Lobbies for Akaka Bill*, HONOLULU ADVERTISER, May 18, 2006, *available at* http://the.honoluluadvertiser.com/article/2006/May/18/ln/FP605180329.html.

In this light, *OHA v. HCDCH* highlights a limited but nevertheless significant executive recalcitrance in the reconciliation realm and underscores the need for targeted accountability. In the big picture, it is about the Hawai'i Supreme Court's willingness to enforce key action-oriented aspects of the government's reconciliation commitment to ensure that reconciliation efforts are more than words alone.

B. A Court's Limited Though Significant Role in the Reconciliation Process

OHA v. HCDCH thus lays a foundation for reconciliation participants who seek to preserve for ultimate political resolution the crucial aspects of a government's and citizenry's commitments. The case demonstrates how a court, under certain conditions, plays a limited but nevertheless integral role in legitimizing and fostering a meaningful reconciliation process. As elaborated below, in appropriate circumstances a court can engage in a two-step process of first identifying a commitment to reconciliation that is embedded in law, and then enforcing key aspects of that commitment in order to ensure that the process proceeds productively. In these situations, the court aids reconciliation initiatives by preventing promises of redress by the executive or legislature from becoming dishonored commitments.

1. Political question?

At the threshold, the issue arises whether even a limited judicial role in a reconciliation process moves a court into the realm of non-justiciable political questions, thereby transgressing the proper separation of powers. The U.S. Supreme Court's six-factor test for determining non-justiciable political questions provides guidance.[169] The Hawai'i Supreme Court in *OHA v.*

Revisions to the Akaka Bill led Governor Lingle to temporarily withhold support, but after additional revisions, the Governor reaffirmed her support. *See* Derrick De Pledge, *Lingle Backs Akaka Bill Changes*, HONOLULU STAR-ADVERTISER, July 8, 2010, *available at* http://www.staradvertiser.com/news/20100708_Lingle_backs_Akaka_Bill_changes.html.

[169] *See* Baker v. Carr, 369 U.S. 186, 216 (1962). The Hawai'i Supreme Court adopted the *Baker* six-factor test in *Trustees of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987). The standard for a political question is the presence of one of the following six factors: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility for deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 455 (quoting *Baker*, 369 U.S. at 217) (format altered).

HCDCH applied the test and determined that the political question doctrine did not foreclose the plaintiffs' claims.[170] The Hawai'i Supreme Court drew a crucial distinction: "[T]he plaintiffs are not seeking a judicial resolution of the underlying claim for a return of lands, but are rather asking the judiciary to protect the trust assets while the dispute is being resolved [(in the reconciliation process)] by the political branches."[171] The Court recognized that what type of governance relationship is proper (i.e., the State's relationship to a forthcoming sovereign or quasi-sovereign Hawaiian government), and what reparations are adequate (i.e., the amount of money and land returned), are political questions ultimately to be negotiated by the Native Hawaiian entity, the state government, and the people of Hawai'i. A court does not participate in these political negotiations or determine their outcome (i.e., whether Native Hawaiians are entitled to ceded lands or to which lands they are entitled). Instead, the court in essence acts as a legal referee to ensure that the reconciliation process proceeds faithfully.

2. A two-step process

a. Identifying a commitment embedded in law

How does the two-step process work practically? Initially, a court assesses whether a government has made a commitment to reconciliation. This means identifying governmental promises grounded in law to repair the long-standing damage of historic injustice. Words that acknowledge wrongdoing and related harms and promise repair comprise the first two Rs: *recognition* and *responsibility*. A court thus inquires into the existence of a reconciliation commitment through language in the constitution and pronouncements by the legislature and executive.

As a guiding example, the Hawai'i Supreme Court identified the State of Hawai'i's reconciliation commitment to mutually resolve Native Hawaiian people's claims to ceded lands in various realms of state law: the Hawai'i State Constitution, multiple statutes, and executive pronouncements.[172] The Court recognized that Hawai'i's people ratified a 1978 state constitutional amendment creating OHA.[173] Tasked with administering ceded lands trust

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[170] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 210, 177 P.3d 884, 920 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).

[171] *Id.* (internal brackets omitted).

[172] The following discussion is drawn with permission from Brief for Equal Justice Society et al. as Amici Curiae Supporting Respondents, *supra* note 39.

[173] *OHA*, 117 Haw. at 182, 177 P.3d at 892.

resources for the betterment of Native Hawaiians,[174] OHA marked a step toward Hawaiian self-governance.[175] It also represented much more. OHA embodied the State's *recognition* of Native Hawaiians' loss of self-governance and its corresponding *responsibility* for beginning to repair the damage of colonization.[176] By supporting this new semi-autonomous government agency, Hawai'i's citizenry embraced collective *responsibility* for affording Hawai'i's indigenous peoples a measure of self-determination.

The 1978 Constitutional Convention delegates expressly recognized the historic injustices and determined that it was "well past time" for the State to "meet the obligation that we have to do justice" for the Native Hawaiian people.[177] Anticipating self-government and reparations as part of the reparatory justice process, the Convention's Committee on Hawaiian Affairs described OHA's function as a "receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians."[178] OHA would be the vehicle that "provide[d] for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base."[179] OHA would have "the power to accept the transfer of reparations moneys and land."[180]

Equally significant, the Hawai'i Supreme Court highlighted the Legislature's recognition of past injustices and the acceptance of responsibility for repair.[181] The Court acknowledged that after the adoption of the 1978 Constitutional Amendment creating OHA, the Hawai'i Legislature enacted enabling legislation.[182] Act 196 reaffirmed the State's "solemn trust obligation and responsibility to [N]ative Hawaiians."[183] Envisioning future redress, as did the

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[174] *See* HAW. CONST. art. XII, §§ 5-6; HAW. REV. STAT. § 10-3(6) (2009).

[175] *See* Melody K. MacKenzie, *Self-Determination and Self-Governance*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 52, at 77, 89.

[176] *See* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1766-67 (2000) (describing the struggle over collective memory of an injustice as a predicate to recognizing the harms and need for repair).

[177] DEBATES IN COMM. OF THE WHOLE ON HAWAIIAN AFFAIRS, COMM. PROPOSAL NO. 13, *in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 460 (1980) (statement of Delegate Barr). *See also id.* at 457, 458 ("[T]he Hawaiians had become . . . landless" and the creation of OHA would "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." (statement of Delegate De Soto)).

[178] STANDING COMM. REP. NO. 59, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 644 (1980).

[179] *Id.* at 646.

[180] *Id.* at 645.

[181] *See* Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 182, 177 P.3d 884, 892 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1439 (2009).

[182] *See id.*

[183] Act of June 7, 1979, No. 196, § 2, 1979 Haw. Sess. Laws 398, 399.

Constitutional Convention delegates, the Act expressly identified one of OHA's primary functions as serving "as a receptacle for reparations."[184]

Subsequent legislation embraced the language of reconciliation and crystallized the State's commitment. Specifically, the Court pointed to Acts 354, 359, 329, and 340,[185] which acknowledged the long-standing harms to the Hawaiian community and the State's commitment to repairing the damage. Emphasizing the State's *recognition* of harms and commitment to *reconstructing* relationships and *repairing* the damage, the Court quoted from Act 354: "The [Hawai'i] legislature has also *acknowledged* that the actions by the United States were illegal and immoral, and *pledges its continued support* to the native Hawaiian community by *taking steps to promote the restoration* of the rights and dignity of native Hawaiians."[186] Additionally, the Court recognized that the Legislature in Act 359 "made findings similar to those expressed in the Apology Resolution,"[187] detailed in the Act's purpose to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing."[188] Act 329 also provided the Court with compelling evidence of the State's commitment to "*permanent reconciliation*" with Native Hawaiians in order to achieve a "*comprehensive, just, and lasting resolution.*"[189] As highlighted by the Court, "[*t*]*he legislature recognizes that the lasting reconciliation so desired by all people of Hawai'i is possible only if it fairly acknowledges the past while moving into Hawaii's future.*"[190]

Kaho'olawe[191] legislation indicated that verbal commitments about recognition and responsibility would materialize into reparatory action. Act 340 dictated that "the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by

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[184] HAW. REV. STAT. § 10-3(6) (2009).

[185] *OHA*, 117 Haw. at 193, 177 P.3d at 903.

[186] *Id.* (quoting Act of July 1, 1993, No. 354, § 1, 1993 Haw. Sess. Laws 999, 1000) (emphasis added).

[187] *Id.* (quoting Act of July 1, 1993, No. 359, §§ 1-2, 1993 Haw. Sess. Laws 1009, 1009-11).

[188] *Id.* (quoting Act of July 1, 1993, No. 359, § 2, 1993 Haw. Sess. Laws at 1010).

[189] *Id.* at 194, 177 P.3d at 904 (quoting Act of June 30, 1997, No. 329, § 1, 1997 Haw. Sess. Laws 956, 956) (emphasis added).

[190] *Id.* (quoting Act of June 30, 1997, No. 329, § 1, 1997 Haw. Sess. Laws at 956) (emphasis added).

[191] Kaho'olawe is one of the eight main islands in the Hawaiian Islands. Despite the spiritual and cultural significance of the island to Native Hawaiians, the federal government used the island for U.S. military training operations. Senator Daniel Inouye of Hawai'i obtained federal appropriations to repair the damage caused by the U.S. Navy's bombing. The State created the Kaho'olawe Island Reserve Commission to manage the Kaho'olawe Island Reserve while it is held in trust for a future sovereign Native Hawaiian entity. *See* KAHO'OLAWE ISLAND RESERVE COMMISSION, http://kahoolawe.hawaii.gov/home.php (last visited Mar. 2, 2011).

the United States and the State of Hawai'i."[192] Significantly, the legislation referred to *reconstruction* of government relationships with Native Hawaiians and to *reparation* in the form of land restoration.

This confluence of legislation persuaded the Court that the State made a commitment to reconciliation with Native Hawaiians—a commitment that encompassed future negotiations over issues of self-governance and return of land. Commitments made by Hawai'i's executive branch further bolstered the Court's assessments. Former Governor Lingle, in her 2003 State of the State Address, pledged: "Here at home in Hawai'i[,] I will continue to work with [the legislators] and with the Hawaiian community to resolve the ceded lands issue once and for all."[193] Governor Lingle's words echoed similar commitments made by previous governors.[194]

As identified by the Court, the State's commitment to reconciliation is rooted in the state constitution, detailed legislation, and executive pronouncements. In this initial step, then, a court's role is to identify when the political branches have made a commitment to reconcile.

b. Enforcing key aspects of the reconciliation commitment

The second step, in limited fashion, helps transform words of *recognition* and *responsibility* into reparatory action. After identifying a commitment to reconciliation that promises *reconstruction* and *reparation*, the court, under certain conditions, carefully enforces key aspects of those promises in ways that are consistent with the goal of the initiative.[195] More specifically, the court inquires into whether it is necessary for the government to take appropriate action on key aspects of the reconciliation commitment in order to ensure the process proceeds productively. Some aspects of the reconciliation process are necessarily fluid and depend on external circumstances. But not all. The court's role is to identify and preserve the key pieces that are integral to the reconciliation process.

How does the court know when to intercede? Inquiry into appropriate acts of *reconstruction* and *reparation* that transform verbal commitments into concrete actions provides guidance.

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[192] *OHA*, 117 Haw. at 194, 177 P.3d at 904 (quoting Act of June 30, 1993, No. 340, § 2, 1992 Haw. Sess. Laws 803, 806).

[193] *Id.* at 213, 177 P.3d at 923 (quoting Governor Linda Lingle, State of Haw., *State of the State Address: An Outline of the Governor's Agenda* (Jan. 21, 2003)).

[194] *See* Benjamin J. Cayetano, *The Next Four Years: Completing the Vision*, HONOLULU ADVERTISER, Oct. 16, 1998, at A13.

[195] Yamamoto & Obrey, *supra* note 1, at 7 (identifying the dual goals of reconciliation as healing the injured and healing society).

In *OHA v. HCDCH*, the Hawai'i Supreme Court determined that the State's commitment to reconciliation included negotiation over the return of land and some form of self-governance.[196] The Court then identified the central role that ceded lands, now held in trust, play in the reconciliation process.[197]

The *reconstruction* inquiry illuminates why ceded lands are integral aspects of the reconciliation commitment. Reconstruction entails fundamental restructuring of relationships and a reallocation of power.[198] Grounds exist under international law[199] for restructuring State-Hawaiian relations, as well as U.S.-Hawaiian relations, according to principles of self-determination.[200] These principles are enshrined in a plethora of international human rights instruments.[201] In particular, the United Nations Declaration of the Rights of Indigenous Peoples,[202] to which the United States pledged support in 2010,[203] acknowledges indigenous peoples' right to self-determination.[204] Under the Declaration, indigenous peoples have the "right to autonomy or self-government in matters relating to their internal and local affairs"[205] and the

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[196] *See OHA*, 117 Haw. at 212-14, 177 P.3d at 922-24.

[197] *See id.* at 213-17, 177 P.3d at 923-27.

[198] Yamamoto & Obrey, *supra* note 1, at 34; YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 190-91.

[199] The Hawai'i Supreme Court "recognize[d] that international law and situations cited by the plaintiffs provide support for their requested injunction" but reserved discussion because the Court found adequate state and federal laws to support its holding. *OHA*, 117 Haw. at 211 n.25, 177 P.3d at 921 n.25.

[200] *See, e.g.*, Anaya, *supra* note 23, at 330-31; Elena Cirkovic, *Self-Determination and Indigenous Peoples in International Law*, 31 AM. INDIAN L. REV. 375, 381 (2007); Trask, *supra* note 53, at 90-95; Jon M. Van Dyke, Carmen Di Amore-Siah & Gerald W. Berkley-Coats, *Self-Determination for Nonself-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii*, 18 U. HAW. L. REV. 623 (1996).

[201] *See* U.N. Charter art. 1 para. 2, art. 55; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Mar. 23, 1966); International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), para. 2, U.N. GAOR, 15th Sess., Supp. No. 16 at 66, U.N. Doc. A/4684 (Dec. 14, 1960); Declaration on Principles of International Law Concerning the Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970).

[202] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/en/drip.html [hereinafter Declaration on the Rights of Indigenous Peoples].

[203] Krissah Thompson, *U.S. Will Sign U.N. Declaration on Rights of Native People, Obama Tells Tribes*, WASH. POST, Dec. 16, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121603136.html.

[204] Declaration on the Rights of Indigenous Peoples, *supra* note 202, at art. 3.

[205] *Id.* at art. 4. The United Nations Declaration on the Rights of Indigenous Peoples evidences the international community's aspirations to support and protect the rights of

"right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions."[206]

More concretely, as the Hawai'i Supreme Court acknowledged, Native Hawaiians and the state and federal governments are in the process of attempting to restructure their relationship through controversial federal legislation commonly referred to as the "Akaka Bill."[207] The Court observed that the purpose of the Akaka Bill "is to authorize a process for the reorganization of a [n]ative Hawaiian government and to provide for the recognition of [a] [n]ative Hawaiian government by the United States for the purpose of carrying on a government-to-government relationship."[208] The Court explained that the Akaka Bill "provides that the federal government is authorized to negotiate with the State and the reorganized [n]ative Hawaiian government for a transfer of land and resources to a [n]ative Hawaiian government."[209] The bill would formally recognize the Native Hawaiians as indigenous people and set in motion a negotiating process for pursuing land claims with the State.[210] The legislation, if enacted, would therefore *restructure* the relationship between the State and Native Hawaiians.[211]

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indigenous peoples.

[206] *Id.* at art. 5.

[207] *See* Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA*), 117 Haw. 174, 182, 177 P.3d 884, 892 (2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1439 (2009). For a discussion on the Akaka Bill, see Le'a Malia Kanehe, *The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 U. HAW. L. REV. 857 (2001); R. Hōkūlei Lindsey, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 U. HAW. L. REV. 693 (2002); and VAN DYKE, *supra* note 22, at 270-72.

[208] *OHA*, 117 Haw. at 182 n.7, 177 P.3d at 892 n.7 (quoting S. REP. NO. 107-66, at 1 (2001)).

[209] *Id.* at 182, 177 P.3d at 892. The Akaka Bill has garnered support and opposition from Hawaiian and non-Hawaiian groups. Proponents view the bill as part of restructuring the relationship between Native Hawaiians and the state and federal government. Opponents claim that the bill is merely a "racial preference" and is therefore illegal. Other opponents charge that the bill does not reach far enough and that the U.S. Department of Interior's control over the "self-governance" process undermines genuine self-determination. *See* Richard Borreca, *Hopes Dim for Akaka Bill Vote*, HONOLULU STAR-BULLETIN, July 21, 2005, *available at* http://archives.starbulletin.com/2005/07/21/news/index2.html; Bruce Fein, Op-Ed., *Senator Made Several Mistakes in Conception of Race-based Bill*, HONOLULU STAR-BULLETIN, Aug. 7, 2005, *available at* http://archives.starbulletin.com/2005/08/07/editorial/special.html; Boyd P. Mossman, Op-Ed., *Hawaiians Deserve Recognition Like Other Indigenous Groups*, HONOLULU STAR-BULLETIN, Aug. 7, 2005, *available at* http://archives.starbulletin.com/2005/08/07/editorial/special.html.

[210] *See* VAN DYKE, *supra* note 22, at 270-72 (explaining the Akaka Bill).

[211] On July 6, 2011, Governor Abercrombie signed into law Senate Bill 1520 as Act 195. Chad Blair, *'First step' to a Native Hawaiian Governing Entity*, HONOLULU CIVIL BEAT, July 6, 2011, *available at* http://www.civilbeat.com/articles/2011/07/06/12000-first-step-to-a-native-hawaiian-governing-entity/. Patterned generally on the Akaka Bill, the Act aims to reconstruct

Underscoring the importance of preserving ceded lands as a focal point for *restructuring* this relationship, the Court observed that expert David H. Getches highlighted that "what is special about these claims is that this is land that has a pedigree tracing back to a disposition of the Hawaiian people at the time of the overthrow."[212] When asked whether a political entity can govern without territory, Getches explained that "[i]t is very difficult to have sovereignty without land."[213]

The Court's inquiry into Native Hawaiians' historical connection to land revealed that ceded lands also play a fundamental role in meaningful acts of *reparation*. As the Court recognized, loss of homeland contributes to Native Hawaiians' present-day grievances. Highlighting the special relationship between Native Hawaiians and the land, or 'āina,[214] the Court's opinion included an eloquent statement by the trial court:

> *'Aina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable.* The natural elements—land, air, water, ocean—are interconnected and interdependent. *To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians.* The 'aina is part of their 'ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.[215]

This language underscores why the return of some portion of ceded lands to a representative Hawaiian entity is a key aspect of the reconciliation initiative. According to Hawaiian kūpuna, land is not merely a limited resource; it is intimately connected to Native Hawaiians' cultural and spiritual identity as a group.[216] It is integral to their long-standing injury. Return of some portion of the ceded lands—the original Crown and Government lands—works to *repair* the damage of historical injustice. As the Court's holding acknowledged,

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the State-Native Hawaiian political relationship. Act of July 6, 2011, No. 195, § 1, 2011 Haw. Sess. Laws 646, 648 ("The purpose of this Act is to recognize Native Hawaiians as the only indigenous, aboriginal, maoli population of Hawaii. It is also the state's desire to support the continuing development of a reorganized Native Hawaiian governing entity and, ultimately, the federal recognition of Native Hawaiians."). With reconciliation as a primary purpose, the Act strives to facilitate Native Hawaiian organization of a self-governing entity. *Id.*

[212] *OHA*, 117 Haw. at 214, 177 P.3d at 924.

[213] *Id.* at 214, 177 P.3d at 925.

[214] Melody K. MacKenzie, Susan K. Serrano & Koalani L. Kaulukukui, *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RESOURCES & ENV'T 37, 37 (2007); *see also* Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311 (2001).

[215] *OHA*, 117 Haw. at 214, 177 P.3d at 924 (footnotes omitted in original) (some emphases in original and some emphases removed). The trial court's statement drew upon the expert testimony of Professor Davianna McGregor.

[216] *See* MCGREGOR, *supra* note 53; KAME'ELEIHIWA, *supra* note 50.

reducing reparations to monetary payments would undermine the reconciliation process. It would disregard the cultural and spiritual salience of the ceded lands.[217] Monetary reparations would not suffice as a logical remedy.

The *reconstruction* and *reparation* inquiries thus guide a court in facilitating the transformation of redress promises into concrete actions. The Hawai'i Supreme Court cautioned that "without an injunction, any ceded lands alienated from the public lands trust will be lost and will not be available for the future reconciliation efforts contemplated by . . . Acts 354, 359, and 329, and Governor Lingle."[218] Given the State's recognition of Native Hawaiians' unrelinquished claims to ceded lands and desire for self-governance, "any further diminishment of the ceded lands (the 'aina) from the public lands trust will negatively impact the contemplated reconciliation/settlement efforts between native Hawaiians and the State."[219] The Court therefore preserved that integral part of the government's commitment to reconciliation with Native Hawaiians.

Assessed through the lens of *Social Healing Through Justice*, *OHA v. HCDCH* thus illuminates the two-step process for determining when the judiciary can and should intercede, in essence, to act as a legal referee to ensure that the reconciliation process proceeds faithfully.

3. Going forward: A state law basis for reconciliation

Going forward, key questions remain for Native Hawaiians and the State as they endeavor to repair the "devastating" damage.[220] What will be the form of Native Hawaiian self-governance? What land will be returned? The Hawai'i Supreme Court in *OHA v. HCDCH* acknowledged that its role is not to resolve those questions.[221] The answers will be negotiated through the political process.[222]

The Court clearly conveyed, however, its assessment that there exists an adequate basis in state law for the state courts to enforce key aspects of the

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[217] Scholars have recognized the inappropriateness and inadequacy of reducing reparations to monetary payments. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (providing seminal scholarship on reparations for Native Hawaiians); *see also* BROOKS, *supra* note 47; BROPHY, *supra* note 47.

[218] *OHA*, 117 Haw. at 214, 177 P.3d at 924.

[219] *Id.* at 216, 177 P.3d at 926.

[220] *See* Hawaii Advisory Committee, *supra* note 51, at 12-18.

[221] *See OHA*, 117 Haw. at 213, 177 P.3d at 923 ("For present purposes, this court need not speculate as to what a future settlement might entail—*i.e.*, whether such settlement would involve monetary payment, transfer of lands, ceded or otherwise, a combination of money and land, or the creation of a sovereign Hawaiian nation; it is enough that Congress, the legislature, and the governor have all expressed their desire to reach such a settlement.").

[222] *See id.*

reconciliation commitment.[223] Although the U.S. Supreme Court vacated the original Hawai'i Supreme Court decision because of its reliance on federal law, the U.S. high court left the door open for the Hawai'i Supreme Court to reinscribe its state law-based reconciliation analysis in future cases.

V. CONCLUDING THOUGHTS: RIPPLE EFFECTS

The Hawai'i Supreme Court's transformative decision in *OHA v. HCDCH* shows that a commitment to reparatory justice may be more than rhetoric. In some situations, it has real legal consequences with significant cultural and institutional impacts. Implicit in the Court's holding is the notion that there are certain aspects of a reconciliation initiative that are so fundamental to the process that promises of action on those aspects are enforceable by courts of law. Thus, if the political branches and affected groups engage in a struggle to address the historic injustice and mutually commit to a process of reconciliation, including reparatory action, then the government's commitment embraces more than words. The commitment carries limited, but nevertheless significant, legal obligations.[224] For the State of Hawai'i, at a minimum, those legal obligations encompass the preservation of ceded lands held in trust until Native Hawaiian claims to those lands are politically negotiated as an integral part of the reconciliation process.

Chief Justice Moon's *OHA v. HCDCH* opinion, then, illuminates one possible way to construct a multi-faceted reconciliation initiative. If government, organizations, and communities shape a reconciliation initiative by identifying claims to special land or cultural resources and commit through law to negotiate over those claims,[225] then the government (or organizations) cannot subvert that commitment by selling or destroying the targeted land or cultural resources before faithfully completing negotiations. If the government (or organizations) attempts to do so, the judiciary is empowered to intercede in limited fashion through its equitable powers[226] to preserve that land or resources throughout the reconciliation process.

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[223] *See supra* Part IV.B.2.a.

[224] *See supra* Part IV.B.2.b.

[225] Whether the special land or other resources must be the res of a formal trust, generating traditional trustee duties, or need only be designated by policymakers to be an integral part of the reconciliation process is a question to be resolved as it arises in concrete cases.

[226] A court's equitable powers are employed to assure fairness and justice where the court's powers at law (mainly in the form of monetary compensation) are inadequate. *See* Fleming v. Napili Kai, Ltd., 50 Haw. 66, 70, 430 P.2d 316, 319 (1967) ("We hold the court of equity has plenary power to mold its decrees in such form as to conserve the equities of all parties." (quoting Baker Sand & Gravel Co. v. Rogers P. & H. Co., 154 So. 591, 597 (Ala. 1934))); 27A Am. Jur. 2d *Equity* § 2 (2008) ("[E]quity's purpose is to promote and achieve justice and do so with some degree of flexibility.").

OHA v. HCDCH thus stands, if not as a beacon, then as a guiding light for some reconciliation initiatives. The rubble-strewn roads to reconciliation in the United States and worldwide pose many challenges, particularly where promises to repair damages of historic injustice are followed by sluggish reparatory action. Indeed, a common concern confronting all redress participants is how to transform promises of repair into concrete action. Peru and South Africa, for example, engaged reconciliation initiatives that *recognized* widespread human rights violations and accepted *responsibility* for remediating them. They also embraced comprehensive plans for repair. Those initiatives, though, fell short of genuine social healing because of a lack of comprehensive and systemic reparatory action—including economic justice[227]—in the form of bottom-up economic development (*reconstruction*) and individual payments (*reparations*) to those aggrieved.[228] Similar "obstacles plague reconciliation initiatives across the globe, from Sierra Leone to Chile and from Sri Lanka to Bosnia."[229]

People suffering the persisting harms of historic injustice in Hawai'i, the continental United States, and other countries seek, and deserve, more than "cheap grace"—all words and no action.[230] Often promised much, they frequently receive little. But sometimes governments and the populace deliver the kind of multi-faceted justice that heals.[231] Against these stark realities, the *Social Healing Through Justice* framework for shaping and assessing reconciliation initiatives illuminates the salience of Chief Justice Moon's *OHA v. HCDCH* opinion and its potential ripple effects in this "Age of Reconciliation." That opinion charts a potential collaborative path for the people, the legislature, the executive branch, and, yes, the courts in fostering genuine reconciliation—so that all in the polity might work together productively and live together peacefully. We all have a stake in social healing through justice.

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[227] EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS 1167, 1174 (2005); EMMA COLEMAN JORDAN & ANGELA P. HARRIS, WHEN MARKETS FAIL: RACE AND ECONOMICS 489-91 (2006); *see also* HAYNER, *supra* note 16; SEN, *supra* note 47.

[228] *See* Yamamoto & Mackintosh, *supra* note 29. *See also* Ángel Páez, *No Right Reparations Yet for Families of Civil War Victims*, INTERPRESS SERVICE (July 27, 2010), http://ipsnews.net/news.asp?idnews=52284.

[229] YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION, *supra* note 2.

[230] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 24, at 194-95.

[231] *See* YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION, *supra* note 2.

Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law

D. Kapua'ala Sproat*

I. INTRODUCTION

Dr. Martin Luther King Jr.'s vision of "justice roll[ing] down like waters and righteousness like a mighty stream"[1] captures the essence of the relationship between justice and flowing water in Hawai'i. This observation particularly resonates in an island community where the private diversion of public fresh water resources has created colonial empires, spanned generations, and for many years defied even justice and the rule of law.[2]

In Hawai'i, the flow of fresh water is the lifeblood of natural ecosystems and the human communities that rely on them: ola i ka wai ola, ola ē kua'āina, life through the life-giving waters brings life to the people of the land.[3] According to basic principles of geology and hydrology, water on islands should flow naturally toward the ocean.[4] In many instances throughout Hawai'i's history, however, the flow of water has been directed by political and economic forces, regardless of what the laws or justice required.[5]

Hawai'i has always recognized that fresh water resources are part of a public trust, with the first constitution of the Kingdom of Hawai'i declaring that the land and its resources "belonged to the Chiefs and people in common, of whom

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[1] Martin Luther King, Jr., I've Been to the Mountaintop (Apr. 3, 1968) (quoting *Amos* 5:24), *available at* http://www.afscme.org/about/1549.cfm.

[2] See *infra* Part II for further discussion of the legal and political development of Hawai'i water law.

[3] Kelikokauaikekai Hoe, Kāko'o Ko'olau (unpublished mele composed in 2001) (on file with author).

[4] *See generally* GORDON TRIBBLE, U.S. GEOLOGICAL SURVEY, GROUND WATER ON TROPICAL PACIFIC ISLANDS—UNDERSTANDING A VITAL RESOURCE (2008), *available at* http://pubs.usgs.gov/circ/1312/c1312.pdf.

[5] See *infra* Part II for further discussion of the legal and political development of Hawai'i water law.

[the King] was the head and had the management of landed property."[6] Even after traditional systems of land management were replaced with a Western system of private land ownership via the Māhele,[7] kingdom laws classified water as a resource reserved for the public good.[8] Despite these and other laws, judges often made decisions skewed toward foreign principles that benefitted large agricultural plantations to the detriment of the ecosystems and indigenous communities that relied upon free-flowing streams.[9] That was the state of water law in these islands for many years, until the Hawai'i Supreme Court took up the issue in a series of cases including *McBryde Sugar Co. v. Robinson*,[10] *Robinson v. Ariyoshi*,[11] and *Reppun v. Board of Water Supply*,[12] all under the leadership of the late, great Chief Justice William S. Richardson. Although the Richardson Court settled many outstanding issues, legal and political resistance by entrenched interests persisted.

Under the guidance of Chief Justice Ronald T.Y. Moon, the Hawai'i Supreme Court built upon the Richardson Court's decisions and illuminated Hawai'i water law. The Moon Court wrestled with five major decisions that further refined the legal precepts of water use and management in Hawai'i today. Much of this was accomplished in *In re Water Use Permit Applications (Waiāhole I)*,[13] the first major case to interpret and apply Hawai'i's amended constitution and the State Water Code, Hawai'i Revised Statutes chapter 174C.

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[6] HAW. CONST. of 1840, *reprinted in* FUNDAMENTAL LAW OF HAWAII 3 (Lorrin A. Thurston ed., 1904).

[7] See generally LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992) for a detailed explanation of the Māhele. The Māhele process, which took place between approximately 1845 and 1855, "transformed the traditional Land system from one of communal tenure to private ownership on the capitalist model." *Id.* at 8. For a detailed discussion of Hawaiian land tenure, see also DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE 35-40 (2007); Brenton Kamanamaikalani Beamer, Huli Ka Palena (Aug. 2005) (unpublished Master's thesis, University of Hawai'i at Mānoa) (on file with author); Donovan C. Preza, The Empirical Strikes Back: Re-examining Hawaiian Dispossession Resulting From The Mahele of 1848 (May 2010) (unpublished Master's thesis, University of Hawai'i at Mānoa) (on file with author).

[8] Reppun v. Bd. of Water Supply, 65 Haw. 531, 542-45, 656 P.2d 57, 65-67 (1982).

[9] *See* CAROL WILCOX, SUGAR WATER 33 (1996) (acknowledging that "from 1900 to 1959, the Hawaii Supreme Court was composed of lawyers drawn from the prominent business interests whose commercial philosophy they upheld").

[10] See *infra* Part II for further discussion of *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973).

[11] See *infra* Part II for further discussion of *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982).

[12] See *infra* Part II for further discussion of *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982).

[13] 94 Haw. 97, 9 P.3d 409 (2000). See *infra* Part III.B.1 for further discussion of *Waiāhole I*.

Together with cases from the islands of O'ahu and Moloka'i, three significant themes emerged which encapsulate the Moon Court's contributions to Hawai'i water law: the public trust, indigenous rights, and the courage to uphold the law. Part II provides the necessary cultural and historical context for water in Hawai'i nei, focusing on the Richardson Court's decisions that created a foundation for the Moon Court. Part III explores the Moon Court's major water cases and explains how they shaped water law in Hawai'i today. Part IV delves into the three aspects that define the Moon Court's water law legacy. Through these principles in particular, the Moon Court, with careful attention to the fundamental purposes of Hawai'i water law, enabled justice to flow like water from mauka to makai (from the mountains down to the ocean).[14]

II. WATER'S CULTURAL AND HISTORICAL SIGNIFICANCE IN HAWAI'I NEI[15]

"He Mele No Kāne," an ancient song from the island of Kaua'i, explains in poetic detail that fresh water permeates all aspects of life in Hawai'i.[16] These waters span the horizon from where the sun rises in the East to where it sets in the West.[17] They flow down mountain peaks and over river bottoms, through the sea and above the land in the form of rain, clouds, and rainbows, dwell deep within the earth as aquifers, or bubble up as springs.[18] "He wai e mana, he wai e ola, e ola no eā":[19] it is fresh water that empowers and provides life.

Today, most water management practices no longer reflect the wisdom that enabled Native Hawaiians[20] to thrive in these islands for countless generations; as a result, Hawai'i's water resources and communities have suffered.[21] The waters of life are no longer as abundant as "He Mele Nō Kāne" proclaimed. Most of Hawai'i's streams no longer flow continuously from mauka to makai.[22]

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[14] This article gives particular attention to the intersection between water issues and Native Hawaiian rights and practices, which is one significant area where the Moon Court expanded upon the Richardson Court's legacy.

[15] Some text from this section has previously appeared in D. Kapua'ala Sproat, *Water*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE 187, 187-94 (Craig Howes & Jon Osorio eds., 2010).

[16] NATHANIEL B. EMERSON, UNWRITTEN LITERATURE OF HAWAI'I, THE SACRED SONGS OF HULA 257-59 (1964).

[17] *Id.*

[18] *Id.* (excerpts from "He Mele No Kāne").

[19] *Id.* at 258.

[20] In this article, the term "Native Hawaiian," or Kānaka Maoli, refers to individuals able to trace their ancestry to the peoples inhabiting the Hawaiian Islands prior to the arrival of Captain James Cook in 1778, regardless of blood quantum. Both the "N" and the "H" are capitalized (similar to "Native American") to signify that the indigenous people of Hawai'i have a status unique from other inhabitants of these islands.

[21] Sproat, *supra* note 15, at 188.

[22] *See, e.g.*, DELWYN S. OKI, U.S. GEOLOGICAL SURVEY, TRENDS IN STREAMFLOW

Where they still flow, stream and marine ecosystems are often polluted or infested with invasive species that threaten to choke out native wildlife.[23] Meanwhile, ground water supplies that feed nearshore marine ecosystems and provide drinking water for most of Hawai'i's communities have declined in both quantity and quality.[24] Native Hawaiian traditional and customary practices, as well as other local activities dependent on abundant fresh water—including fishing, gathering, and traditional agriculture and aquaculture—have dwindled in that wake.[25]

Native Hawaiians recognized that lush forests and healthy watersheds gathered the rains that fed streams and seeped deep into the earth to recharge drinking water supplies.[26] They appreciated the vital role that fresh water plays—flowing down streams and up as springs, especially in coastal areas—in feeding estuary systems where aquatic and other life can thrive.[27] They

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CHARACTERISTICS AT LONG-TERM GAGING STATIONS, HAWAII 1, 3 (2004), *available at* http://pubs.usgs.gov/sir/2004/5080/pdf/sir20045080.pdf (noting the serious implications of declining surface and ground water levels for long-term drinking water supplies, farmers who rely on these resources, and the habitat available for native stream animals).

[23] Teresa Dawson, *Hawai'i Aquatic Biologists Seek Help Fending Off Marine Invasions*, ENVIRONMENT HAWAI'I, Jan. 2003; DEP'T OF LAND & NATURAL RES., DIV. OF AQUATIC RES., STATE OF HAWAI'I AQUATIC INVASIVE SPECIES MANAGEMENT PLAN (2003), *available at* http://www.anstaskforce.gov/State%20Plans/More/HAWAII%20mgt%20PLAN%2003.pdf. "Today, more than [fifty] species of nonnative invertebrates, reptiles, amphibians and plants are established in Hawaii's streams, reservoirs, and other inland waters." *Id.* at 2-7. Aquatic invasive species cause environmental impacts including "[l]oss of native biodiversity due to invasive species preying upon native species; decreased habitat availability for native species; additional competition; parasites and disease; smothering and overgrowth (leading to loss of key reef building species); genetic dilution; functional changes of freshwater, estuarine, other inland waters, and nearshore marine ecosystems; alterations in nutrient cycling pathways; [and] decreased water quality." *Id.* at 2-1.

[24] *See* OKI, *supra* note 22, at 3.

[25] *See* MCGREGOR, *supra* note 7, at 211; 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, 72-73 (1996) ("Just as a plant wilts and loses strength in the absence of water, Hawaiian life has suffered as access to water diminished through the dominance of foreign beliefs, values, practices and concepts of private property."); DEP'T OF LAND & NATURAL RES., *supra* note 23, at 2-1 (stating that aquatic invasive species cause significant cultural and traditional impacts, including "competition with native species used in subsistence harvesting; degradation of culturally important habitats (such as Hawaiian fishponds); [and] disintegration of cultural resources (such as Hawaiian fishponds and native Hawaiian habitats) for use with cultural education and practice of traditional knowledge for children and communities").

[26] *See* E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY, WITH THE COLLABORATION OF MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAI'I, THEIR LIFE, LORE, & ENVIRONMENT 63 (4th ed. 1995) [hereinafter HANDY & HANDY].

[27] D. KAPUA'ALA SPROAT, OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAI'I 3 (2009).

Continuous mauka to makai (from the mountains to the ocean) stream flow provided

understood that the cultivation of kalo[28] required an ample supply of fresh water flowing through irrigated terraces and back into streams, and the necessity of this system for the sustenance of the larger community.[29] Water truly provided life for ecosystems and empowered the human communities that depended on them.[30]

Hawaiian laws and customs both prior and subsequent to Western contact reflected these important principles, recognizing that water could not be "owned" in any sense, but instead must be proactively managed as a resource for generations to come.[31] For instance, the 1839 Law Respecting Water for

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critical fresh water for drinking, supported traditional agriculture and aquaculture, recharged ground water supplies, and sustained productive estuaries and fisheries by both bringing nutrients from the uplands to the sea and providing a travel corridor so that native stream animals could migrate between the streams and ocean and complete their life cycles.

Id. See also CITY & CNTY. OF HONOLULU BD. OF WATER SUPPLY, WATER FOR LIFE, *available at* http://www.boardofwatersupply.com/files/Wfl_Website.pdf (last visited Feb. 25, 2011).

[28] Kalo (Taro, or *Colocasia esculenta*) was the Native Hawaiian staple. *See* HANDY & HANDY, *supra* note 26, at 69-118 (detailing the practices and culture of kalo cultivation in ancient Hawai'i, including the role of kalo and poi in Kānaka Maoli society); *see also* Martin et al., *supra* note 25, at 86-87.

Taro, a spiritual and nutritional center of Hawaiian culture, was raised by early native planters to a higher state of cultivation than anywhere else in the world. Successful wetland cultivation of taro depends upon steady flows of cool, fresh water. The large-scale taro production necessary to support large pre-contact Hawaiian populations required building and maintaining extensive 'auwai (ditch, canal) systems to effectively distribute the water. The engineering and water management mastery of Hawaiians is renowned, particularly with respect to building and operating flooded terraces, irrigation ditches, and fresh and salt water fishponds. The need for cooperation and for coordination of tasks associated with planting, watering, tending, and harvesting taro shaped relationships between individuals, families, and communities. "The streams and ditches were the regulators, the law givers in the communal relationship—not directly, but because upon their water depended the taro, and upon the taro depended man."

Id. (citations omitted).

[29] *See* HANDY & HANDY, *supra* note 26, at 76-77, 279; *see also* STEPHEN B. GINGERICH ET AL., U.S. GEOLOGICAL SURVEY, WATER USE IN WETLAND KALO CULTIVATION IN HAWAI'I (2007).

[30] D. Kapua'ala Sproat, *From Wai to Kānāwai: Water Law in Hawai'i*, *in* NATIVE HAWAIIAN LAW (Melody MacKenzie, Susan Serrano & D. Kapua'ala Sproat eds., 2d ed. forthcoming 2013); Martin et al., *supra* note 25, at 87-88 ("Kapu (codes of behavior) ensured that all community members would avoid polluting the streams. Konohiki ensured that all tenants of the ahupua'a enjoyed equal access to water. Disputes over water were rare. . . . [F]or early Hawaiians, principles of property and law were based primarily upon use of land and water, rather than upon concepts of ownership.").

[31] *See, e.g.*, HAW. CONST. of 1840, *reprinted in* FUNDAMENTAL LAW OF HAWAII 3 (Lorrin A. Thurston ed., 1904) (declaring that the land, along with its resources "was not [the King's] private property. It belonged to the Chiefs and people in common, of whom [the King] was the head, and had the management of the landed property."); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 185-87, 504 P.2d 1330, 1338-39 (1973). *See also* SPROAT, *supra* note 27, at 3-7.

Irrigation sought to ensure the equal distribution of resources and "to correct in full all those abuses which men have introduced."[32] It made clear that "it is not the design of this law to withhold unjustly from one, in order to unjustly enrich another";[33] instead, it sought to manage water resources for the common good, even if that meant reallocating water among current users.[34]

The arrival of foreigners to Hawaiian shores and the subsequent decimation of the indigenous population by introduced diseases affected everything in the islands, including the management of water resources.[35] This transformation resulted from numerous developments, including the institution of private property via the Māhele,[36] the subsequent consolidation of land ownership by foreign—and largely American—interests, and the growing recognition that Hawai'i's climate and year-round growing season made plantation agriculture, particularly sugar cane, a lucrative venture.[37]

To establish and expand their businesses, plantation interests constructed massive irrigation systems to transport and use water in ways and locations that nature never intended.[38] Instead of utilizing water within watersheds and allowing the native hydrological system to determine where and how water should flow, plantations radically redirected these systems.[39] To satisfy their thirsty crops, sugar planters constructed ditches that diverted streams from rainy Windward communities predominantly populated by Native Hawaiians to the drier Central and Leeward plains where sugar was cultivated.[40] Wells also

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[32] Hawai'i Kingdom Laws of 1839, *reprinted in* FUNDAMENTAL LAW OF HAWAII, *supra* note 6, at 29.

[33] *Id.* at 30.

[34] *Id.*

[35] *See* O. A. BUSHNELL, THE GIFTS OF CIVILIZATION: GERMS AND GENOCIDE IN HAWAI'I 132-54 (1993) (detailing the impact of foreign diseases on the Native Hawaiian population); *see generally* DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAI'I ON THE EVE OF WESTERN CONTACT (1989) (same). *See also* SPROAT, *supra* note 27, at 5 (explaining the role of foreigners in changing water management practices in Hawai'i).

[36] *See generally* KAME'ELEIHIWA, *supra* note 7.

[37] *See* WILCOX, *supra* note 9, at 2 ("The sugar industry was the prime force in transforming Hawaii from a traditional, insular, agrarian, and debt-ridden society into a multicultural, cosmopolitan, and prosperous one.").

[38] *See id.* at 5; *see also* CITY & CNTY. OF HONOLULU BD. OF WATER SUPPLY, *supra* note 27 (explaining that the sugar industry created a huge demand for water and that "[d]iverting the water ultimately meant diverting everything").

[39] WILCOX, *supra* note 9, at 29 ("The sugar ditches transported enormous quantities of water permanently out of the streams—and most often out of the watershed as well."); D. Kapua'ala Sproat & Isaac H. Moriwake, *Ke Kalo Pa'a O Waiāhole: Use of the Public Trust as a Tool for Environmental Advocacy*, *in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 247, 251-52 (Clifford Rechtschaffen & Denise Antolini eds., 2007).

[40] WILCOX, *supra* note 9, at 5, 31.

siphoned ground water.[41] Plantation owners often undertook these measures with no consideration of or consultation with the communities that they drastically affected.[42] Water was simply taken, and streams and springs dried up. Impacted communities, both natural and human, were left to live or die with the consequences.[43] This rapid change altered the natural environment and inflicted significant physical and cultural harms on Native Hawaiians, many of which endure to this day.[44] Within a short period, plantations and their irrigation systems took root on each of the major Hawaiian Islands, fundamentally changing the locations and methods of water use for over a century.[45]

Sugar's rise to dominance rewrote the social contract.[46] Plantations used public trust resources for private commercial purposes and, in turn, took over small towns, larger communities, and even whole islands.[47] Plantations were the economy. This economic dominance pervaded government as well.[48] Management practices and even court decisions during the Hawaiian Kingdom and the territorial period reflected increasingly Western notions of private

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[41] *Id.*

[42] *See, e.g.*, Ty P. Kāwika Tengan et al., Report on the Archival, Historical and Archaeological Resources of Nā Wai 'Ehā, Wailuku District, Island of Maui 15-18 (Sept. 2007) (on file with author).

[43] Maka'āinana (people of the land) and others filled Hawaiian-language newspapers at the time with complaints directed at the sugar plantations' devastating impacts on Native Hawaiians and their lifestyles. Sproat, *supra* note 30, at 11. As just one example, S.D. Haku'ole from Kula, Maui lamented:

> DESPAIR! WAILUKU IS BEING DESTROYED BY THE SUGAR PLANTATION—A letter by S.D. Haku'ole, of Kula, Maui arrived at our office, he was declaring that *the land of Wailuku is being lost due to the cultivation of sugarcane.* Furthermore, he states the current condition of once cultivated taro patches being dried up by the foreigners, where they are now planting sugarcane. Also, he fears that *Hawaiians of that place will no longer be able to eat poi,* and that *there will probably only be hard crackers which hurt the teeth when eaten, a cracker to snack on but does not satisfy the hunger of the Hawaiian people.* Although, let it be known that the Hawaiian people were accustomed to eating poi.

Letter from S.D. Hakuole to Nūpepa Kū'oko'a (Jan. 13, 1866) (translated by Hōkūao Pellegrino) (emphases added).

[44] WILCOX, *supra* note 9, at 9-11 (acknowledging that "[o]ne can admire the vision and initiative of the early sugar planters while at the same time mourning the loss of water resources and authentic Hawaiian lifestyle"). *See generally* KAME'ELEIHIWA, *supra* note 7 (detailing cultural harms to Native Hawaiians); JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 44-73, 250-60 (2002) (same).

[45] Sproat, *supra* note 15, at 189-90.

[46] *Id.*

[47] *See* WILCOX, *supra* note 9, at 29.

[48] Sproat & Moriwake, *supra* note 39, at 252.

property.[49] Where once Hawai'i's people respected water as a physical embodiment of Akua Kāne[50] and a fundamental requirement for a balanced and healthy environment, plantation interests reduced water to a mere commodity, sold to the highest bidder with no regard for impacts to the streams or other needs.[51]

Unsurprisingly, conflicts over water ensued, first between plantation interests and Native Hawaiians, and later between competing sugar plantations.[52] The kingdom government created a Commission of Private Ways and Water Rights in 1860 to address water controversies.[53] Initially, a board of three commissioners (two Native Hawaiians and one foreigner) was appointed from each election district within the kingdom to resolve water disputes.[54] Although both the boards and the courts were empowered "to declare and to protect these rights as they existed[] under the ancient Hawaiian customs and regulations," increasingly Western notions of ownership, as opposed to management, constrained their ability to respond to individual cases and reapportion water.[55] Amendments over the years substituted a single commissioner for the boards and altered the appeals process; eventually, in 1907, circuit court judges assumed the boards' duties to maintain the new status quo.[56]

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[49] SPROAT, *supra* note 27, at 6.

[50] Akua Kāne is one of the four principal gods of the Hawaiian pantheon. *See* HANDY & HANDY, *supra* note 26, at 63. Traditional mo'olelo (stories or history) explain that Kāne brought forth fresh water from the earth and traveled throughout the archipelago with Kanaloa creating springs and streams, many of which continue to flow today. *See id.*

[51] Sproat, *supra* note 30; Martin et al., *supra* note 25, at 90-98 (noting that sugar plantations withdrew "unlimited quantities of water regardless of the consequences to the environment and other water users. Euro-American settlers ignored the basic precept that Hawaiians' traditional life support systems depended upon the integrity of ma[u]ka-makai (mountain to sea) resources.").

[52] *See, e.g.*, Territory v. Gay, 31 Haw. 376 (1930); Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 14 Haw. 50 (1902), *on subsequent appeal*, 15 Haw. 675 (1904); Horner v. Kumuliilii, 10 Haw. 174 (1895); Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895); Peck v. Bailey, 8 Haw. 658 (1867) (denying sugar company's claim to paramount rights to water in the Wailuku (or 'Īao) Stream, holding that both parties were limited to their ancient appurtenant rights to use water for their lands, neither party having any exceptional rights, and further holding that the defendant had the right to use taro water on other lands, limited in quantity to the amount defendant was entitled to use on his taro lands by immemorial usage, provided no injury was done to the water rights of others).

[53] *See* Antonio Perry, *Hawaiian Water Rights*, *in* HAWAIIAN ALMANAC & ANNUAL FOR 1913, at 90, 96-99 (Thomas G. Thrum ed., 1912) (providing an in-depth discussion of the Commission of Private Ways and Water Rights).

[54] *Id.*

[55] *Id.* at 97-98.

[56] *Id.* at 97; HAROLD ANDERSON WADSWORTH, A HISTORICAL SUMMARY OF IRRIGATION IN HAWAII 131 (1933).

After roughly a century of plantation rule, a movement emerged in the 1960s and 1970s to reaffirm public management and control over water resources.[57] One critical stimulus to this movement followed statehood in 1959, when Hawai'i began to select its own judges rather than having them appointed in Washington D.C., which had been the practice while Hawai'i was a territory.[58] Locally appointed judges better understood Hawai'i laws and issues, including native custom and tradition, which provide an important legal foundation for Hawai'i's common law.[59]

Tensions between this foundation of Hawai'i water law and foreign private property concepts came to a head on the island of Kaua'i in *McBryde Sugar Co. v. Robinson*.[60] Two sugar companies litigated their respective rights to take water from the Hanapēpē River.[61] The Hawai'i Supreme Court, led by Chief Justice William S. Richardson, took the occasion in 1973 to address both the bickering between the sugar companies and the larger issue of water management in Hawai'i.[62] The court held that "the right to water is one of the most important usufruct of lands, and it appears clear to us 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."[63] Although the parties in that case possessed rights to use water, the court declared that they held no ownership interest in the water itself.[64] Rights of water ownership were never included when fee simple title was instituted in Hawai'i.[65] Instead, the court ruled that the sovereign—currently the State of Hawai'i—holds all water in trust for the benefit of the larger community.[66] The sugar companies disagreed and filed multiple appeals in both federal and state court, but those appeals were

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[57] WILCOX, *supra* note 9, at 34 (maintaining that after statehood in 1959, a transformation occurred in the government's priorities for water coinciding with a change in the makeup of the Hawai'i Supreme Court, which was "no longer dominated by justices with interests sympathetic to sugar. The new court shifted its emphasis to acknowledge some basic Hawaiian concepts of water law by way of two landmark cases: McBryde and Reppun."); Martin et al., *supra* note 25, at 105-12.

[58] WILCOX, *supra* note 9, at 34; *see also* Melody 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] MacKenzie & Soifer, *supra* note 58, at vi-vii; *see also, e.g.*, HAW. REV. STAT. § 1-1 (2009) (adopting English common law except as established by Hawaiian usage).

[60] 54 Haw. 174, 504 P.2d 1330, *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam).

[61] *Id.* at 176, 504 P.2d at 1332; *see also* WILCOX, *supra* note 9, at 35.

[62] *McBryde*, 54 Haw. 174, 504 P.2d 1330. Although Justice Abe authored the *McBryde* opinion, Chief Justice Richardson's role and influence in the case was significant.

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

[64] *Id.* at 186-87, 504 P.2d at 1338-39.

[65] *Id.*

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

ultimately resolved in favor of the State.[67] Resistance to the law nonetheless persisted, and ensuing cases continued the dispute over the nature of water as a public trust.

In *Robinson v. Ariyoshi*,[68] the Hawai'i Supreme Court responded to six questions certified by the Ninth Circuit in appeals related to *McBryde* and made several important clarifications regarding Hawai'i water law, including strongly reaffirming the public trust doctrine's role in both traditional Hawaiian and modern usage. Chief Justice Richardson took the opportunity to delve deeper into the public nature of water resources, explaining that

> a public trust was imposed upon all the waters of the kingdom. That is, we find 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. 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 the State's ownership as a retention of such authority to assure the continued existence and beneficial application of the resource for the common good.[69]

Robinson underscored that the *McBryde* decision did not depart from settled principles.[70] The case was also instrumental in affirming the role of riparianism[71] in Hawai'i water law.

The 1982 case *Reppun v. Board of Water Supply* involved a dispute over the water in Waihe'e Stream on O'ahu; specifically, the impacts of the City and County of Honolulu Board of Water Supply's wells on the rights of downstream kalo farmers.[72] The court's ruling further clarified the doctrines of appurtenant and riparian rights in Hawai'i, including whether such rights may be transferred or extinguished.[73] The decision also refined the role of

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[67] *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, 65 Haw. 641, 658 P.2d 287 (1982). See also Sproat, *supra* note 30, at 15-16, for a more detailed discussion of the cases.

[68] 65 Haw. 641, 658 P.2d 287.

[69] *Id.* at 674, 658 P.2d at 310.

[70] *Id.* at 676, 658 P.2d at 311-12.

[71] Riparianism is a doctrine of water law premised on the foundational principle that landowners with property abutting a natural watercourse have a right to the reasonable use of the water. *See* Reppun v. Bd. of Water Supply, 65 Haw. 531, 553, 656 P.2d 57, 72 (1982).

[72] *See id.* at 532-38, 656 P.2d at 59-63.

[73] Appurtenant rights appertain or attach to parcels of land that were cultivated, usually in the traditional staple kalo, at the time of the Māhele. *See id.* at 564, 656 P.2d at 78. Riparian rights protect the interests of people who live along the banks of rivers or streams to the reasonable use of water from the stream or river on the riparian land. *See id.* at 563-64, 656

riparianism in local water use and management, especially between competing water uses.[74]

Although the Richardson Court's decisions proved groundbreaking in the area of water resource management, they had far-reaching effects in other areas as well. As Chief Justice Richardson observed,

> 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 . . . and consistent with Hawaiian practice, our court held that 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.[75]

Around the same time that the initial stages of the *McBryde* litigation took place, sugar plantations began to close, losing their dominant economic role to tourism and the military.[76] Communities seized this opportunity to reexamine the legal framework for water use and more proactively manage those resources for the benefit of the larger community, rather than for the profit of a handful of private interests.[77] The 1978 Constitutional Convention developed amendments that Hawai'i voters later ratified to enshrine resource protection as a constitutional mandate.[78] Article XI, section 1 of Hawai'i's constitution now declares that

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P.2d at 78-79.

[74] *See generally id.*

[75] MacKenzie & Soifer, *supra* note 58, at vi-vii.

[76] *See* WILCOX, *supra* note 9, at 34 ("As Hawai'i became less and less dependent on the sugar industry as the only source of income, the exclusive power it had enjoyed for decades began to wane."); Kathy E. Ferguson & Phyllis Turnbull, *The Military*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE, *supra* note 15, at 47, 47 (noting the U.S. military is the second largest industry in Hawai'i); Ramsay Remigius Mahealani Taum, *Tourism*, *in* THE VALUE OF HAWAI'I: KNOWING THE PAST, SHAPING THE FUTURE, *supra* note 15, at 31, 31 (noting tourism is Hawai'i's primary industry).

[77] Martin et al., *supra* note 25, at 105-12; *see also* Sproat & Moriwake, *supra* note 39, at 251-56.

[78] Martin et al., *supra* note 25, at 105-06 ("The *McBryde* and *Reppun* decisions motivated large water users to vigorously pursue political solutions to restore their visions of an appropriate 'legal' balance. The 1978 Constitutional Convention ("ConCon") provided a forum

> [f]or the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.[79]

Article XI, section 7 articulates the State's "obligation to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people."[80] In 1987, the Legislature enacted Hawai'i's State Water Code, which established a new framework for water resource management that balanced resource protection with reasonable and beneficial use.[81]

III. WATER CASES UNDER CHIEF JUSTICE MOON'S TENURE[82]

Once the state ratified the new constitutional and statutory provisions, community members began to utilize available legal tools to protect and restore their resources. This spawned a series of cases—*Ko'olau Agricultural Co. (Ko'olau Ag)*,[83] *Waiāhole I*[84] and *Waiāhole II*,[85] *In re Wai'ola O Moloka'i, Inc. (Wai'ola)*,[86] and *In re Kukui (Moloka'i), Inc. (Kukui)*[87]—that presented the Moon Court the opportunity to refine water law in Hawai'i and revisit Chief Justice Richardson's rulings in light of Hawai'i's revised framework for water

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for them and for other interest groups seeking to achieve political solutions balancing private and group rights in water."). At the same time, voters also elevated the protection of Native Hawaiian traditional and customary rights to a constitutional mandate. *See* HAW. CONST. art. XII, § 7 ("The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.").

[79] HAW. CONST. art. XI, § 1.

[80] *Id.* art. XI, § 7.

[81] *See* HAW. REV. STAT. ch. 174C (1993 & Supp. 2010). The Code also incorporated public trust principles, clarifying in its opening declaration of policy that "the waters of the State are held for the benefit of the citizens of the State," and that "the people of the State are beneficiaries and have a right to have the waters protected for their use." *Id.* § 174C-2(a) (1993).

[82] Some text from this section originally appeared in previous publications, including Sproat & Moriwake, *supra* note 39, and SPROAT, *supra* note 27.

[83] Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt. (*Ko'olau Ag*), 83 Haw. 484, 927 P.2d 1367 (1996).

[84] *In re* Water Use Permit Applications (*Waiāhole I*), 94 Haw. 97, 9 P.3d 409 (2000).

[85] *In re* Water Use Permit Applications (*Waiāhole II*), 105 Haw. 1, 93 P.3d 643 (2004).

[86] 103 Haw. 401, 83 P.3d 664 (2004).

[87] 116 Haw. 481, 174 P.3d 320 (2007).

resource management.[88] Together, these cases upheld and further elaborated the public's interest in Hawai'i's water resources, ensuring that they will be managed as a trust for present and future generations.

A. Ko'olau Agricultural Co.

With a brand new Water Code in place, community members began putting this law to work. One initial step was to petition the Commission on Water Resource Management (Water Commission or Commission) to "designate" water management areas (WMAs).[89] Although the Commission is responsible for stewarding all of Hawai'i's water resources, designation is necessary to implement the Code's permitting provisions, which help to control water uses and withdrawals.[90] The Water Code requires designation when water resources are or may become threatened, and the process may be initiated by either the Water Commission or any interested member of the public.[91]

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[88] Justice Paula Nakayama authored the majority of the water law decisions issued by the Moon Court; Chief Justice Moon authored one of the decisions (*Ko'olau Ag*) and joined in the others. Chief Justice Moon's leadership and guidance, however, were undoubtedly instrumental in all the court's cases, including those decisions involving water resources.

[89] HAW. REV. STAT. § 174C-41 (1993). One of the Water Commission's first actions was to initiate a process by which users "declared" current water uses, Martin et al., *supra* note 25, at 139-40, to "gather information about the physical nature (including the quantity and quality) of Hawai'i's water resources and how they are being used." *Id.* at 140. The Code required Commission staff to review the declarations and issue certificates of water use for all reasonable and beneficial uses, which would have priority in resolving claims over water rights and uses. *Id.* at 140-41. Over 7000 declarations were filed with the Water Commission by the 1989 deadline. *Id.* at 141. The Water Commission was unable to meet its own deadline for acting on the individual declarations due to the sheer number filed. *Id.* Facing strong public opposition, the Commission categorized the declarants, "allegedly to facilitate the review and processing of declarations." *Id.* at 141-42. The Commission decided that declarations for instream uses, water rights, and future uses (categories 2 and 3) would not be certified, and in doing so, the Commission created "a subclass of declarants, [mostly Hawaiians,] restricting their access to Water Code proceedings and procedural safeguards, and interfering with the protection of their water uses as the Commission proceeds with allocation of water to others." *Id.* at 143-44. Despite best intentions, very little resulted from this debacle; for more information on the process for filing declarations and certifying water uses, see *id.* at 139-47.

[90] SPROAT, *supra* note 27, at 16.

[91] HAW. REV. STAT. § 174C-41(a)-(b) (Supp. 2010). If the Commission's Chair recommends designation, the Commission must hold a public hearing at a location near the area proposed for designation, and must publish a notice of hearing in a local newspaper. *Id.* § 174C-42. The Commission may also conduct investigations with regard to any proposed designation. *Id.* § 174C-43. In WMAs, the Water Code regulates all consumptive uses of water via water use permits. SPROAT, *supra* note 27, at 17. In contrast, "water rights in non-designated areas are governed by common law." Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt. (*Ko'olau Ag*), 83 Haw. 484, 491, 927 P.2d 1367, 1374 (1996). So far, all of O'ahu

In December 1988, the Punalu'u Community Association and affected individuals George Fukumitsu, Charles Reppun, and John L. Reppun, represented by the public interest litigation firm Sierra Club Legal Defense Fund,[92] filed a petition with the Water Commission to designate five Windward O'ahu aquifers as ground water management areas (GWMAs).[93] The Water Commission unanimously granted the petition, designating the Kawailoa, Ko'olauloa, Kahana, Ko'olaupoko, and Waimānalo aquifers as GWMAs on July 15, 1992.[94]

Unsure of how to appeal the Commission's decision, Ko'olau Agriculture Co., Ltd. (Ko'olau Ag)[95] challenged the designations by filing three duplicative

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except Wai'anae, the whole island of Moloka'i, and the 'Īao aquifer on Maui have been designated as GWMAs. In April 2008, the Water Commission designated Nā Wai 'Ehā, Maui the first Surface Water Management Area (SWMA) in the history of the Water Code. SPROAT, *supra* note 27, at 17. The Code articulates specific criteria for surface and ground water management area designation. HAW. REV. STAT. §§ 174C-44 to -45 (Supp. 2010).

[92] The Sierra Club Legal Defense Fund (SCLDF) was established in 1971. *About Us*, EARTHJUSTICE, http://www.earthjustice.org/about (last visited Feb. 25, 2011). In 1997, it changed its name to Earthjustice, but continues to operate as a "non-profit public interest law firm dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment." *Id.* In this case, Earthjustice (then, SCLDF) represented community groups and individuals who lived in the impacted areas and relied on the affected ground water for a range of community uses. Interview with Lea Hong, Dir., Trust for Public Lands Hawaiian Islands Program and former SCLDF attorney, in Honolulu, Haw. (Mar. 28, 2011). The Punalu'u Community Association is a community group that is working within the Punalu'u Watershed Alliance (including Kamehameha Schools, the Honolulu Board of Water Supply, the U.S. Geological Service, and the State Commission on Water Resource Management). CITY & CNTY. OF HONOLULU BD. OF WATER SUPPLY, Ko'olau Loa Community Input, *available at* http://www.boardofwatersupply.com/cssweb/display.cfm?sid=1409 (last visited Mar. 26, 2011). The Alliance's goal is to set the instream flow standard for Punalu'u Stream, address on-going and future use of surface water and groundwater, and conduct watershed management for Punalu'u. *Id.* The group meets regularly to discuss current projects and issues. *Id.*

[93] *Ko'olau Ag*, 83 Haw. at 486-87, 927 P.2d at 1369-70.

[94] *Id.* at 487, 927 P.2d at 1370. This decision followed several public hearings and deferrals for further investigation. *Id.* A special meeting was held on May 5, 1992 at which Ko'olau Agricultural Co. (Ko'olau Ag) appeared and submitted testimony. *Id.* At that meeting, the Commission staff submitted an amended report that recommended the designation of all five aquifer systems. *Id.* Thereafter, the Commission voted unanimously to designate all five aquifer systems as WMAs. *Id.*

[95] Ko'olau Ag is a Hawai'i corporation, run by Valerie Trotter, wife of James Campbell (of the Campbell Estate). *See* Jim Dooley, *Campbell Estate Heir Files for Bankruptcy*, HONOLULU ADVERTISER, Apr. 29, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/Apr/29/ln/ln10a.html. Ko'olau Ag operated with the purpose of developing water resources in Punalu'u Valley on the Windward side of O'ahu. *Id.*

actions on August 17, 1992.[96] Ultimately, the courts dismissed two of the three appeals for lack of jurisdiction, and only a complaint for declaratory and injunctive relief was left pending with the circuit court.[97] In August 1994, the court granted the Water Commission's motion to dismiss Ko'olau Ag's claims, and the matter was appealed.[98] This case, therefore, determined the appropriate method to challenge a WMA designation,[99] due to the Code's "fail[ure] to specify explicitly how, and to which court, an appeal from a WMA designation may be taken."[100]

At the outset, the Moon Court acknowledged the Code's complex regulatory framework and "bifurcated system of water rights."[101] "In WMAs, the permitting provisions of the Code prevail; water rights in non-designated areas are governed by the common law."[102] Although it acknowledged "the uncertainty caused by [the] inartful drafting of the Code[,]"[103] the court deferred to the agency: "The Commission, by virtue of its agency expertise, is certainly in a better position than the courts to evaluate 'scientific investigations and research' to determine whether a water resource 'may be threatened by existing or proposed withdrawals and diversions of water.'"[104] The Moon Court upheld the lower court's ruling, having been "persuaded by the language and structure of the Code that the legislature did not intend that a designation decision may be challenged by way of a declaratory judgment action."[105] Ultimately, the Moon Court held that "a WMA designation is not judicially reviewable."[106] "[U]nless the legislature 'specifically provide[s]' for an appeal, the Commission has 'exclusive jurisdiction and final authority' over a WMA designation, which is indisputably a 'matter relating to implementation and administration of the state water code.'"[107]

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[96] *Ko'olau Ag*, 83 Haw. at 487, 927 P.2d at 1370. Ko'olau Ag filed (1) a complaint for declaratory and injunctive relief with the circuit court; (2) a direct appeal to the Hawai'i Supreme Court; and (3) an administrative appeal to the circuit court. *Id.* The Hawai'i Supreme Court dismissed the direct appeal for lack of jurisdiction because it was not timely filed. *Id.*; *see also* Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt., 76 Haw. 37, 868 P.2d 455 (1994). Ko'olau Ag later "stipulated to dismiss its appeal to the circuit court, leaving only the instant declaratory judgment action unresolved." *Ko'olau Ag*, 83 Haw. at 487, 927 P.2d at 1370.

[97] *Ko'olau Ag*, 83 Haw. at 487, 927 P.2d at 1370.

[98] *Id.*

[99] *Id.* at 487-88, 927 P.2d at 1370-71.

[100] *Id.* at 489, 927 P.2d at 1372.

[101] *Id.* at 491, 927 P.2d at 1374.

[102] *Id.*

[103] *Id.* at 489, 927 P.2d at 1372.

[104] *Id.* at 493, 927 P.2d at 1376.

[105] *Id.* at 495, 927 P.2d at 1378.

[106] *Id.* at 493, 927 P.2d at 1376.

[107] *Id.* The court did acknowledge that the Commission's erroneous refusal to designate a WMA would breach its constitutional and statutory duties and may be reviewable via

At first blush, *Ko'olau Ag* may appear to address peripheral procedural issues. Closer examination, however, reveals that the case was critical in upholding the Code's new framework for water resource management and the Commission's first, formative step toward implementing that framework. Where the Commission took the initial procedural action to protect water resources, the Moon Court respected and upheld the Commission's "'exclusive jurisdiction and final authority'" in taking such action.[108] Had the court overturned the Commission's decision, it would have stymied the Commission's regulatory role and undermined the Code's foundation for water resource management at the outset.

The cases that ensued further addressed the Code's management framework and delved into more substantive issues. This presented both the Water Commission and the Moon Court with the opportunity to shape the future of water management and allocation in Hawai'i nei.

B. The Waiāhole Decisions

The Waiāhole decisions offered the Moon Court its first opportunity to grapple with the inherent nature of Hawai'i's water resources: whether they would be managed as a public trust or continue to be hoarded as private commodities. The new constitutional and statutory provisions faced off against plantation-era water politics in what was the biggest battle over water in Hawai'i's recent history.

The Waiāhole Ditch stretches from Kahana Valley all the way to Kahalu'u on O'ahu's Windward side.[109] Since it was constructed in the early 1900s, that system has taken roughly 27 million gallons of water each day (mgd) from Windward streams and communities, through the Ko'olau mountains, to the Central plain where it was used primarily for sugar.[110] The streams diverted by the Waiāhole Ditch provide the major source of fresh water to support native stream life, enable traditional agriculture and aquaculture including lo'i kalo (wetland kalo cultivation),[111] sustain productive estuaries and fisheries, and nourish many other public trust purposes and community uses on the

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mandamus. *Id.* at 494, 927 P.2d at 1377.

[108] *Id.* at 493, 927 P.2d at 1376 (quoting HAW. REV. STAT. § 174C-7(a) (1993)).

[109] *Waiāhole I*, 94 Haw. 97, 111, 9 P.3d 409, 423 (2000).

[110] *Chronology of Waiahole Ditch*, ENVIRONMENT HAWAI'I, Nov. 2000, http://www.environment-hawaii.org/members_archives/archives_more.php?id=653_0_24_0_C; *see also* WILCOX, *supra* note 9, at 98-108.

[111] Lo'i kalo refers to the wetland cultivation of the staple crop kalo (taro, or *Colocasia esculenta*), which was traditionally raised in irrigated paddies. *See* HANDY & HANDY, *supra* note 26, at 69-118 (detailing the practices and culture of kalo cultivation in ancient Hawai'i, including the role of kalo and poi in Kānaka Maoli society).

Windward side.[112] Yet, for roughly 100 years, those streams have been diverted to subsidize agriculture on O'ahu's Central plain to the detriment of Windward needs and uses.[113]

In 1993, shortly after the areas surrounding the Waiāhole Ditch were designated as GWMAs, and that decision was upheld in *Ko'olau Ag*,[114] O'ahu Sugar announced that it would be closing.[115] A coalition of Windward interests including Native Hawaiians and small family farmers (Waiāhole-Waikāne Community Association,[116] Hakipu'u 'Ohana,[117] and Ka Lāhui Hawai'i[118] (collectively, the Windward Parties)), represented by pro bono attorneys including the public interest litigation firms Earthjustice[119] and the Native Hawaiian Legal Corporation (NHLC),[120] petitioned for the return of all water diverted by the ditch system to the Windward streams.[121]

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[112] *Waiāhole I*, 94 Haw. at 111, 9 P.3d at 423.

[113] *Chronology of Waiahole Ditch*, *supra* note 110.

[114] *See generally* Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt. (*Ko'olau Ag*), 83 Haw. 484, 927 P.2d 1367 (1996).

[115] *Chronology of Waiahole Ditch*, *supra* note 110; *see also* WILCOX, *supra* note 9, at 98-108.

[116] Waiāhole-Waikāne Community Association is a grassroots group comprised of residents from the Waiāhole and Waikāne areas of Windward O'ahu who sought the restoration of streams to revive the native stream and estuary ecosystem and the Native Hawaiian and other community uses they once supported. Sproat & Moriwake, *supra* note 39, at 257.

[117] Hakipu'u 'Ohana is a family-based hui (group) from the Hakipu'u area of Windward O'ahu that has been engaged in a range of Native Hawaiian and cultural issues, including the restoration of water diverted by the Waiāhole Ditch System. Interview with Kahikūkalā Hoe, Hakipu'u 'Ohana member, in Honolulu, Haw. (Dec. 15, 2010). Hakipu'u 'Ohana is one of the original petitioners in the Waiāhole case. *Id.*

[118] Ka Lāhui Hawai'i is one of the first groups organized to advocate for and model Hawaiian sovereignty. Sproat & Moriwake, *supra* note 39, at 257. Ka Lāhui was one of the original groups who petitioned to restore Windward streams and communities. *Id.*

[119] *See supra* note 92 (explaining what Earthjustice is).

[120] NHLC is Hawai'i's only non-profit, public interest law firm focused solely on Native Hawaiian law. *About the Native Hawaiian Legal Corporation*, NATIVE HAWAIIAN LEGAL CORPORATION, http://www.nhlchi.org/about-us (last visited Feb. 25, 2011). NHLC provides legal assistance to families and communities engaged in perpetuating the culture and traditions of Hawai'i's indigenous people. *Id.*

[121] The Windward Parties, joined by OHA, petitioned to restore stream flow by amending the Interim Instream Flow Standards (IIFSs) for the Windward O'ahu streams affected by the Waiāhole Ditch System. *Waiāhole I*, 94 Haw. 97, 112, 9 P.3d 409, 424 (2000). An IIFS is the minimum amount of water that must remain in a stream or a given reach of a stream to support beneficial instream uses, such as environmental protection or traditional and customary Native Hawaiian practices. HAW. REV. STAT. § 174C-3 (1993). IIFSs and permanent instream flow standards "are the Water Commission's principal mechanisms to ensure that surface water rights and interests, including resource protection, are adequately considered." SPROAT, *supra* note 27, at 22. The Water Code required the establishment and administration of an "instream use protection program" when the Water Code was passed in 1987; however, the only standards that

Nearly twenty other parties wanted Windward water to continue going to the Central and Leeward plains; most of these parties sought permits for large-scale agricultural and urban development.[122] A wide range of interests filed water use permit applications[123] or supported the continued diversion of water, including county, state, and federal entities as well as some of the most powerful private interests in Hawai'i.[124] With the exception of the Windward Parties, the Office of Hawaiian Affairs (OHA), and the Department of Hawaiian Home Lands (DHHL), all opposed the restoration of Windward streams and communities.[125]

After months of contested case hearings, in December 1997 the Water Commission issued a decision dividing the water between Windward streams and Central/Leeward users.[126] For the first time in Hawai'i's history, the Commission ordered the ditch operator to restore water that had been taken for plantation agriculture to the streams of origin.[127]

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are based on some actual information (as opposed to the status quo) have been set as a result of litigation, with the first such standards established in *Waiāhole*. *See* HAW. REV. STAT. § 174C-71 (1993) (detailing the requirements of the instream use protection program).

[122] In *Waiāhole I*, the petitions to amend the interim instream flows and water use permit applications in that case collectively exceeded the entire flow of the ditch system. *Waiāhole I*, 94 Haw. at 111-12, 9 P.3d at 423-24.

[123] The Water Code requires a water use permit for any consumptive use of water within a designated WMA, with some limited exceptions. HAW. REV. STAT. § 174C-48(a) (1993). Practically speaking, water use permits are the Commission's administrative tool to regulate how and where water is used. *See* SPROAT, *supra* note 27, at 16-19 (detailing the purpose and requirements of designation and water use permits); *see also infra* Part III.A (same).

[124] Interested entities included the Office of Hawaiian Affairs, Kamehameha Schools (then called Bishop Estate), James Campbell Estate, Robinson Estate, Amfac and its subsidiary the Waiāhole Irrigation Company, City and County of Honolulu Board of Water Supply, Hawai'i Department of Agriculture, Hawai'i Department of Hawaiian Home Lands, Hawai'i Department of Land and Natural Resources (DLNR), and the United States Navy. *Waiāhole I*, 94 Haw. at 110-11, 9 P.3d at 422-23.

[125] The appearance of DLNR, which officially opposed restoring stream flow, raised a major procedural issue, because the Water Commission is administratively housed within DLNR, and directed by the same official who chairs the Department. Ultimately, the Hawai'i Supreme Court noted the conflict, but deemed any error waived or excused by the "rule of necessity." *Id.* at 123-24, 9 P.3d at 435-36.

[126] *Id.* at 113, 9 P.3d at 425.

[127] *See id.* at 97, 9 P.3d at 409. In this initial decision, the Water Commission assigned 14.03 mgd of the total 27 mgd to Leeward users and "system losses" and released 12.97 mgd into Windward streams. *Id.* at 118, 9 P.3d at 430. However, 6.97 mgd of the 12.97 mgd released into the Windward streams remained available for Leeward offstream uses as a "proposed agricultural reserve" and "non-permitted ground water buffer." *Id.* Although the Commission increased the IIFS of Waiāhole and Waianu streams to 10.4 mgd, it neither mentioned nor made any provision for Waikāne Stream's IIFS. *Id.* at 117, 9 P.3d at 429.

No one was completely satisfied with the Commission's decision, and it was appealed to the Hawai'i Supreme Court.[128] This case of "unprecedented size, duration, and complexity" was the first time that the Moon Court reviewed various provisions of the constitution and Water Code, including the standards for water use permits and interim instream flow standards (IIFSs).[129] The Windward Parties argued—and the Moon Court eventually agreed—that not enough water had been restored to the streams, while Central/Leeward interests complained that too much water had been returned.[130]

In August 2000, the Moon Court issued a landmark decision in that appeal.[131] Although the court acknowledged the Commission's efforts at water conservation, it went further to ensure that Hawai'i's streams receive the protection that the law requires.[132] Upon review, the court found much of the Commission's decision unsupported by the evidence and in violation of the State Water Code.[133] The court ordered the Commission to reconsider the amount of water the Windward streams need to support native stream life and community uses, vacated permits the Commission had issued to Leeward interests, and required the Commission to make a new decision on the permits that followed from the evidence.[134] In sum, the court decided most of the issues, but sent seven back to the Commission for more work.[135] The court's 2000 decision strongly reaffirmed several important principles, especially regarding the relationship between water and Native Hawaiian issues.

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[128] *Id.* at 118, 9 P.3d at 430; *see also* Sproat & Moriwake, *supra* note 39, at 259-60.

[129] *Waiāhole I*, 94 Haw. at 118, 9 P.3d at 430; *see supra* note 121 (defining IIFS).

[130] *Waiāhole I*, 94 Haw. at 147, 9 P.3d at 459.

[131] *See generally id.*

[132] *See id.*

[133] *Id.* at 148, 9 P.3d at 460 (pointing out that the Water Commission's analysis "misconstrues the Code's framework for water resource management").

[134] *Id.* at 189, 9 P.3d at 501.

[135] In *Waiāhole I*, the court vacated the Commission's initial decision in part, remanding seven issues for further hearings:

> (1) the designation of an interim instream flow standard for windward streams based on the best information available, as well as the specific apportionment of any flows allocated or otherwise released to the windward streams; (2) the merits of the petition to amend the interim standard for Waikāne Stream; (3) the actual need for 2,500 gallons per acre per day over all acres in diversified agriculture; (4) the actual needs of Field Nos. 146 and 166 (ICI Seeds) and Field Nos. 115, 116, 145, and 161 (Gentry and Cozzens); (5) the practicability of Campbell Estate and PMI using alternative ground water sources; (6) practicable measures to mitigate the impact of variable offstream demand on the streams; and (7) the merits of the permit application for ditch "system losses."

Id. (internal citations and formatting omitted). The court affirmed "all other aspects of the Commission's decision not otherwise addressed." *Id.* at 190, 9 P.3d at 502.

1. Waiāhole I

a. The public trust doctrine

The Moon Court strongly reaffirmed that Hawai'i law has always and continues to recognize the "public trust doctrine," which mandates that all waters are held in trust for all of the State's citizens.[136] The court noted that this doctrine is so important that even the Legislature cannot abolish it and upheld the independent validity of the public trust, ruling that article XI, sections 1 and 7 of Hawai'i's constitution "adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."[137] Therefore, the Water Code supplements, not supplants, the public trust doctrine's protections.[138]

The court next addressed the scope and substance of the trust, holding that the public trust applies to all water resources without exception or distinction between surface and ground water.[139] "The public trust [possesses] a dual concept of sovereign right[s] and responsibilit[ies]."[140] Thus, the purposes of the trust have evolved from the traditional public rights of navigation, commerce, fishing, recreational uses, and scenic viewing, to include resource protection as an important underlying responsibility of the trust.[141]

In response to arguments that stream water would be better utilized by offstream users, the Moon Court acknowledged the public interest in free-flowing streams and specifically dispelled any argument that the "retention of waters in their natural state" constitutes "waste."[142] The court also recognized the exercise of Native Hawaiian and traditional and customary rights,[143]

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[136] *Id.* at 131-32, 9 P.3d at 443-44.

[137] *Id.* at 132, 9 P.3d at 444.

[138] *Id.* at 133, 9 P.3d at 445.

[139] *Id.*

[140] *Id.* at 135, 9 P.3d at 447.

[141] *Id.* at 136, 9 P.3d at 448.

[142] *Id.* at 136-37, 9 P.3d at 448-49.

[143] Native Hawaiian traditional and customary rights include "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778[.]" HAW. CONST. art. XII, § 7; Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 46-47, 7 P.3d 1068, 1083-84 (2000) (ruling that to effectuate the State of Hawai'i's "obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests" in the context of the Land Use Commission's review of a petition for reclassification of district boundaries, the State must, at a minimum, make specific findings and conclusions regarding: "(1) the identity and scope of 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be

appurtenant rights,[144] resource protection, and domestic water uses[145] as public trust purposes.[146] Importantly, public trust purposes have priority over other types of uses.[147]

The court made clear that private commercial uses are not public trust purposes: "the public trust has never been understood to safeguard rights of exclusive use for private commercial gain."[148] After considering all of the various public trust purposes, the court overruled the Commission's conclusion that the public trust establishes resource protection as "a categorical imperative and the precondition to all subsequent considerations."[149] Instead, the court held that the Commission "must inevitably weigh competing public and private water uses on a case-by-case basis," but that any balancing must "begin with a presumption in favor of public access, use, and enjoyment."[150]

Under the public trust, the state has a dual mandate of protection and maximum reasonable-beneficial use, which prescribes a higher level of scrutiny for private commercial uses.[151] Therefore, the doctrine requires close scrutiny of any requests by private interests to use public resources for private gain to ensure that the public interest in the resource is fully protected.[152]

After considering the basic principles of statutory construction and the Water Code's declaration of policy, the Moon Court also ruled that the Code provides for a public trust "essentially identical to the previously outlined dual mandate of protection and 'conservation'-minded use, under which resource 'protection,' 'maintenance,' and 'preservation and enhancement' receive special consideration or scrutiny, but not a categorical priority."[153]

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affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [Land Use Commission] to reasonably protect native Hawaiian rights if they are found to exist."); *see also* HAW. REV. STAT. § 174C-101 (1993) (describing Native Hawaiian water rights).

[144] *See supra* note 73 (defining appurtenant rights).

[145] HAW. REV. STAT. § 174C-3 (1993) (defining a domestic water use as "any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation"). The Water Code separately defines municipal water services provided by a county or Board of Water Supply. *Id.*

[146] *Waiāhole I*, 94 Haw. at 136-37, 9 P.3d at 448-49.

[147] *Id.* at 137, 9 P.3d at 449.

[148] *Id.* at 138, 9 P.3d at 450.

[149] *Id.* at 142, 9 P.3d at 454.

[150] *Id.*

[151] *Id.*

[152] *See id.*

[153] *Id.* at 146, 9 P.3d at 458. In its 1997 Final Decision and Order, the Water Commission concluded that its "duty to protect public water resources is a categorical imperative and the precondition to all subsequent considerations[.]" *Id.* at 113, 9 P.3d at 425. The Moon Court overruled that conclusion, holding "that the Commission inevitably must weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards

b. The precautionary principle

In addition to the public trust, the court also discussed the "precautionary principle."[154] The Commission adopted this tenet in its decision, ruling that "the lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation" and that "where [scientific] uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource."[155]

On appeal, the Moon Court affirmed the adoption of the precautionary principle.[156] *Waiāhole I* noted the principle's "diverse forms throughout the field of environmental law" and quoted excerpts from the "loadstar opinion" of the U.S. Court of Appeals for the District of Columbia Circuit in *Ethyl Corp. v. EPA*, including the recognition that "[q]uestions involving the environment are particularly prone to uncertainty. . . . Yet the statutes—and common sense—demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable."[157]

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provided by law." *Id.* at 142, 9 P.3d at 454.

[154] There are several variations of the precautionary principle, all of which share the "normative assumption that when a government is balancing and integrating scientific, economic, political, and social values for the purpose of risk management, environmental protection is to be a paramount value." Phillip M. Kannan, *The Precautionary Principle: More Than a Cameo Appearance in United States Environmental Law?*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 409, 418 (2007). *See also* Michael Pollan, *The Year in Ideas, A to Z: Precautionary Principle*, N.Y. TIMES MAGAZINE, Dec. 9, 2001, at 92 (explaining that the precautionary principle, rooted in German environmental law, has gone international, popping up in the preamble of the U.N. Treaty of Biodiversity and appearing in a "slew of protocols and rules issued by the European Union in the 90s. It informs treaties like the 2000 Cartagena Protocol on Biosafety, which allows countries to bar genetically modified organisms on the basis of precaution."). A Westlaw search for "precautionary principle" reveals only two cases in which U.S. courts cited to the precautionary principle prior to the year 2000 when the Moon Court decided *Waiāhole I*.

[155] *Waiāhole I*, 94 Haw. at 154, 9 P.3d at 466 (quoting the Commission's decision). The first statement generally tracks the language of Principle 15 of the Rio Declaration on Environment and Development. *See* Rio Declaration on Environment and Development, princ. 15, U.N. Doc. A/Conf.151/5 (1992), *reprinted in* 31 I.L.M. 874, 879 (1992) ("Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."). In its decision, the Water Commission cited two cases from the U.S. Court of Appeals for the District of Columbia: *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), and *Lead Industrial Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), both dealing with the U.S. EPA's statutory authority to regulate air pollution in the face of scientific uncertainty.

[156] *Waiāhole I*, 94 Haw. at 154-55, 9 P.3d at 466-67.

[157] *Id.* at 155 n.59, 9 P.3d at 467 n.59 (quoting *Ethyl Corp.*, 541 F.2d at 24-25).

The court recognized that the principle "must vary according to the situation and can only develop over time."[158] Nevertheless, it agreed with what it considered the principle's "quintessential form: at minimum, the absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures designed to further the public interest."[159]

Similar to the Commission's conception of the precautionary principle in terms of a "trustee's duty," the court viewed the principle as "simply restat[ing]" the Commission's duties under the public trust and the Code, neither of which "constrains the Commission to wait for full scientific certainty in fulfilling its duties towards the public interest in [providing for] instream flows."[160] After all, "[u]ncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection."[161] Based on the Commission's "duties as a trustee" and the "interest in precaution," the court held that "the Commission should consider providing reasonable 'margins of safety' for instream trust purposes when establishing instream flow standards."[162]

Waiāhole I broke legal ground on a number of levels. First, it solidified the foundation for water law in Hawai'i that Chief Justice Richardson articulated in *McBryde*, *Robinson*, and *Reppun*.[163] As detailed above, the Moon Court strongly reaffirmed that water and other public natural resources in Hawai'i are held in trust by the State for the benefit of present and future generations.

Second, the Moon Court built upon Chief Justice Richardson's legal foundation to elucidate the larger framework for water resource management in Hawai'i under the amended constitution and Water Code. This new framework demands that the Commission take a proactive role; as "the primary guardian of public rights under the trust[,]" the "Commission must not relegate itself to the role of a mere 'umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process."[164]

Third, the court identified public trust purposes, including resource protection, Native Hawaiian traditional and customary rights, and appurtenant rights, which have priority over other types of uses.[165] The court also clarified

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[158] *Id.* at 155, 9 P.3d at 467.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at 156, 9 P.3d at 468.

[163] *See supra* text accompanying notes 60-74.

[164] *Id.* at 143, 9 P.3d at 455 (quoting Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984)).

[165] *Id.* at 130-44, 9 P.3d at 442-56.

the Water Commission's duties, the permit applicant's burden of proof, and other issues. Thus, *Waiāhole I* resolved the vast majority of questions about the state of water law in Hawai'i.

2. Waiāhole II

After the Hawai'i Supreme Court's pathbreaking decision in *Waiāhole I*, the Commission held remanded hearings and issued a decision in December 2001 amending the IIFSs for the streams diverted by the Waiāhole Ditch and issuing water use permits to several Leeward users.[166] The Commission attempted to justify the revised IIFSs by claiming that they were approximately one half of the streams' historic pre-ditch flows, and, "according to one Hawaiian historian, 'no ditch was permitted to divert more than half the flow from a stream.'"[167] The Water Commission apparently assumed that if Native Hawaiians never traditionally diverted more than half of the flow of a stream, then half of a stream's flow must be sufficient to protect instream values.[168] The Commission also claimed that its revised flows should sufficiently protect aquatic life because the IIFSs "exceed the 1960s flows, where testimony established that presence of aquatic biota at a higher level than today."[169] The Windward Parties appealed again on several grounds, including that the Commission's decision was arbitrary and misunderstood Hawaiian custom and tradition.[170] The Hawai'i Supreme Court rendered a second decision in the case in June 2004, affirming part of the Water Commission's decision, vacating

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[166] *Waiāhole II*, 105 Haw. 1, 11, 93 P.3d 643, 653 (2004). The Water Commission issued its first remanded decision on December 28, 2001 and responded to the issues posed by the Hawai'i Supreme Court by concluding:

> (1) 8.7 mgd shall be released into Waiāhole stream, 3.5 mgd shall be released into Waianu stream, and 3.5 mgd shall be released into Waikane stream; (2) IIFSs must be met before the ditch operator may allocate water to any of the leeward offstream permitted uses, and any water not used shall be released into the windward streams, of which 0.9 mgd shall be released into Waikane stream and any remainder into Waiāhole stream; (3) "2,500 gad [(gallons per acre per day)] for acres under cultivation or planned to be under cultivation is a reasonable water duty for leeward diversified agriculture" and the diversified agriculture water use permits are conditioned "on a showing of actual use, not to exceed 2,500 gad, within four years of this Decision and Order"[;] (4) Campbell Estate and PMI have no practicable alternative sources of water; and (5) "ADC should be able to function with a system-loss use permit of 2.00 mgd."

Id. at 7, 93 P.3d at 649.

[167] *Id.* at 11, 93 P.3d at 653 (citing HANDY & HANDY, *supra* note 26, at 58).

[168] *Id.* at 10-14, 93 P.3d at 652-56.

[169] *Id.* at 12, 93 P.3d at 654 (quoting the Commission's decision).

[170] *Id.* at 10-14, 93 P.3d at 652-56.

others, and remanding more issues back to the Commission for further hearings.[171]

On this second appeal, the Moon Court rejected the "half approach" as "erroneous" because it was based on an assumption that was "arbitrary and speculative," and because the proposed IIFSs did not ensure the protection of instream resources, which is a fundamental purpose of an IIFS.[172] In doing so, the court rejected the deference normally given to an administrative agency; such a rejection occurs where that agency fails to base its decision on "reasonably clear" findings of fact and conclusions of law based on the evidence.[173] The court was particularly insistent on clarity "where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute."[174]

Moreover, because the Water Commission also failed to make specific findings regarding each stream's flow during the 1960s, the court ruled that the Water Commission's remanded decision was unsupported by the evidence.[175] Instead of concluding that the Commission had committed clear error, the *Waiāhole II* court remanded the case a second time and directed the Commission to make specific findings quantifying stream flows in the 1960s, which were necessary to support its rationale.[176] The court clarified that it would closely examine the Commission's findings for flow standards that result in "stream habitat improvement" and the satisfaction of "appurtenant rights, riparian uses, and existing uses."[177] Such findings must "adequately establish that instream values would be protected to the extent practicable for interim purposes."[178]

Despite strong language in *Waiāhole I* encouraging prompt action on instream flow standards (IFSs), the Commission failed to establish any permanent IFSs in the intervening four-year period between the two *Waiāhole* appeals.[179] Troubled by this inaction on permanent IFSs, the *Waiāhole II* court admonished the Commission:

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[171] *Id.* at 27, 93 P.3d at 669.

[172] *Id.* at 11, 93 P.3d at 653.

[173] *Id.* (citing *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Haw. 401, 432, 83 P.3d 664, 695 (2004)).

[174] *Id.* (citing Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1159-60 (La. 1984)).

[175] *Id.* at 12, 93 P.3d at 654.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

> We take this opportunity, however, to remind the Water Commission that seventeen years have passed since the Water Code was enacted requiring the Water Commission to set permanent instream flow standards by investigating the streams. In addition, four years have passed since this court held that "the Commission shall, with utmost haste and purpose, work towards establishing permanent instream flow standards for windward streams." The fact that an IIFS is before this court evinces that this mandate has not yet been completed as of the Water Commission's D&O II.[180]

On this second appeal, appellants also challenged a 2.2 mgd "buffer" flow that the Commission had not specifically allocated as part of any IIFS.[181] The court concluded that the Commission had failed to make any findings regarding the buffer, leaving the court without a means to decide the issue.[182] Accordingly, the court once again remanded this issue for appropriate findings and conclusions to allow for any review on appeal.[183] Despite being reversed numerous times, the Water Commission resisted the Moon Court's guidance, which extended the case for almost two decades.

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[180] *Id.* (internal citations omitted).

[181] *Id.* at 13, 93 P.3d at 655.

[182] *Id.*

[183] After *Waiāhole II*, the Commission's 2006 decision on remand again divided the water between Windward streams and Leeward users. About 12 mgd was split between Waiāhole, Waianu and Waikāne streams; another 12.6 mgd was permitted for offstream use in Leeward O'ahu; roughly 2.4 mgd was temporarily restored to the streams, subject again to the condition that the restored water could be taken later for other uses. Comm'n on Water Res. Mgmt., Findings of Fact, Conclusions of Law, and Decision and Order in the Second Remand Proceedings of *In Re* Water Use Permit Applications 72-73 (July 13, 2006), *available at* http://hawaii.gov/dlnr/cwrm/currentissues/cchoa9501/CCHOA95-3F.pdf. For the first time in the Commission's history, the 2006 decision also included a vigorous dissent, which argued that more water should have been restored to the streams and that the permit issued to a defunct golf course was wrong. Comm'n on Water Res. Mgmt., Opinion Dissenting in Part and Concurring in Part, By Commissioner Peter T. Young and Joined by Commissioner Chiyome L. Fukino in the Second Remand Proceedings of *In Re* Water Use Permit Applications 1-7 (July 13, 2006), *available at* http://hawaii.gov/dlnr/cwrm/currentissues/cchoa9501/CCHOA95-3F.pdf. In 2004, the Legislature amended the law abolishing direct appeals from the Water Commission and a host of other agencies. HAW. REV. STAT. § 91-14 (Supp. 2010) (the amended law took effect on July 1, 2006). Since that amendment, appeals under the Water Code now go to the Hawai'i Intermediate Court of Appeals instead of the Hawai'i Supreme Court. *Id.* In October 2010, the Intermediate Court of Appeals issued an unpublished memorandum opinion in the appeal of the 2006 decision. *In re* Water Use Permit Applications, No. 28108, 2010 WL 4113179 (Haw. App. Oct. 13, 2010). The court agreed (and thus reversed the Commission's determination) that a permit for the defunct Pu'u Makakilo golf course violated the Water Code, but upheld the Commission's decision to issue a permit to Campbell Estate and not restore more water to the Windward streams. *Id.* at *1. As an unpublished memorandum opinion, however, the 2010 decision had no bearing on the Moon Court's decisions.

Following *Waiāhole I* and *II*, two cases originating on Moloka'i helped to shed light on several outstanding issues, including the identification of Department of Hawaiian Home Lands reservations as protected public trust purposes, the scope of the Commission's public trust obligation to protect Native Hawaiian traditional and customary rights, and the burdens imposed on applicants who seek to use public trust resources for their private commercial gain.[184]

C. In re Wai'ola O Moloka'i, Inc.

In re Wai'ola O Moloka'i, Inc. (*Wai'ola*) presented the first opportunity for the Moon Court to focus on and address the scope of the public trust in Hawai'i's ground water resources.[185] Because *Waiāhole I* resolved much of the existing framework for water resource management, *Wai'ola* concentrated largely on the allocation of ground water, including how the public trust balanced competing needs, especially between public trust purposes and private commercial uses.[186]

As with other Hawaiian islands, Moloka'i's ground and surface water resources are intimately linked.[187] Ground water pumpage and use in one area has the potential to impact the quality of wells and the discharge of fresh water into nearshore marine areas, the latter of which is necessary to protect and restore traditional and customary Native Hawaiian practices, including the gathering of fish, limu (seaweed), and other marine life.[188] Due in part to these connections, including the practical reality that Moloka'i's ground water supplies constitute one unified water body, the entire island was designated a GWMA[189] in 1992.[190] For administrative purposes, the Water Commission

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[184] *See generally In re* Kukui (Moloka'i), Inc. (*Kukui*), 116 Haw. 481, 174 P.3d 320 (2007); *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Haw. 401, 83 P.3d 664 (2004).

[185] 103 Haw. 401, 83 P.3d 664. Although *Waiāhole I* focused largely on IIFSs for the streams diverted by the Waiāhole Ditch System, the case involved some ground water regulation because the majority of the water delivered by the ditch is ground water from a designated WMA that would otherwise feed the Windward streams. *See Waiāhole I*, 94 Haw. 97, 111, 9 P.3d 409, 423 (2000).

[186] *See generally Wai'ola*, 103 Haw. 401, 83 P.3d 664.

[187] *See* DELWYN S. OKI, NUMERICAL SIMULATION OF THE HYDROLOGIC EFFECTS OF REDISTRIBUTED AND ADDITIONAL GROUND-WATER WITHDRAWAL, ISLAND OF MOLOKA'I, HAWAI'I: SCIENTIFIC INVESTIGATIONS REPORT 2006-5177 (2006) [hereinafter OKI, HYDROLOGIC EFFECTS STUDY] (detailing the interconnection between Moloka'i's ground and surface water resources); DELWYN S. OKI, EFFECTS OF GROUND-WATER WITHDRAWAL ON KAUNAKAKAI STREAM ENVIRONMENTAL RESTORATION PLAN, MOLOKA'I, HAWAI'I (2007) (noting the same).

[188] *Wai'ola*, 103 Haw. at 410-15, 83 P.3d at 673-78.

[189] *See supra* note 91 and accompanying text (providing more background on GWMA designation).

[190] *Wai'ola*, 103 Haw. at 413, 83 P.3d at 676.

delineated four hydrologic units,[191] which were subdivided into sixteen separate aquifer[192] (ground water)[193] systems.[194]

When the appeal was filed in 1999, Moloka'i Ranch owned "approximately one third of the land on Moloka'i (approximately fifty thousand acres)."[195] Wai'ola was a wholly owned subsidiary of the Moloka'i Ranch and its water purveyor.[196] By 1998, Wai'ola supplied water "to approximately one sixth of the population of Moloka'i, primarily consisting of residences and commercial businesses in" West Moloka'i, including Kualapu'u.[197] Moloka'i Ranch "created a thirty-year development plan to revitalize the Moloka'i economy[,]" including various development projects, some of which sought to maintain and capitalize on the island's "rural character and open space."[198] Moloka'i's West end in particular possesses critically limited ground water resources, and private

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[191] The Hawai'i State Water Code defines "hydrologic unit" as a "surface drainage area or a ground water basin or a combination of the two." HAW. REV. STAT. § 174C-3 (1993). The United States is divided and sub-divided into successively smaller hydrologic units. U.S. Geological Survey, *What are Hydrologic Units?*, http://water.usgs.gov/GIS/huc.html (last visited Feb. 25, 2011). Hydrologic units are classified into four levels: regions (largest), sub-regions, accounting units, and cataloging units (smallest). *Id.* The Hawaiian Islands comprise Region 20. *Id.* Hawai'i's Water Commission established ground water hydrologic units to "provide a consistent basis for managing ground water resources. The units [were] primarily determined by subsurface conditions. In general, each island [was] divided into regions that reflect broad hydrogeological similarities while maintaining hydrographic, topographic, and historical boundaries where possible. Smaller sub-regions [were] then delineated based on hydraulic continuity and related characteristics. In general, these units allow for optimized spreading of island wide pumpage on an aquifer-system-area scale." Comm'n on Water Res. Mgmt., *Ground Water Hydrologic Units*, http://www.state.hi.us/dlnr/cwrm/gw_hydrounits.htm (last visited Mar. 26, 2011).

[192] An "aquifer" means a "geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well, tunnel or spring." HAW. CODE R. § 11-23-03 (1996).

[193] The Code defines "ground water" as "any water found beneath the surface of the earth, whether in perched supply, dike-confined, flowing, or percolating in underground channels or streams, under artesian pressure or not, or otherwise." HAW. REV. STAT. § 174C-3 (1993).

[194] *Wai'ola*, 103 Haw. at 411, 83 P.3d at 674 ("Moloka'i is composed of four hydrologic units: the West, Central, Northeast, and Southeast sectors. The four hydrologic units have been subdivided into sixteen aquifer systems. The Kualapu'u aquifer system is located in the Central sector, and the Kamiloloa aquifer system (Wai'ola's proposed well site) is located in the Southeast sector, adjacent to and east of the Kualapu'u aquifer system."). For more information on Moloka'i's hydrology, see also WILSON OKAMOTO CORP., COMM'N ON WATER RES. MGMT., HAWAII WATER PLAN: WATER RESOURCE PROTECTION PLAN (2008), *available at* http://www.state.hi.us/dlnr/cwrm/planning/wrpp2008update/FINAL_WRPP_20080828.pdf.

[195] *Wai'ola*, 103 Haw. at 410, 83 P.3d at 673.

[196] *Id.*

[197] *Id.*

[198] *Id.*

development interests often compete with Native Hawaiians attempting to enforce their rights.[199]

This case centered on Wai'ola's request to construct a well, install a pump, and obtain a water use permit for an additional 1.25 mgd from the Kamiloloa aquifer for current and future domestic, commercial, industrial, and municipal water needs.[200] Wai'ola's "proposed well site is approximately three miles from the existing Kualapu'u well field, from which" Maui County, Hawai'i's Department of Hawaiian Home Lands (DHHL), and Kukui Moloka'i Inc. (KMI)[201] currently pump drinking water.[202] Appellants, including DHHL, the Office of Hawaiian Affairs (OHA), and individual Native Hawaiian practitioners represented by the Native Hawaiian Legal Corporation and Earthjustice,[203] raised concerns about the potential impacts of Wai'ola's use on the adjacent Kualapu'u aquifer.[204] Although the court upheld the administrative division of the aquifers, it nevertheless addressed the interconnectivity of these ground water sources to ensure that the water rights of other users were not affected by Wai'ola's actions.[205] The case provided a unique opportunity to further define the rights of water users in GWMAs, while also clarifying various Water Code provisions affecting Native Hawaiians.[206]

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[199] *Id.* at 411, 83 P.3d at 674. In 2008, Moloka'i Ranch (also known as Moloka'i Properties Limited), the island's largest private landowner and employer, moved forward with a plan to develop Lā'au Point, an area of tremendous cultural significance to Native Hawaiians. MOLOKA'I PROPERTIES LIMITED, LĀ'AU POINT DRAFT ENVIRONMENTAL IMPACT STATEMENT (2008), *available at* http://gen.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Molokai/2000s/2008-01-08-DEIS-Laau-Point-Vol-1-JAN-2008-withdrawn.pdf [hereinafter LĀ'AU POINT DEIS]. Moloka'i Ranch offered to put 50,000 acres into a land trust, preserving the majority of the Ranch's land-holdings from future development in exchange for community support to develop 200 luxury homes at Lā'au Point. *Id.* When faced with strident community opposition, the Ranch closed its doors, laying off about 120 employees on Moloka'i. *See* Chris Hamilton, *Molokai Ranch Gone, But Not La'au Point Plans*, HONOLULU ADVERTISER, Apr. 6, 2008, *available at* http://the.honoluluadvertiser.com/article/2008/Apr/06/br/hawaii80406015.html.

[200] *Wai'ola*, 103 Haw. at 411, 83 P.3d at 674.

[201] KMI was a company owned entirely by Moloka'i Properties Limited, Moloka'i's largest private landowner. *See generally* LĀ'AU POINT DEIS, *supra* note 199, at 20. KMI owned and operated the Kaluako'i Resort in addition to Well 17, a productive ground water source in the Kualapu'u aquifer. *Wai'ola*, 103 Haw. at 410, 83 P.3d at 673. KMI was involved in this case because it sold water from Well 17 to Wai'ola. *Id.*

[202] *Wai'ola*, 103 Haw. at 411, 83 P.3d at 674.

[203] *Id.* at 407, 83 P.3d at 670.

[204] *Id.* at 411-13, 83 P.3d at 674-76.

[205] *See, e.g.*, *id.* at 424, 83 P.3d at 687. Because each aquifer is hydrologically connected, pumping and other water use in one aquifer can affect the water levels in the adjacent aquifers. *Id.* at 423-24, 83 P.3d at 686-87.

[206] *Id.* at 439-43, 83 P.3d at 702-06.

1. DHHL water reservations are public trust purposes

One of the essential issues the Moon Court resolved in *Wai'ola* was whether DHHL reservations have priority as a public trust purpose. DHHL was established in 1920 to help provide homestead opportunities for Hawaiians with greater than fifty percent blood quantum.[207] Under both the Hawaiian Homes Commission Act[208] and Hawai'i's State Water Code,[209] DHHL is entitled to reserve water for its use.[210] DHHL has over 25,000 acres on Moloka'i alone and reserved 2.905 mgd from the Kualapu'u aquifer for homesteading opportunities on those lands.[211] DHHL raised concerns about the impacts of Wai'ola's proposed new well on its water reservation and, in 1996, filed a water use permit application for an "additional 0.9 mgd of groundwater from its two existing wells in the Kualapu'u aquifer system for domestic and agricultural uses in Ho'olehua and Kalama'ula."[212]

The Commission, however, ruled that DHHL's reservations were aquifer-specific and did not constitute "existing legal uses" under the Code.[213] The Commission concluded that because DHHL's reservation was for the

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[207] DHHL was established through the enactment of the Hawaiian Homes Commission Act, ch. 42, 42 Stat. 108 (1921), *reprinted in* 1 HAW. REV. STAT. 261 (2009). The Hawaiian Homes Commission Act (HHCA) provides for the "rehabilitation of the native Hawaiian people through a government-sponsored homesteading program" intended to "provide for economic self-sufficiency of native Hawaiians through the provision of land." Dep't of Hawaiian Homelands, *Laws/Rules*, http://hawaii.gov/dhhl/laws (last visited Feb. 25, 2011). "Native Hawaiians" are defined by the HHCA as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act § 201(a). Homestead leases are for residential, agricultural, or pastoral purposes. Dep't of Hawaiian Homelands, *Laws/Rules*, *supra*. For more background on DHHL and its programs, visit http://hawaii.gov/dhhl.

[208] *See, e.g.*, Hawaiian Homes Commission Act § 221(c) ("In order adequately to supply livestock, the aquaculture operations, the agriculture operations, or the domestic needs of individuals upon any tract, the department is authorized (1) to use, free of all charge, government-owned water not covered by any water license or covered by a water license issued after the passage of this Act or covered by a water license issued previous to the passage of this Act but containing a reservation of such water for the benefit of the public[.]").

[209] HAW. REV. STAT. § 174C-101(a) (1993) (The Water Commission "shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act."); HAW. CODE R. § 13-171-63 (1996) (expressly reserving 2.905 mgd for DHHL from the Kualapu'u aquifer).

[210] *Wai'ola*, 103 Haw. at 412, 83 P.3d at 675; *see also* HAW. REV. STAT. § 174C-101(a) (1993).

[211] *Wai'ola*, 103 Haw. at 412, 83 P.3d at 675.

[212] *Id.*

[213] *Id.* at 427, 83 P.3d at 690.

Kualapu'u aquifer and Wai'ola was requesting water from the Kamiloloa aquifer, issuing the permit would not affect DHHL's reservation.[214]

The Hawai'i Supreme Court accepted the Commission's reasoning regarding both aquifer specificity and the fact that reservations of water are not "existing legal uses."[215] The court would not, however, allow the Commission to use those classifications to "divest DHHL of its right to protect its reservation interests from interfering water uses in adjacent aquifers."[216] Moreover, even though DHHL's reservation of water was not deemed an existing legal use, the reservation was nonetheless protected by the Code and is, in fact, "a public trust purpose, which the commission has a duty to protect in balancing the competing interests for a water use permit application."[217]

The court based its conclusion on Hawai'i common law, the Hawai'i Constitution, the Hawaiian Homes Commission Act, and the Water Code,[218] ruling that "DHHL's reservations of water throughout the State are entitled to the full panoply of constitutional protections afforded the other public trust purposes."[219] The court recognized, however, that this protection does not "preclude the controlled development of water resources for private commercial use."[220] Rather, there must be a balance between public and private purposes, and planning and allocation of water "must account for the public trust and protect public trust uses to the extent feasible."[221] Because the record did not include "a single [finding of fact] regarding whether [Wai'ola] established that the proposed use would interfere with DHHL's reservation in the Kualapu'u aquifer . . . [,]" the court determined that the Commission had violated its public trust duty, vacated Wai'ola's permit, and remanded for further

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[214] *Id.*

[215] *Id.*; *see also* HAW. REV. STAT. § 174C-50 (1993 & Supp. 2010) (outlining permitting provisions for any "existing uses"; or those uses in effect on the date of a water management area's designation). Although the Commission failed to address DHHL's water reservations in the Kualapu'u aquifer, the court ruled that the Commission properly addressed DHHL's existing legal uses in the Kualapu'u aquifer, namely DHHL's existing wells. *Wai'ola*, 103 Haw. at 432, 83 P.3d at 695. The court based this finding on three considerations: two hydrological studies that the Commission relied on to determine that impact to existing uses would be minimal; the fact that the Commission permitted only half of the amount Wai'ola requested; and the Commission's proposed municipal reservation. *Id.* at 432-33, 83 P.3d at 695-96. By considering these factors in light of DHHL's existing wells, the court ruled that the Commission acted "with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *Id.* at 433, 83 P.3d at 696 (quoting *Waiāhole I*, 94 Haw. 97, 143, 9 P.3d 409, 455 (2000)).

[216] *Wai'ola*, 103 Haw. at 424, 83 P.3d at 687.

[217] *Id.* at 427, 83 P.3d at 690.

[218] *Id.* at 428, 83 P.3d at 691.

[219] *Id.* at 431, 83 P.3d at 694.

[220] *Id.* (citing *Waiāhole I*, 94 Haw. at 141, 9 P.3d at 453).

[221] *Id.* (citing *Waiāhole I*, 94 Haw. at 142, 9 P.3d at 454).

proceedings.[222] On remand, the court required the applicant to demonstrate that the proposed use will not interfere with the rights of DHHL before the Commission may issue a water use permit.[223]

2. Respecting Native Hawaiian traditional and customary rights

In *Wai'ola*, the Moon Court strongly reaffirmed Native Hawaiian traditional and customary rights, including gathering rights.[224] The decision noted that "a substantial population of native Hawaiians on Moloka'i engage[] in subsistence living[,]" which includes gathering limu and fishing in nearshore areas, where the input of freshwater is a necessity.[225] The Commission found "no evidence was presented" that the drilling of Wai'ola's well would affect the exercise of Native Hawaiian traditional and customary rights, and concluded that such rights would not be abridged by Wai'ola's proposed pumping.[226]

The Moon Court, however, disagreed and ruled that "the absence of evidence . . . [is] insufficient to meet the burden imposed on Wai'ola by the public trust doctrine."[227] In addition, the hearings officer erred by failing to allow attorneys for the Native Hawaiian cultural practitioners to cross-examine a witness relating to conflicting data.[228] Thus, the court held that the Commission failed to uphold its public trust duty in not requiring Wai'ola to meet its burden of establishing that its proposed use would not abridge or deny Native Hawaiian traditional and customary rights and practices.[229] After all, the Hawai'i Supreme Court "ha[s] consistently recognized the heightened duty of care owed to the native Hawaiians."[230]

D. In re Kukui (Moloka'i), Inc.

Similar to the Moon Court's ruling in *Wai'ola, In re Kukui (Moloka'i), Inc.* (*Kukui*) involved multiple appeals of the Water Commission's 2001 decision

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[222] *Id.* at 432, 83 P.3d at 695.

[223] *Id.* at 439, 83 P.3d at 702. Beyond the issue of interference with DHHL's water rights, the court ruled that the applicant had met all other criteria required by the Code pursuant to issuance of a water use permit. *Id.* As of the date of this article's publication, the remanded hearings have yet to occur. E-mail from Bill Tam, Deputy Dir., Comm'n on Water Res. Mgmt., to author (Apr. 9, 2011, 20:06 HST) (on file with author).

[224] *See Wai'ola*, 103 Haw. at 441, 83 P.3d at 704.

[225] *Id.* at 439, 83 P.3d at 702.

[226] *Id.* at 442, 83 P.3d at 705.

[227] *Id.*

[228] *Id.* at 443, 83 P.3d at 706.

[229] *Id.*

[230] *Id.* at 430, 83 P.3d at 693.

issuing water use permits to Kukui (Moloka'i), Inc. (KMI)[231] for approximately 1 mgd for existing and proposed new uses from Well 17 in the Kualapu'u aquifer.[232] Although the location of the well in *Kukui* differed from the location of the well in *Wai'ola* (which was in the neighboring Kamiloloa aquifer), the two cases draw close parallels because they both involved the impacts of ground water withdrawals on the Kualapu'u aquifer, its interconnected coastal waters, and DHHL's water reservations in Kualapu'u.[233] *Kukui* thus involved many of the same issues and parties as *Wai'ola*, including appellants DHHL, OHA, and Native Hawaiian practitioner Judy L. Caparida.[234] DHHL voiced concerns about the impacts of KMI's uses on DHHL's existing wells and reservations of water, including the Commission's failure to adequately consider impacts on these public trust purposes.[235] OHA pointed out numerous problems, including violations of the public trust.[236] Native Hawaiian practitioners Caparida and Georgina Kuahuia took issue with the effects of KMI's use on ground water discharges into the nearshore marine area, which negatively impacts traditional and customary Native Hawaiian rights and practices.[237]

In 2007, the Moon Court vacated the Commission's final decision and order granting KMI's water use permits, and remanded for further proceedings.[238] The Commission's mandate to protect the public's interest in Hawai'i's water resources figured prominently in the court's decision.[239] The court ultimately vacated KMI's permits by ruling that "the Commission's decision lacked the requisite degree of scrutiny."[240] In reaching that holding, the court rejected DHHL's arguments concerning sustainable yield,[241] existing water uses,[242] and

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[231] *See supra* note 201 (explaining KMI's interest). As is relevant to *Kukui*, KMI owned the land overlying Well 17, the well at issue in this case. *In re* Kukui (Moloka'i), Inc. (*Kukui*), 116 Haw. 481, 486, 174 P.3d 320, 325 (2007). While the appeal was pending, Kaluakoi Land, LLC acquired KMI's assets. *Id.* at 488, 174 P.3d at 327.

[232] *Id.* at 488-89, 174 P.3d at 327-28.

[233] *See id.* at 491, 493, 174 P.3d at 330, 332.

[234] *See id.*

[235] *Id.* at 485, 174 P.3d at 324.

[236] *Id.* at 485-86, 174 P.3d at 324-25.

[237] *Id.* at 486, 174 P.3d at 325.

[238] *Id.* As of the date of this article's publication, the remanded hearings have yet to occur. E-mail from Bill Tam to author, *supra* note 223.

[239] *Kukui*, 116 Haw. at 490, 174 P.3d at 329-30.

[240] *Id.* at 492, 174 P.3d at 331.

[241] Sustainable yield is the maximum amount of water that may be pumped from a ground water aquifer while still maintaining the integrity of that source. *See* HAW. REV. STAT. § 174C-3 (1993). Specifically, DHHL argued that the Commission erred when it "relied on the 5.0 mgd sustainable yield determination in spite of evidence that the Kualapu'u Aquifer may be overdrawn and that the sustainable yield may actually be as low as 3.2 mgd." *Kukui*, 116 Haw. at 492, 174 P.3d at 331. The court disagreed and ruled that even if 5.0 mgd was too high, the

Safe Drinking Water Act violations,[243] but agreed with DHHL regarding KMI's failure to satisfy its burden of demonstrating the absence of practicable alternatives to the water source at issue.[244]

Commission could, in this case, rely on the sustainable yield that was adopted prior to KMI's application. *Id.* at 499-500, 174 P.3d at 338-39. Despite established flaws in the methodology used to establish the sustainable yields for many aquifers statewide, including Kualapu'u, the court ruled that "it would be inappropriate for the Commission to reevaluate the sustainable yield figure in a permit application proceeding." *Id.* at 493, 174 P.3d at 332. *See also* SPROAT, *supra* note 27, at 37-38 ("The initial Sustainable Yields adopted by the Water Commission . . . largely used the RAM or Robust Analytical Model, a two dimensional model developed by John Mink. Scientific models have since demonstrated that the RAM incorporated certain principles, such as the ideal placement of wells, which are not required or provided for by the Water Code. Therefore, many of the Commission's initial Sustainable Yields overestimated the amount of water that could be safely withdrawn without impairing the integrity of the water source. Later studies by United States Geological Survey and others have assisted the Water Commission in calculating more accurate Sustainable Yields and the Commission is in the process of updating those figures. In the absence of more detailed data and modeling, however, RAM continues to provide the only information available.").

[242] DHHL argued that the Commission's permit approval for existing and new uses, including KMI's, could not be reconciled with the Commission's earlier refusal to grant DHHL's water use permit applications. *Kukui*, 116 Haw. at 493, 174 P.3d at 332. DHHL's request to exercise its reservation and increase its withdrawals from 0.367 mgd to 1.247 mgd had been denied based on "very real concerns" over "sustaining the 'potable quality' of the wells located in the Kualapu'u Aquifer." *Id.* Chloride levels, or the salt content of pumped ground water, are often an indicator of an aquifer's health and whether it can continue to produce drinkable or "potable" water. *See id.* at 494, 174 P.3d at 333. *See also* U.S. Geological Survey, *Recent Hydrologic Conditions, Chloride Concentration of Pumped Water, Iao and Waihee Aquifer Areas, Maui, Hawaii: Chloride Concentration of Pumped Water*, http://hi.water.usgs.gov/recent/iao/chloride.html (last visited Feb. 25, 2011) (providing information on the relationship between chloride concentrations and ground water pumping). The court agreed with DHHL in part, distinguished between KMI's application for existing versus new uses, and remanded the issue. *Kukui*, 116 Haw. at 494-95, 174 P.3d at 333-34. The court reasoned that the Commission was concerned "with the effect of increased pumpage on the chloride content in the well field[,]" and that "KMI's application to continue an existing use did not threaten to increase pumpage[.]" *Id.* at 494, 174 P.3d at 333 (emphasis omitted). The court also recognized the Code's "preference for existing uses." *Id.* Because KMI's application to withdraw 82,000 gallons per day for new uses might, however, result in the same "potable quality" concerns as DHHL's application, the court remanded that issue for further clarification. *Id.* at 494-95, 174 P.3d at 333-34.

[243] DHHL argued that KMI violated the Safe Drinking Water Act (SDWA), codified as Hawai'i Revised Statutes chapter 420E. *Kukui*, 116 Haw. at 496-97, 174 P.3d at 335-36. The record indicated that the "Department of Health filed a 'Notice and Finding of Violation' against KMI . . . [finding] that 'KMI had been using the Kaluakoi water system to supply water to the public, after June 29, 1993, without filtration that meets the criteria of HAR section 11-20-46(c) of the Surface Water Treatment Rule (SWTR) Administrative Manual, as required by HAR section 11-20-46(a)(4).'" *Id.* Nevertheless, the court ruled that neither the Water Code nor the public trust preclude the Commission from granting KMI's water use permit due to a SDWA violation. *Id.* at 497, 174 P.3d at 336.

Ultimately, the Moon Court vacated KMI's permits based on the Commission's failure to enter findings of fact or conclusions of law "as to the existence or feasibility of any alternative sources of water whatsoever. The Commission . . . failed to hold KMI to its burden of demonstrating the absence of feasible alternative sources of water."[245] As evidenced by special condition #5 on KMI's permits, the Commission "appear[ed] to have reserved consideration . . . until after the permit ha[d] been granted[,]" which was "fundamentally at odds with the Commission's public trust duties."[246]

1. DHHL reservations have priority as a public trust purpose

Relying on precedent from *Wai'ola*, which was decided while the Commission's final decision and order in *Kukui* was on appeal,[247] the Moon Court concluded that DHHL's reservation was a "public trust 'purpose' and not an 'existing legal use.'"[248] The court ruled that *Wai'ola* "conclusively resolved" this issue based on the plain language of Hawai'i Revised Statutes section 174C-49(d) and Hawai'i Administrative Rules section 13-171-63.[249] Although DHHL's reservation was not an "existing use," as a "public trust purpose" it was "entitled to the full panoply of constitutional protections afforded the other public trust purposes . . . in *Waiāhole I*."[250]

The Moon Court recognized that DHHL's status as a public trust purpose renders DHHL's reservation "superior to the prevailing private interests in the resources at any given time."[251] The court acknowledged, however, that the Commission may still approve private uses that might "compromise DHHL's reservation," so long as that decision is made with "openness, diligence, and foresight."[252]

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[244] *Id.* at 495-96, 174 P.3d at 334-35.

[245] *Id.* at 496, 174 P.3d at 335.

[246] *Id.*

[247] *Id.* at 491, 174 P.3d at 330.

[248] *Id.* at 486, 174 P.3d at 325.

[249] *Id.* at 491, 174 P.3d at 330.

[250] *Id.* (quoting *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Haw. 401, 430, 83 P.3d 664, 693 (2004)). Again, other public trust purposes include: (1) water resource protection; (2) domestic water uses (which are distinct from municipal water uses); and (3) the exercise of Native Hawaiian and traditional and customary rights. *Id.* at 492 n.6, 174 P.3d at 331 n.6; *see supra* notes 143 (defining "traditional and customary Native Hawaiian rights"), 145 (defining "domestic water uses").

[251] *Kukui*, 116 Haw. at 491, 174 P.3d at 330 (quoting *Wai'ola*, 103 Haw. at 429, 83 P.3d at 692).

[252] *Id.*

2. Applicants bear the burden of proving no harm to public trust resources

The court also held that the Commission improperly "placed the burden of proof on DHHL to demonstrate that pumpage at KMI's well would increase the chloride concentration at the DHHL well site."[253] The Commission's Conclusion of Law (COL) #51 rejected DHHL's allegation of harm after concluding that DHHL failed to present "conclusive evidence" that KMI's proposed pumping of Well 17 would increase the chloride levels in DHHL's wells.[254] The court agreed with DHHL that COL #51 was a "cause for concern" because it suggested that KMI was not required to "justify its existing and proposed uses."[255] The court observed, however, that when "inconclusive allegations raise a specter of harm[,] . . . the public trust doctrine does not handcuff the Commission."[256] It is the applicant's burden to demonstrate that its use satisfies all of the requirements of the law, including "that there is, in fact, no harm, or that any potential harm does not rise to a level that would preclude a finding that the requested use is nevertheless reasonable-beneficial."[257]

3. Applicants bear the burden of proving no harm to Native Hawaiian rights and practices

Many Native Hawaiians on Moloka'i rely on natural resources from the land and sea to put food on their tables and otherwise subsist in a traditional manner.[258] "The gathering of crab, fish, limu, and octopus are traditional and customary practices that have persisted on Moloka'i for generations."[259] Traditional and customary Native Hawaiian rights are protected by various constitutional and statutory provisions, including article XII, section 7 of the Hawai'i Constitution, Hawai'i Revised Statutes sections 174C-2 and -101,[260] and other case law.[261] In *Waiāhole I*, the Moon Court upheld "'the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose.'"[262] Private commercial use of water resources, on the other hand, is

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[253] *Id.* at 497, 174 P.3d at 336.

[254] *Id.* at 499, 174 P.3d at 338.

[255] *Id.* at 498, 174 P.3d at 337.

[256] *Id.* at 499, 174 P.3d at 338.

[257] *See id.*

[258] *Id.* at 508, 174 P.3d at 347.

[259] *Id.*

[260] *See, e.g.*, HAW. CONST. art. XII, § 7; HAW. REV. STAT. §§ 1-1 (2009), 7-1 (2009), 174C-2 (1993), 174C-101 (1993).

[261] *See supra* note 143.

[262] *Kukui*, 116 Haw. at 508, 174 P.3d at 347 (quoting *Waiāhole I*, 94 Haw. 97, 137, 9 P.3d 409, 449 (2000)).

not a protected public trust purpose, despite the fact that "economic development may produce important public benefits."[263]

Appellants Caparida and Kuahuia argued that increases in the amount of water pumped from Well 17 would reduce the amount of fresh water discharged into the nearshore marine environment.[264] This, in turn, would negatively impact the resources in that area, such as fish and limu (seaweed), which rely on fresh water to survive.[265] Appellants contended that "a reduction of marine life, if severe enough, [would] diminish their ability to practice their traditional and customary native Hawaiian gathering rights even if access [was] not impaired by KMI's proposed use."[266] In response, the Commission "merely observed that the 'potential adverse impacts of the current level of ground water pumpage . . . should already be visible,'" and that the "'evidence does not show that nearshore resources are in decline.'"[267] Further, the Commission's COL #40 concluded that "no evidence was presented that the use of water from Well 17 would adversely affect the exercise of traditional and customary native Hawaiian rights . . . or [that] proposed uses would adversely affect any access to the shoreline or the nearshore areas."[268]

Caparida and Kuahuia asserted, and the Moon Court agreed, that the "Commission impermissibly shifted the burden of proving harm to those claiming a right to exercise a traditional and customary native Hawaiian practice."[269] The statement that "no evidence was presented" to the Commission "erroneously shifted the burden of proof to Caparida and Kuahuia."[270] Recalling its decision in *Wai'ola*, which involved the same issue regarding the surface and ground water interrelationship on Moloka'i, the court emphasized that "'an applicant for a water use permit bears the burden of establishing that the proposed use will not interfere with any public trust purposes . . . [and] the Commission is duty bound to hold an applicant to its burden during a contested-case hearing.'"[271] Under *Wai'ola*, an applicant is obligated "'to demonstrate affirmatively that the proposed well would not affect

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[263] *Id.*

[264] *Id.* After the case was appealed, the U.S. Geological Survey issued several reports establishing that pumping the well at issue would reduce the discharge of fresh water into the nearshore marine area, thus validating appellants' concerns. *See, e.g.*, OKI, HYDROLOGIC EFFECTS STUDY, *supra* note 187, at 25.

[265] *Kukui*, 116 Haw. at 508, 174 P.3d at 347.

[266] *Id.*

[267] *Id.* at 508-09, 174 P.3d at 349-50.

[268] *Id.* at 509, 174 P.3d at 348. *But see* OKI, HYDROLOGIC EFFECTS STUDY, *supra* note 187, at 25.

[269] *Kukui*, 116 Haw. at 486, 174 P.3d at 325.

[270] *Id.* at 509, 174 P.3d at 348.

[271] *Id.* (quoting *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Haw. 401, 441, 83 P.3d 664, 704 (2004)).

native Hawaiian[s'] rights; in other words, *the absence of evidence* that the proposed use would affect native Hawaiian[s'] rights *was insufficient to meet the burden.*'"[272] KMI submitted expert testimony and asserted that it satisfied its burden of proof.[273] The court, however, determined that the Commission's findings of fact were "insufficiently clear" to support the conclusions of law.[274]

Because earlier cases had largely resolved Hawai'i's framework for water resource management, *Kukui* essentially enforced and clarified that foundation. In particular, *Kukui* helped to elucidate the burdens imposed on private commercial users, especially in the area of native rights. *Kukui*, together with *Ko'olau Ag*, *Waiāhole I* and *II*, and *Wai'ola*, shaped the Moon Court's water law legacy.

III. THE MOON COURT'S WATER LAW LEGACY

Through *Ko'olau Ag*, *Waiāhole I* and *II*, *Wai'ola*, and *Kukui*, the Moon Court illuminated Hawai'i water law, giving greater depth and substance to underutilized constitutional and statutory provisions. Although the full range of the court's contributions extend beyond the scope of this article, three themes in particular distinguish the Moon Court's water law legacy: the public trust, indigenous rights, and the courage to uphold the law.

A. Defending the Public Trust

Under Chief Justice Moon's leadership, the Hawai'i Supreme Court upheld constitutional and statutory provisions, bringing them to life on the ground and in the resources and communities in greatest need of the law's protection. The court unambiguously affirmed the public trust by holding "that article XI, section 1 and article XI, section 7" of Hawai'i's constitution "adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."[275] The court made clear that "[u]nder the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state."[276] In doing so, the Moon Court articulated a presumption for public use over private commercial interests, mandating that "any balancing between public and private purposes [must] begin with a presumption in favor of public use, access, and enjoyment."[277]

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[272] *Id.* (quoting *Wai'ola*, 103 Haw. at 442, 83 P.3d at 705) (emphases in original).
[273] *Id.* at 507, 174 P.3d at 346.
[274] *Id.* at 509, 174 P.3d at 348.
[275] *Waiāhole I*, 94 Haw. 97, 132, 9 P.3d 409, 444 (2000).
[276] *Id.* at 141, 9 P.3d at 453.
[277] *Id.* at 142, 9 P.3d at 454.

The Moon Court's decisions, especially in *Waiāhole I* and *II*, built upon the Richardson Court's unequivocal rulings in *McBryde*, *Reppun*, and *Robinson* that water resources are held in trust by the State for the benefit of the people. The Moon Court's decisions were essential given that the Richardson Court's decisions did not end the controversy over water in Hawai'i. The Richardson Court's rulings left no room to question the public trust over Hawai'i's water resources, yet opposition persisted as a range of interests challenged those holdings in the federal courts, the political arena, and beyond.[278] Moreover, the 1978 constitutional amendments and 1987 passage of the Water Code should have put to rest any lingering uncertainty, but as the *Waiāhole* litigation demonstrated, resistance to the very concept of the public trust continued.[279] The Moon Court considered and rejected this opposition, affirming and refining the legal and practical dimensions of the public trust, especially as it relates to water resources.[280]

B. Protecting Indigenous Rights

The Moon Court also built upon the Richardson Court's recognition of the role of Native Hawaiian practices and traditions in the evolution and current management of water resources. In *Robinson*, the Richardson Court acknowledged that "Native Hawaiian practices respecting water" provide a legal and cultural foundation "from which our water law ostensibly springs[.]"[281] In *Reppun*, the court similarly recognized that

> this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, the creation of private and exclusive interests in water, within a context of western concepts regarding property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.[282]

In *Waiāhole I*, the Moon Court looked to Hawaiian practices and principles of water management to inform the scope of the public trust: "In view of the

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[278] *See, e.g.*, *supra* Part II.

[279] For example, several parties in *Waiāhole* argued that the public trust should not apply to ground water, *Waiāhole I*, 94 Haw. at 135, 9 P.3d at 447, while others claimed private commercial uses should be protected public trust purposes. *Id.* at 149-50, 9 P.3d at 437-38. The Moon Court rejected both propositions and emphasized the public nature of the trust. *Id.* at 138, 9 P.3d at 450. *See also* David L. Callies & Calvert G. Chipchase, *Water Regulation, Land Use and the Environment*, 30 U. HAW. L. REV. 49, 72-76 (2007) (disagreeing with the Moon Court's rulings regarding the public trust).

[280] *Waiāhole I*, 94 Haw. at 133, 9 P.3d at 445 (recognizing the trust's inclusion of "all public resources," but declining to articulate the precise scope of the trust).

[281] Robinson v. Ariyoshi, 65 Haw. 641, 675, 658 P.2d 287, 310 (1982).

[282] Reppun v. Bd. of Water Supply, 65 Haw. 531, 547, 656 P.2d 57, 68 (1982).

ultimate value of water to the ancient Hawaiians, it is inescapable that the sovereign reservation was intended to guarantee public rights to all water, regardless of its immediate source."[283] The Moon Court again expanded upon the Richardson Court's rulings by identifying Native Hawaiian traditional and customary rights and appurtenant rights among the handful of public trust purposes that have priority over private commercial uses.[284] In doing so, the court considered the "specific objective" and "original intent" of various Hawaiian Kingdom laws to "preserv[e] the rights of native tenants during the transition to a western system of private property."[285]

In *Wai'ola* and *Kukui*, the Moon Court outlined stringent requirements to protect indigenous rights by assuring, for example, that water use permit applicants bear the ultimate burden of demonstrating that a water use will not harm traditional and customary Native Hawaiian practices.[286] In both cases, Native Hawaiian practitioners objected to permits out of concern that pumping ground water would reduce the discharge of fresh water into nearshore marine areas where Native Hawaiians exercised traditional gathering practices.[287] The Water Commission dismissed the practitioners' concerns and concluded that no evidence in either case demonstrated that the wells would impact the exercise of traditional and customary rights.[288] In *Wai'ola*, the court ruled that "the absence of evidence . . . [is] insufficient to meet the burden imposed upon Wai'ola by the public trust doctrine."[289] In *Kukui*, the court similarly ruled that the "Commission impermissibly shifted the burden of proving harm to those claiming a right to exercise a traditional and customary native Hawaiian practice."[290] In light of these rulings, simply pointing to an empty record and claiming no impact to indigenous rights will no longer suffice; permit applicants bear an affirmative burden of demonstrating that a proposed use will not impact traditional and customary Native Hawaiian rights and practices, which the Moon Court also recognized and protected as a public trust purpose.

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[283] *Waiāhole I*, 94 Haw. at 135, 9 P.3d at 447.

[284] *Id.* at 137 & n.34, 9 P.3d at 449 & n.34.

[285] *Id.* at 135, 9 P.3d at 447. The Moon Court did not, however, merely accept at face value all claims and issues regarding indigenous rights in the context of water management. In *Waiāhole II*, the court rejected the Water Commission's misplaced attempt to justify IIFSs based on the "half approach," a claimed Native Hawaiian tradition of not diverting more than one-half of the flow of a stream because it "left unanswered the question whether instream values would be protected to the extent practicable." *Waiāhole II*, 105 Haw. 1, 12, 93 P.3d 643, 654 (2004).

[286] *See generally In re* Kukui (Moloka'i), Inc. (*Kukui*), 116 Haw. 481, 174 P.3d 320 (2007); *In re* Wai'ola O Moloka'i, Inc. (*Wai'ola*), 103 Haw. 401, 83 P.3d 664 (2004).

[287] *See generally Kukui*, 116 Haw. 481, 174 P.3d 320; *Wai'ola*, 103 Haw. 401, 83 P.3d 664.

[288] *See Kukui*, 116 Haw. at 499, 174 P.3d at 338; *Wai'ola*, 103 Haw. at 442, 83 P.3d at 705.

[289] *Wai'ola*, 103 Haw. at 442, 83 P.3d at 705.

[290] *Kukui*, 116 Haw. at 486, 174 P.3d at 325.

C. Upholding the Law in the Face of Opposition

As with Chief Justice Richardson's time at the Hawai'i Supreme Court, water issues remained highly political and contentious during Chief Justice Moon's tenure. Both courts faced fierce opposition as commercial and other interests questioned the legal basis for decisions and refused to accept the state of the law.[291] In *Robinson*, the Richardson Court pointed out that "[t]he reassertion of dormant public interests in the diversion and application of Hawaii's waters has become essential with the increasing scarcity of the resource and recognition of the public's interests in the utilization and flow of those waters."[292] Almost two decades later in *Waiāhole*, the Moon Court still found itself defending the public's interest in Hawai'i's precious water resources: "[I]f the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time."[293] The Moon Court also recognized the pressing need for proactive management of trust resources:

> [W]e simply reaffirm the basic, modest principle that use of the precious water resources of our state must ultimately proceed with due regard for certain enduring public rights. This principle runs as a common thread through the constitution, Code, and common law of our state. Inattention to this principle may have brought short-term convenience to some in the past. But the constitutional framers and legislature understood, and others concerned about the proper functioning of our democratic system and the continued vitality of our island environment and community may also appreciate, that we can ill-afford to continue down this garden path this late in the day.[294]

The Moon Court had the courage to respect both the letter and spirit of the law even when that position lacked universal support. This especially rang true in the Waiāhole controversy where the community faced overwhelming opposition from the government and other political and economic forces.[295] Rather than letting popular sentiment or powerful private interests dictate its decisions,[296] the court articulated "serious misgivings" about the political

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[291] *See, e.g.*, Callies & Chipchase, *supra* note 279.

[292] Robinson v. Ariyoshi, 65 Haw. 641, 676, 658 P.2d 287, 311 (1982).

[293] *Waiāhole I*, 94 Haw. 97, 138, 9 P.3d 409, 450 (2000).

[294] *Id.* at 190 n.108, 9 P.3d at 502 n.108.

[295] Sproat & Moriwake, *supra* note 39, at 277.

[296] *Waiāhole I*, 94 Haw. at 110, 9 P.3d at 422 (acknowledging that "this dispute culminated in a contested case hearing of heretofore unprecedented size, duration, and complexity"); *see also* Sproat & Moriwake, *supra* note 39, at 258-59 (noting that more than twenty-five parties were admitted to the case, including "many of the largest, wealthiest, and most powerful interests in the state, including Campbell and Robinson Estates (large landed estates and former

influences over the Water Commission's proceedings, which "strongly suggested that improper considerations tipped the scales in this difficult and hotly disputed case," and which "did nothing to improve public confidence in government and the administration of justice in this state."[297] The court's concerns about inappropriate political pressures reflected its overall conviction that the public trust must set higher standards beyond what the "present majority," or most powerful, happen to favor at any given time.[298]

The Moon Court grounded itself in Hawai'i's laws, history, and culture, and systematically confronted and resolved difficult issues with the tenacity to do what the law required and what was best for Hawai'i's water future, even if those actions did not particularly suit influential political and economic interests.[299] The Moon Court also demonstrated a commitment to upholding the rights of underrepresented groups, including Native Hawaiians and other community stakeholders, thereby preserving traditional practices dependent upon Hawai'i's natural and cultural resources that both deserve and require the law's protection. It took this kuleana, or responsibility, to heart: "As with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state."[300]

IV. CONCLUSION

Ko 'olau Ag, *Waiāhole I* and *II*, *Wai 'ola*, and *Kukui* reflect the Moon Court's deep appreciation for the relationship between justice and flowing water in Hawai'i. The court's understanding of and respect for Hawai'i's indigenous culture and unique history provided invaluable context, which enabled the Moon Court to reaffirm and clarify the public trust over Hawai'i's water

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plantation land-owners), Kamehameha Schools (a large Native Hawaiian educational trust that at the time was the wealthiest private charity in the United States and the largest private landowner in Hawai'i), multinational corporations such as Del Monte, Dole, and Castle and Cooke, and land development and farm lobbies. Branches of the county, state, and federal governments, including the City and County of Honolulu Board of Water Supply, Department of Agriculture of the State of Hawai'i, and the U.S. Navy also joined the fray, all in favor of retaining the maximum stream diversions.").

[297] *Waiāhole I*, 94 Haw. at 127, 9 P.3d at 439.

[298] Sproat & Moriwake, *supra* note 39, at 278.

[299] *Waiāhole I*, 94 Haw. at 124, 9 P.3d at 436 (observing that, in *Waiāhole I*, the Windward Parties raised procedural due process claims, in part because of the then-Governor and Attorney General's involvement in the case, including "the governor's public criticism of the proposed decision, [and] the attorney general's personal appearance before the Commission in order to argue DLNR/DOA's exceptions to the proposed decision, and the dismissal of the deputy attorney general assigned to the Commission.").

[300] *Waiāhole II*, 105 Haw. 1, 8, 93 P.3d 643, 650 (2004) (quoting *Waiāhole I*, 94 Haw. at 143, 9 P.3d at 455).

resources. The court's willingness to defend the public's and indigenous rights was both courageous and crucial to the preservation of limited resources for present and future generations, clearing the way for fresh water to once again rejuvenate the natural ecosystems and human communities and cultures that depend on them. Through its rulings, the Moon Court has removed political and other structural diversions to enable water to once again flow with justice from mauka to makai.

The Moon Court did its part. Now, the impetus is on the Water Commission and the public trust's beneficiaries to ensure that water and justice will continue to flow so that ola i ka wai ola, ola ē kua'āina, life through the life-giving waters will bring life to the people of the land.

The Moon Court's Environmental Review Jurisprudence: Throwing Open the Courthouse Doors to Beneficial Public Participation

Denise E. Antolini*

> "'All parties involved and society as a whole' would have benefitted had the public been allowed to participate in the review process of the Superferry project, as was envisioned by the legislature when it enacted the Hawai'i Environmental Policy Act."[1]

At first blush, the Hawai'i Supreme Court's environmental review jurisprudence under the leadership of Chief Justice Ronald T.Y. Moon—twelve major decisions from 1993 until 2010—appears "pro-environmental" in terms of the classic "environment versus development" paradigm. In eight of those decisions,[2] the citizens challenging state or county agencies for evading the public review process required by Hawai'i Revised Statutes (H.R.S.) chapter 343[3] won major, sometimes stunning, victories. On deeper examination of all twelve cases,[4] however, the environmental review jurisprudence of the Moon

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[1] Sierra Club v. Dep't of Transp. (*Superferry I*), 115 Haw. 299, 343, 167 P.3d 292, 336 (2007) (quoting HAW. REV. STAT. § 343-1 (1993)).

[2] Unite Here! Local 5 v. City & Cnty. of Honolulu (*Turtle Bay*), 123 Haw. 150, 231 P.3d 423 (2010); Sierra Club v. Dep't of Transp. (*Superferry II*), 120 Haw. 181, 202 P.3d 1226 (2009); *Superferry I*, 115 Haw. 299, 167 P.3d 292; Sierra Club v. State Office of Planning (*Koa Ridge*), 109 Haw. 411, 126 P.3d 1098 (2006); Kepo'o v. Kane (*Kepo'o II*), 106 Haw. 270, 103 P.2d 939 (2005); Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai'i (*North Kohala*), 91 Haw. 94, 979 P.2d 1120 (1999); Kepo'o v. Watson (*Kepo'o I*), 87 Haw. 91, 952 P.2d 379 (1998); Kahana Sunset Owners Ass'n v. Cnty. of Maui, 86 Haw. 66, 947 P.2d 378 (1997).

[3] The court and many practitioners often refer to H.R.S. chapter 343 as "HEPA," an acronym for the "Hawaii Environmental Policy Act," because the law is one part of Hawai'i's version of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (2006). This article uses the technically correct reference "chapter 343" to avoid confusion with the other part of Hawai'i's "mini-NEPA," the little-known Hawai'i Revised Statutes chapter 344, aptly titled the "State Environmental Policy" Act.

[4] See Part III for a discussion of *Sierra Club v. Hawai'i Tourism Authority* (*HTA*), 100 Haw. 242, 59 P.3d 877 (2002), *Nuuanu Valley Ass'n v. City & County of Honolulu* (*Nuuanu*),

Court appears to be concerned less with substantive results than with process, focusing on the likely benefits to agencies and all stakeholders of more robust public participation, a core value of chapter 343. In its vigorous enforcement of chapter 343, the court has identified sensible boundaries to the law, while implicitly rejecting objections from the losing agencies (and the private developers) about the short-term economic implications of its rulings. The court has stayed true to the original intent of the law even when that meant squaring off against other branches of state government. Despite the criticism, the Hawai'i Supreme Court, under the leadership of Chief Justice Moon, maintained its judicial independence and bravely protected public participation in the environmental review process.

Throughout its chapter 343 decisions, the court repeatedly cited the first aspirational section of the law, where the Legislature expressly encourages public participation,[5] putting the public at the table alongside agencies and applicants in the review process. The twelve key cases discussed in this article indicate that the Moon Court's decisions almost uniformly rule in favor of those seeking to maintain openness in the governmental processes that protect environmental values against arbitrary and capricious agency decision-making, particularly when those agencies are reviewing large-scale projects. Plaintiffs do not always win, but when an agency abruptly or unfairly cut off a potentially beneficial process for a large-impact project, the court reacted strongly. As the court lamented in the 2007 case, *Sierra Club v. Department of Transportation* (*Superferry I*), "[c]ontrary to the expressly stated purpose and intent of [chapter 343], the public was prevented from participating in an environmental review

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119 Haw. 90, 194 P.3d 531 (2008), *Price v. Obayashi Hawaii Corp.*, 81 Haw. 171, 914 P.2d 1364 (1996), and *Morimoto v. Board of Land & Natural Resources*, 107 Haw. 296, 113 P.3d 172 (2005).

[5] Hawai'i Revised Statutes section 343-1 states:

> The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole. It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.

HAW. REV. STAT. § 343-1 (2010).

process[,]"[6] and their participation would have benefitted "[a]ll parties involved and society as whole."[7]

This article reviews the environmental review jurisprudence of the Moon Court along a theoretical spectrum of "beneficial public participation." Part I presents a brief background on chapter 343 litigation in Hawai'i. Part II discusses the eight cases where the court expressed most strongly that citizens' lack of participation harmed the public interest in, and the integrity of, the environmental review process; this part focuses on three "blockbuster" cases: *Kahana Sunset*,[8] *Superferry I*[9] and *Superferry II*,[10] and *Turtle Bay*.[11] Part III examines the two decisions where the court tipped the public benefit versus the procedural injury balance in favor of defendants, splitting the court in one case (*Hawaii Tourism Authority*[12]) and setting some boundaries on the reach of chapter 343 in the other (*Nuuanu*[13]). Part III also mentions briefly the remaining two Moon Court cases, *Price v. Obayashi Hawaii Corp.*[14] and *Morimoto v. Board of Land and Natural Resources*,[15] in which quixotic individuals, seeking more environmental review against a backdrop of already extensive agency review processes, simply lost.

The legacy of the Moon Court's decisions in this core area of environmental law is a ringing endorsement of the fundamental principles enshrined by the Hawai'i Legislature in chapter 343 that environmental values must be fully considered alongside economic concerns, that citizens play a vital role in giving voice to those values as part of permitting and development reviews, and that the role of the judiciary is to enforce the legislature's plain intent. Although not without harsh critics among some agencies and members of the development community, the Moon Court's decisions provide a cohesive, principled, and well-balanced body of jurisprudence in this area that will well serve Hawai'i's environment, agencies, responsible applicants, and citizens' groups for many years to come.

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[6] *Superferry I*, 115 Haw. at 343, 167 P.3d at 336.

[7] *Id.*

[8] Kahana Sunset Owners Ass'n v. Cnty. of Maui, 86 Haw. 66, 947 P.2d 378 (1997).

[9] 115 Haw. 299, 167 P.3d 292.

[10] 120 Haw. 181, 202 P.3d 1226 (2009).

[11] Unite Here! Local 5 v. City & Cnty. of Honolulu (*Turtle Bay*), 123 Haw. 150, 231 P.3d 423 (2010).

[12] Sierra Club v. Haw. Tourism Auth. (*HTA*), 100 Haw. 242, 59 P.3d 877 (2002).

[13] Nuuanu Valley Ass'n v. City & Cnty. of Honolulu (*Nuuanu*), 119 Haw. 90, 194 P.3d 531 (2008).

[14] 81 Haw. 171, 914 P.2d 1364 (1996).

[15] 107 Haw. 296, 113 P.3d 172 (2005).

I. BACKGROUND OF CHAPTER 343 LITIGATION IN HAWAI'I

Since the Legislature's enactment of chapter 343 in the early 1970s,[16] Hawai'i state courts have played an important role in the environmental review process by interpreting the statute and its administrative rules in the context of lawsuits brought by citizens challenging a variety of state and county agency determinations. Although procedural in nature, chapter 343 is an action-forcing statute requiring agencies and applicants to consider at the earliest stage the environmental effects of certain proposals for action, projects, or development.

Chapter 343 requires that an "action" that proposes to "use state or county lands or funds" or meets certain other land use or environmental "triggers" undergo a public review that can involve two basic steps and may last months or a few years.[17] First, the agency prepares a preliminary screening document called an Environmental Assessment (EA). Then, if the environmental impacts are likely to be significant, the applicants must prepare an Environmental Impact Statement (EIS), a more comprehensive and usually much longer analysis that examines the potential impacts, as well as project alternatives, in greater depth. If the state or county agency accepts the final EA or EIS, that analysis is supposed to inform the agency's decision-making on subsequent substantive approvals, such as a zoning change or a permit sought under another law. Chapter 343 itself does not require an agency to select the most environmentally benign alternative; rather, it requires agencies to take a "hard look"[18] at the information and give it serious consideration.

When that review system breaks down, chapter 343 provides for a back-end enforcement system of judicial review and lawsuits by "persons aggrieved."[19]

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[16] For a comprehensive analysis of chapter 343 and its companion laws, chapter 341 and chapter 344, see the series of three reports prepared by the University of Hawai'i for the State of Hawai'i since 1978: DOAK COX, PETER RAPPA & JACQUELIN MILLER, THE HAWAII STATE ENVIRONMENTAL IMPACT STATEMENT SYSTEM: SUMMARY AND CONCLUSION (1978); PETER RAPPA, JACQUELINE MILLER & C. COOK, THE HAWAII STATE ENVIRONMENTAL IMPACT STATEMENT SYSTEM: REVIEW AND RECOMMENDED IMPROVEMENTS (1991); and KARL KIM, DENISE ANTOLINI, PETER RAPPA, SCOTT GLENN & NICOLE LOWEN, FINAL REPORT ON HAWAII'S ENVIRONMENTAL REVIEW SYSTEM (2010) [hereinafter KIM, ANTOLINI & RAPPA].

[17] *See* HAW. REV. STAT. § 343-5(a)(1)-(9) (2010) (listing what are commonly known as the "triggers"); *id.* § 343-5(b)-(c) (describing the two-step environmental assessment and impact statement system).

[18] The "hard look" doctrine, well known under NEPA case law, is also consistently applied by the Hawai'i courts to chapter 343 cases. *See, e.g., Superferry I*, 115 Haw. 299, 342, 167 P.3d 292, 335 (2007) (citing *Price*, 81 Haw. at 182 n.12, 914 P.2d at 1375 n.12 (citation omitted)).

[19] See HAW. REV. STAT. § 343-7(a) and (b) addressing the lack of an EA or the failure to proceed from an EA to an EIS, respectively, providing: "The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for

In fact, one explanation for the wealth of Hawai'i Supreme Court chapter 343 decisions focusing on public participation is that, for citizens' groups, there are no alternatives to judicial review, no administrative remedies to exhaust,[20] and no one with authority[21] to listen to and resolve complaints of citizens seeking to enforce the law.[22] The other reason is that none of the other four kinds of potential plaintiffs—applicants, agencies, the Office of Environmental Quality Control (OEQC), or the Environmental Council—has ever[23] sought a judicial remedy to enforce chapter 343. Approving agencies never[24] reject exemption declarations, EAs, or EISs. Thus, only citizens have sued. Not surprisingly,

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the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved." Section 343-7(c), covering challenges to an EIS, provides a slightly modified standing platform for plaintiffs, limiting it to the council and to those who commented on the draft EIS and to the scope of those comments.

[20] Only applicants whose final EIS is rejected by the approving agency may seek review from the Environmental Council. HAW. REV. STAT. § 343-5(c). The author is unaware of any situation where an agency rejected a final EIS and that non-acceptance was appealed to the Council.

[21] Since 1985, the Environmental Council rules have provided for a declaratory order process. *See* HAW. CODE R. § 11-201-21 to -25 (LexisNexis 2011). When the author served on the council from 2004 to 2006, the Attorney General's Office advised the council repeatedly that it had no declaratory order authority based on the Attorney General's prior opinions and a report by the Legislative Reference Bureau, DECLARATORY RULINGS AND THE ENVIRONMENTAL COUNCIL (1989). Therefore, in 2006, the Council proposed to delete this section of its rules pending legislative clarification. Governor Lingle never approved the Council's proposed rules for public hearings; thus the current Council rules (somewhat ironically) suggest that such quasi-judicial authority exists when the Attorney General takes the position that it does not.

[22] During this author's term of service on the Council, it heard citizen complaints several times but, due to the lack of any advisory opinion, declaratory order, or other authority, was unable to do anything more than write a letter expressing concern to the agencies involved. Hawai'i Revised Statutes section 341-6 provides: "The council shall serve as a liaison between the director and the general public by soliciting information, opinions, complaints, recommendations, and advice concerning ecology and environmental quality through public hearings or any other means and by publicizing such matters as requested by the director pursuant to section 341-4(b)(3)." Whether to modify the legal authority of the council was one issue examined in the 2010 University of Hawai'i study for the legislature. KIM, ANTOLINI & RAPPA, *supra* note 16.

[23] The author is unaware of any such case, and no such case appears in the reported case law.

[24] The only well-known situation in Hawai'i of a rejected EIS involved the 1999 decision by Tim Johns, then-director of the State Department of Land and Natural Resources, who rejected an EIS by Hawaiian Electric Company for the Wa'ahila Ridge transmission project, which engendered thousands of public comments. Director Johns later accepted the EIS, but the agency voted to deny the Conservation District Use Permit in 2002, and the project was ultimately shelved. *See* Mālama O Mānoa, Historic Preservation, http://my.malamaomanoa.org/preservation (last visited Apr. 3, 2011).

then, the case law in this area focuses heavily on removing the barriers to public participation and ensuring the adequacy of the agency process.

Across nearly four decades of chapter 343 litigation, Hawai'i appellate courts have issued approximately twenty-three noteworthy decisions: twenty by the Hawai'i Supreme Court and three by the Hawai'i Intermediate Court of Appeals (ICA).[25] Twelve, more than half of those decisions, were issued during the 1993-2010 term of the Moon Court. Those cases dominated the court's environmental docket, keeping these issues at the forefront of environmental law in Hawai'i and shaping current stakeholder and public perception about the importance and reach of this fundamental environmental law.

The Hawai'i Supreme Court and ICA have repeatedly grounded their decisions in the four key principles of the state environmental review system: (1) the broad purpose and intent of chapter 343 to protect environmental quality, (2) the "informational role" of the environmental review process, (3) the value of public participation, and (4) the goal of improving the quality of agency decision-making. Despite the clamor among agencies and applicants for more efficiency, clarity, and predictability in the law, these values are not embedded in the law itself. In fact, in several of these chapter 343 cases, the Hawai'i Supreme Court has made it clear that agencies and developers proceed at their peril if they circumvent the environmental review process.[26] This is not to say the court is unaware of the potential real-world impact of its rulings, but rather that the Moon Court has given highest priority to the procedural requirements of the law. The court has repeatedly referred to the Legislature's strong emphasis on public participation and restricted its judicial role to

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[25] In addition to the twelve decisions featured in this article, *see supra* notes 2 and 4, the Hawai'i Supreme Court has rendered seven important chapter 343 cases since 1978: *Life of the Land v. Ariyoshi*, 59 Haw. 156, 577 P.2d 1116 (1978); *Molokai Homesteaders Ass'n v. Cobb*, 63 Haw. 453, 629 P.2d 1134 (1981); *McGlone v. Inaba*, 64 Haw. 27, 636 P.2d 158 (1981); *Waikiki Resort Hotel, Inc. v. City & County of Honolulu*, 63 Haw. 222, 624 P.2d 1353 (1981); *Waianae Coast Neighborhood Board v. Hawaiian Electric Co.*, 64 Haw. 126, 637 P.2d 776 (1981); *Pearl Ridge Estates Community Ass'n v. Lear Siegler, Inc.*, 65 Haw. 133, 648 P.2d 702 (1982); and *Mauna Kea Power Co. v. Board of Land & Natural Resources*, 76 Haw. 259, 874 P.2d 1084 (1994). In addition, *Ka Pa'akai O Ka 'Aina v. Land Use Commission*, 94 Haw. 31, 7 P.3d 1068 (2000), discusses the amendments to chapter 343 that initiated the cultural impact statement requirement. The Intermediate Court of Appeals decided three notable cases: *Medeiros v. Hawaii County Planning Ass'n*, 8 Haw. App. 183, 797 P.2d 59 (1990); *Bremner v. City & County of Honolulu*, 96 Haw. 134, 28 P.3d 350 (App. 2001); and *'Ohana Pale Ke Ao v. Board of Agriculture*, 118 Haw. 247, 188 P.3d 761 (App. 2008).

[26] *See Superferry I*, 115 Haw. 299, 167 P.3d 292 (2007) (stopping the $40 million state harbor improvements project, as well as the Superferry's operations, for lack of chapter 343 compliance); *see also Kepo'o II*, 106 Haw. 270, 103 P.3d 939 (2005) (rejecting the defendants' argument that voiding a six-year-old lease deprived them of a vested property right or due process).

interpreting the plain language of the law. In essence, the court has let the economic chips fall where they may, leaving those policy choices to the Legislature.[27]

In slicing up the Moon Court's chapter 343 decisions, it is helpful to keep in mind the four basic types of environmental review cases: (1) failure to prepare (or require) an EA;[28] (2) failure to prepare (or require) an EIS;[29] (3) agency acceptance of an insufficient EIS;[30] and (4) failure to require a supplemental EA or EIS.[31] From the perspective of citizens' groups, the first two types of cases are easier to win. The third type can be quite difficult, and in Hawai'i, the fourth has been successful at least once but is still novel. Perhaps more importantly for this article's focus on public participation, the cases in which the court is most likely to perceive the biggest injustice that merits judicial intervention are the first two—when the agency stiff-arms citizens' groups and

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[27] Amending chapter 343 has often been the topic of legislative debate. The University of Hawai'i study and a legislative working group formed by Senator Mike Gabbard during the 2010 session proposed an omnibus bill to modernize the law, but that bill was not introduced in the 2011 session. For the history of that process, see Assessing Hawaii's Environmental Review Process, http://hawaiieisstudy.blogspot.com (last visited Apr. 3, 2011). During the 2011 session, the only major chapter 343 bills to make it to conference (and then die due to unrelated procedural reasons) were Senate Bill 699, a proposal to strengthen the OEQC by allowing the office to assess fees on filed documents, and Senate Bill 723, the developer and agency-proposed extension of what is called the "ministerial exemption."

[28] When there is a "lack of assessment required under section 343-5," a lawsuit must be filed within 120 days of "the agency's decision to carry out or approve the action" or, if the agency has made no formal determination, within 120 days after the project has started. HAW. REV. STAT. § 343-7(a) (2010).

[29] If an EIS is not prepared when one "is required" and the process stops at only an EA/Finding of No Significant Impact (FONSI), then an action must be brought within thirty days after the public has been informed of that decision. *Id.* § 343-7(b).

[30] An "adequacy" challenge must be brought within sixty days after public notice of the acceptance of an EIS. *Id.* § 343-7(c). These timing restrictions (called "limitation of actions" under chapter 343) act as an important screen for timely litigation. Failure to meet these requirements has barred several citizen claims. *See, e.g.*, *Waikiki Resort Hotel, Inc.*, 63 Haw. 222, 624 P.2d 1353; *Waianae Coast Neighborhood Board*, 64 Haw. 126, 637 P.2d 776; *Medeiros*, 8 Haw. App. 183, 797 P.2d 59; *Bremner*, 96 Haw. 134, 28 P.3d 350. *Cf.* Unite Here! Local 5 v. City & Cnty. of Honolulu (*Turtle Bay*), 123 Haw. 150, 181, 231 P.3d 423, 454 (2010) (finding plaintiffs met the statute of limitations, adopting the more generous 120-day period of -7(a), running from the date of the City and County of Honolulu Department of Planning and Permitting (DPP) approval of the subdivision application).

[31] Chapter 343 itself does not address supplemental documents, but the Environmental Council's rules expressly do. HAW. CODE R. §§ 11-200-26, -27 (LexisNexis 2011). The court specifically upheld the Council's rulemaking authority regarding supplemental documents in the *Turtle Bay* case. *See Turtle Bay*, 123 Haw. at 176, 231 P.3d at 499 ("[T]he rule-making authority expressly grants to the Environmental Council the power to promulgate rules regarding EISs.").

either denies that chapter 343 applies at all, or determines that only an EA (and not a full EIS) is warranted by the proposed action.

The unusual commitment of citizens' groups in pursuing these cases and the summary judgment nature of this type of litigation (which tends to minimize costs and maximize the ability to characterize issues for appeal as "of law" and not "of fact") has meant that almost all chapter 343 cases filed in circuit court have eventually made their way to the Hawai'i Supreme Court.[32] Thus, oddly enough, an examination of the Hawai'i Supreme Court decisions does reflect the in-the-trenches battles over chapter 343 actions by agencies and applicants in Hawai'i.[33] The Moon Court era decisions discussed next, seen from the perspective of a theory of beneficial public participation, represent a striking body of case law in their inclination to throw open the courthouse doors to responsible citizens' groups even when it means stopping high-profile development projects.

II. ENSURING JUDICIAL ACCESS WHEN CITIZENS' LACK OF PARTICIPATION HARMED THE PUBLIC INTEREST IN THE ENVIRONMENTAL REVIEW PROCESS

The Moon Court's environmental review decisions have strongly ensured open access to the courts when citizens' lack of participation has, in the court's view, harmed the public interest role that the Legislature built into the environmental review process. This section reviews eight decisions of the court in chronological rather than thematic order to create a cumulative understanding of "why plaintiffs win so often" across nearly two decades of decisions. This section also highlights the three "game-changing" environmental review rulings of the Moon Court: *Kahana Sunset Owners Association v. County of Maui*,[34] the *Superferry I*[35] and *Superferry II*[36] cases, and *Unite Here! Local 5 v. City and County of Honolulu* (*Turtle Bay*).[37] Each of these major decisions not only had David and Goliath qualities, but all three

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[32] In the author's experience, only one chapter 343 case of recent note has not reached the Hawai'i Supreme Court. *See* 'Ohana Pale Ke Ao v. Bd. of Agric., 118 Haw. 247, 188 P.3d 761 (App. 2008) (finding that chapter 343 review was required for importation of genetically modified algae by a private company to a state research facility).

[33] This is not to say that citizens sue every time they are concerned about the inadequacy of an EA or EIS; citizens' groups often decline to sue because of a variety of factors, such as lack of available counsel, high costs and attorneys' fees, political concerns, internal disagreement, or poor timing. Because the only way to challenge a flawed chapter 343 decision is to sue, however, there is no "bottom of the pyramid" for these kinds of cases, and citizens rarely settle at the circuit court level because of the important legal issues and projects involved.

[34] 86 Haw. 66, 947 P.2d 378 (1997).

[35] 115 Haw. 299, 167 P.3d 292 (2007).

[36] 120 Haw. 181, 202 P.3d 1226 (2009).

[37] 123 Haw. 150, 231 P.3d 423 (2010).

contained numerous progressive rulings on public participation that boldly reinforced the citizen lawsuit paradigm.

A. Kahana Sunset*: Shaping the Broad Funnel of the Applicability of Chapter 343*

In the world of chapter 343 litigation, few issues are more important than the threshold question of *when* the law applies. Divining the precise initial reach of the law consumes much energy in the daily life of consultants, project proponents, agencies, and citizen groups. Prognostication is made simultaneously more—and less—predictable by the structure of the "343 funnel," which is very wide at the top and then rapidly narrowed by an exemption process.[38] At the top, the chapter 343 review process is deliberately broad: it requires an EA for actions that "[p]ropose the use of state or county lands or the use of state or county funds."[39] Following that large initial "big trigger," chapter 343 lists twelve other circumstances that require environmental review.[40] *Kahana Sunset Owners Association v. County of Maui*[41] addressed the breadth of this critical "use" trigger and set the stage for a

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[38] Hawai'i Revised Statutes section 343-6(a)(2) gives the State Environmental Council the authority to promulgate regulations that exempt "specific types of actions, because they will probably have minimal or no significant effects on the environment." The exemption regulations, Hawai'i Administrative Rules section 11-200-8, provide for eleven "classes" of exempt actions and a "safety net" exception. HAW. CODE R. § 11-200-8(a)-(b) (LexisNexis 2011). The agencies maintain "lists" of exemption actions posted on the OEQC web site and in theory the actions are periodically updated and reviewed by the Environmental Council. *Id.* § 11-200-8(d). Agencies are then allowed to "declare" certain action exempt from chapter 343; they must "maintain records" and "produce the records for review upon request." *Id.* § 11-200-8(e). Unfortunately, this very important declaration process is not transparent, except for the release of a few high-profile exemption declarations such as was challenged in *Superferry*; therefore it is not known how many actions are declared exempt each year by state and county agencies or if those declarations comport with the law. For this reason, a recent University of Hawai'i study proposed to create a new transparent declaration accounting system. *See* KIM, ANTOLINI & RAPPA, *supra* note 16, at 60.

[39] HAW. REV. STAT. § 343-5(a)(1) (2010).

[40] Hawai'i Revised Statutes section 343-5(a) lists twelve other triggers for environmental review, including, "use within any land classified as a conservation district," *id.* § 343-5(a)(2); "use within a shoreline area," *id.* § 343-5(a)(3); "use within any historic site," *id.* § 343-5(a)(4); "use within the Waikiki . . . [] Special District," *id.* § 343-5(a)(5); "amendments to existing county general plans" that propose urbanization, *id.* § 343-5(a)(6); "reclassification of . . . a conservation district by the state land use commission," *id.* § 343-5(a)(7); certain new or expanded helicopter facilities, *id.* § 343-5(a)(8); certain large wastewater treatment units, *id.* § 343-5(a)(9)(A); a waste-to-energy facility, *id.* § 343-5(a)(9)(B); a landfill, *id.* § 343-5(a)(9)(C); an oil refinery, *id.* § 343-5(a)(9)(D); or a power-generating facility. *Id.* § 343-5(a)(9)(E).

[41] 86 Haw. 66, 947 P.2d 378 (1997).

series of cases from the court that reinforced the broad shape of the funnel and sparked a backlash from the development community that continues today.

Kahana Sunset was not the first case to define the line between what is covered and what is excluded[42] or exempt from chapter 343. In *McGlone v. Inaba*, decided in 1981 during the Richardson Court era, the court upheld the Board of Land and Natural Resources' (BLNR) decision not to require an EA for an underground utility easement through conservation land or for an adjacent single-family residence in Hawai'i Kai, reasoning that the impacts did not rise to the level of significance contemplated by chapter 343 and, therefore, that BLNR had properly exempted the project.[43] The plaintiffs—six individuals "interested in the preservation of the environment at Paiko Lagoon, Kuliouou, Oahu," represented by Jack Schweigert[44]—lost. The Richardson Court seemed persuaded by three major factors (factors not present in *Kahana Sunset* and its progeny): the project involved a single-family residence; the Environmental Council's exemption regulations expressly included single-family residences and supporting utilities;[45] and the projected impact on Paiko pond was minimal.[46] The court held that "significant effect" is a "relative concept" and that any determination of significant effect is "highly subjective."[47] At the same time, an agency "must consider every phase and every expected consequence of the proposed action" when assessing potential significant effects.[48]

The facts in the 1997 *Kahana Sunset* case were readily distinguishable from *McGlone*. In *Kahana Sunset*, Justice Paula Nakayama, writing for a unanimous court, agreed with the citizen-plaintiff Kahana Sunset Owners Association (not joined by any environmental group but represented by Isaac Hall, a prominent environmental attorney on Maui and chapter 343 expert[49]) that the Maui County Planning Commission had erred in not requiring an EA for a proposal

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[42] "Excluded" means something different than "exempt." Under Hawai'i law, the former indicates that the law does not apply at all; the latter indicates that the law applies but that the project falls under the class of exemptions provided under the rules. *See* HAW. CODE R. § 11-200-8 (LexisNexis 2011). Under federal law, the term used in the Council on Environmental Quality Control's NEPA regulations is "excluded." *See* 40 C.F.R. § 1508.4 (2011).

[43] 64 Haw. 27, 38, 636 P.2d 158, 166-67 (1981).

[44] *Id.* at 28, 636 P.2d at 160.

[45] *Id.* at 36, 636 P.2d at 165 (citing EIS Regs. 1:33(a)(3)[2][d] (currently HAW. CODE R. § 11-200-8(a)(3) (LexisNexis 2011))).

[46] The court explained that "the effect of the construction of underground utilities on Lot 715—designated the primary impact—would only be minimal and temporary. There is ample evidence to support this finding." *Id.* at 37, 636 P.2d at 165.

[47] *Id.* at 35, 636 P.2d at 164.

[48] *Id.*

[49] Kahana Sunset Owners Ass'n v. Cnty. of Maui, 86 Haw. 66, 67, 947 P.2d 378, 379 (1997).

to build 312 multi-family units that required a thirty-six-inch drainage culvert to be tunneled under a street and then connected to a culvert under a public highway.[50] The court found that the agency's decision was inconsistent with the intent of chapter 343 to "exempt only very minor projects" as well as the "letter and intent of the administrative regulations."[51]

Addressing the merits, Justice Nakayama first reviewed the purpose and general provisions of HEPA,[52] quoting the entire first section of section 343-1,[53] which includes the legislative findings emphasizing the role of public participation. She explained the broad reach of chapter 343: an EA is mandatory unless a project is exempt, and an EA must be prepared at the "earliest practicable time."[54] Justice Nakayama noted that it was "undisputed" that the housing complex would install a new thirty-six-inch drainage line beneath Napilihau Street and then connect to an existing twenty-four-inch culvert beneath Lower Honoapi'ilani Highway.[55] In the court's view, this was a "use of state or county lands or funds" under H.R.S. section 343-5(a)(1).[56] The opinion then examined the County's claimed exemption for "minor accessory structures" and certain utilities,[57] finding that the project probably did not fall under the exemptions in Hawai'i Administrative Rules (HAR) section 11-200-8.[58] Stating that the administrative rules intended to exempt "only very minor projects from the ambit of HEPA,"[59] the court found that the exemption was "inconsistent with both the letter and intent of the administrative regulations."[60]

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[50] *Id.* at 71-72, 947 P.2d at 383-84. The *Kahana Sunset* case began in 1991 when the developer filed for a special management area (SMA) permit for the Napilihau Villages development. *Id.* at 68, 947 P.2d at 380. In 1993, the Maui County Planning Commission held a public hearing and granted the homeowners' motion to intervene. *Id.* In 1994, the Commission held a contested case hearing that lasted thirteen days. *Id.* In 1995, the Commission granted the SMA permit, finding that no EA was required for the project. *Id.* The homeowners appealed to circuit court, which affirmed the Commission's order, and then to the Hawai'i Supreme Court. *Id.* Thus, seven years passed while the parties battled in court over whether an EA, which could have taken much less time to complete, would be required.

[51] *Id.* at 72, 947 P.2d at 384.

[52] *Id.* at 70-71, 947 P.2d at 382-83.

[53] *Id.* at 70, 947 P.2d at 382.

[54] *Id.* at 71, 947 P.2d at 383 (quoting HAW. REV. STAT. § 343-5(c) (1993)).

[55] *Id.*

[56] *Id.*

[57] *Id.* The Commission relied on Hawai'i Administrative Rules section 11-22-8(a)(6), "construction of placement of minor structures accessory to existing facilities," and an agency exemption list that covered "drains, sewers, and waterlines within streets or highways." *Id.*

[58] *Id.*

[59] *Id.* at 72, 947 P.2d at 384.

[60] *Id.*

Justice Nakayama concluded by reviewing the purposes of an EA, noting that the document gives the agency and the public information necessary to evaluate environmental effects.[61] She also noted the importance of public notice and comment in that process: "The public comment and notification provisions of HEPA underscore the legislative intent to provide broad-reaching dissemination of proposed projects so that the public may be allowed an opportunity to comment and the agency will have the necessary information to understand the potential environmental ramifications of their decisions."[62] She continued: "[I]n the absence of the preliminary environmental assessment, the legislative intent that potential effects be studied and the public notified is undercut."[63] The vigor of the court's conclusion was supported by a little-

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[61] *Id.*

[62] *Id.*

[63] *Id.* The court also found that, pursuant to H.R.S. section 343-7(a), the plaintiff properly brought the action within 120 days of the Maui County Planning Commission's decision to approve the special management area (SMA) permit. *Id.* at 73, 947 P.2d at 385.

A key but sleeper holding in *Kahana Sunset* involved what is known as the "functional equivalence doctrine," often argued by defendants in NEPA cases, also known as the *Portland/Weyerhaeuser* doctrine (from *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), and *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978)). Maui County claimed that chapter 343 was essentially redundant because the similar SMA review process under Hawai'i Revised Statutes chapter 205 was the "functional equivalent." *Kahana Sunset*, 86 Haw. at 73-74, 947 P.2d at 385-86. The court had previously rejected that theory only indirectly in *Pearl Ridge Estates v. Lear Siegler, Inc.*, in which it held that the State Land Use Commission was required to conduct an EA for a boundary amendment to rezone 8.4 acres from conservation to urban, even though the appellant had participated in a contested case hearing. *Id.* The *Kahana Sunset* court expressly rejected this functional equivalence argument, finding that chapter 343 "contains a fixed scheme of public notice," and that the county's argument improperly shifted the burden of conducting required review and studies from the applicant to the public. *Id.* at 73, 947 P.2d at 385.

A few years later, in *Sierra Club v. State Office of Planning (Koa Ridge)*, 109 Haw. 411, 126 P.3d 1098 (2006), however, the Hawai'i Supreme Court seemed to leave the door ajar for a future case that may satisfy the criteria for functional equivalence. The court noted, "[o]n the record before us, we cannot accept this 'functional equivalent of a required EA argument.'" *Id.* at 420, 126 P.3d at 1107. Thus, with sufficient findings that support equivalence, an agency might be able to satisfy chapter 343 review with a different environmental review procedure. On the other hand, even more recently, in *'Ohana Pale Ke Ao v. Board of Agriculture*, 118 Haw. 247, 188 P.3d 761 (App. 2008), the Intermediate Court of Appeals rejected the argument. The State contended that its process for reviewing algae importation permits under chapter 150A "establishes a comprehensive and exclusive process for the issuance of permits for importing microorganisms and vests in the Board the sole authority to regulate the import of microorganisms." *Id.* at 253, 188 P.3d at 767. The State claimed the chapter 150A process included the "essential components of the HEPA review process." *Id.* The court rejected this argument, finding that, even if the Board of Agriculture had exclusive authority under chapter 150A, "HRS § 343-5 plainly and unambiguously required preparation of an EA before the Board could approve Mera's application" and that "the requirements of HRS Chapter 343 were

noticed observation that the County admitted on appeal—that the lack of an EA "might be error."[64] Ultimately, the court vacated the Commission's granting of the special management area (SMA) permit to the developer and remanded the case.

Kahana Sunset deserves blockbuster status not because the legal ruling is out of line with the statutes or prior case law—it is not. Rather, the case constitutes a ringing endorsement of the chapter 343 process and citizen participation even though the 312-unit Napilihau development had already received its SMA permit from the County. The public participation requirements trumped economic considerations. Moreover, the court's ruling in this case set up a strong foundation for two more "state or county lands or funds" cases in the trilogy—*North Kohala* and *Koa Ridge*, discussed below—further reinforcing the strict process requirements of chapter 343 to the distinct disadvantage of developers who failed to follow the extra steps involved in the EA and EIS review process. *Kahana Sunset* had the perfect plaintiff to set up good case law for future "use" cases.[65] A private homeowners group looking to protect their property values is a sympathetic plaintiff even for conservative judges. The group was a far cry from the rabble-rousing environmental groups who would pick up this case as a sword shortly thereafter.

B. Kepo'o I *and* Kepo'o II

Over the next seven years, the Hawai'i Supreme Court issued two more decisions that followed the principles of *Kahana Sunset*. In *Kepo'o v. Watson*

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intended to be 'integrated' with and to supplement decision-making by agencies involved in a permitting process." *Id.* Because it represents a large potential avoidance strategy for SMA applicants and county agencies, the issue is likely to be brought to the Hawai'i Supreme Court again in the future.

[64] *Kahana Sunset*, 86 Haw. at 72, 947 P.2d at 384. Two other key findings in *Kahana Sunset* outside of the scope of this article are: (1) the EA must address the environmental effects of the entire proposal, not only the drainage system (which has "no independent utility"), because it is a "necessary precedent" to the development; otherwise it would be "improper segmentation"; and (2) the lead agency has the responsibility to prepare the EA and cannot defer that process to another agency with downstream authority. *Id.* at 74-75, 947 P.2d at 386-87.

[65] On the one hand, relatively insignificant private utility connections (as in *McGlone v. Inaba*, 64 Haw. 27, 636 P.2d 158 (1981), and *Nuuanu Valley Association v. City and County of Honolulu*, 119 Haw. 90, 194 P.3d 531 (2008)) appear not to meet the benchmark; on the other hand, tunneling under state highways for major developments projects (*Kahana Sunset*, 86 Haw. 66, 947 P.2d 378, *Citizens for the Protection of the North Kohala Coastline v. State Office of Planning* (*North Kohala*), 91 Haw. 94, 979 P.2d 1120 (1999), and *Sierra Club v. State Office of Planning* (*Koa Ridge*), 109 Haw. 411, 126 P.3d 1098 (2006)), importation of genetically engineered algae for research at state facilities (*'Ohana Pale*, 118 Haw. 247, 188 P.3d 761), and large capital harbor improvements (*Superferry I*, 115 Haw. 299, 167 P.3d 292 (2007)) do trigger the need for review.

(*Kepo'o I*)[66] and *Kepo'o v. Kane* (*Kepo'o II*),[67] the court reinforced its ruling that agencies and applicants must carefully follow the constraints of chapter 343, even when it means holding up major development. Although the cases are less earth-shattering than *Kahana Sunset*, the plaintiffs again were not rag-tag environmentalists; they were, respectively, individual (pro se) residents and a homeowners' association deeply concerned about the economic, social, and environmental implications of a state agency's head-long rush into building a 58-megawatt power plant on the South Kohala coast of the island of Hawai'i.

1. Kepo'o I*: The expansive scope of chapter 343*

In 1998, Justice Mario Ramil wrote the first of the twin *Kepo'o* decisions—*Kepo'o v. Watson* (*Kepo'o I*)[68]—regarding the reach of chapter 343 to Hawaiian Home Lands under the definition of "state lands." In early 1993, the Department of Hawaiian Home Lands (DHHL) completed an EIS for its proposed master plan development of 10,000 acres of Hawaiian Home Lands, which included a power generating facility.[69] In December 1993, DHHL leased forty acres to Waimana Enterprises, Inc., which sublet a portion to Kawaihae Cogeneration Partners (KCP).[70] KCP then prepared an EA for the cogeneration power facility, believing the document was required under chapter 343; it prepared an EA instead of an EIS in part because DHHL had already completed an EIS for the 10,000-acre area.[71] DHHL accepted the EA, finding that an EIS was not required.[72] Three individual pro se plaintiffs, Arthur F. Kepo'o (who died between the first and second decisions),[73] Lillian K. Dela Cruz, and Josephine L. Tanimoto sued DHHL.[74] Waimana and KCP intervened.[75] In the circuit court, DHHL and Waimana/KCP sought summary judgment that chapter 343 did not apply to Hawaiian Home Lands.[76] The circuit court disagreed and granted partial summary judgment to the plaintiffs on the grounds that chapter

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[66] 87 Haw. 91, 952 P.2d 379 (1998).
[67] 106 Haw. 270, 103 P.3d 939 (2005).
[68] *Kepo'o I*, 87 Haw. 91, 952 P.2d 379.
[69] *Id.* at 93, 952 P.2d at 381.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *See Kepo'o II*, 106 Haw. 270, 274 n.4, 103 P.3d 939, 943 n.4 (2005).
[74] *Kepo'o I*, 87 Haw. at 91, 952 P.2d at 379.
[75] *Id.* at 93, 952 P.2d at 381.
[76] *Id.* at 94, 952 P.2d at 382.

343 *did* apply to Hawaiian Home Lands.[77] Waimana/KCP appealed.[78] The issue on the first appeal was this question of applicability.[79]

Justice Ramil agreed with the pro se plaintiffs and the amicus curiae, a private homeowners' group represented by Cades Schutte Fleming & Wright.[80] Although Hawaiian Home Lands are special trust lands, they are "state lands" and thus subject to chapter 343.[81] The court also rejected the defendants' challenge to the individual plaintiffs' compliance with the statute of limitations, or standing, provisions of chapter 343.[82] The court remanded for further proceedings to determine if the Hawaiian Homes Commission and the developer had complied with chapter 343.[83] That remand led to another appeal and decision by the court seven years later, more than ten years after the lease agreement.[84]

2. Kepo'o II: *Chapter 343 trumps a premature state lease, even years later*

With Justice Simeon Acoba writing for a unanimous court, the 2005 *Kepo'o II* decision also favored the plaintiffs.[85] The court again upheld the circuit court's ruling, this time finding not only that an EIS (not just an EA) was required, but also that DHHL's lease with KCP was null and void due to the lack of compliance with chapter 343.[86]

On this second appeal, the lineup of the parties was stronger. The amicus curiae in *Kepo'o I*, James Growney and the Mauna Kea Homeowners' Association, were no longer just "friends of the court" but now intervening plaintiffs.[87] The new issues on appeal involved standing,[88] the significance determination (the threshold line between an EA and an EIS),[89] and a due

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] The prominent law firm represented Amici Curiae James Growney and Mauna Kea Homeowners' Association. *Id.* at 93, 952 P.2d at 381.

[81] *Id.* at 98, 952 P.2d at 386. The court noted that chapter 343 is part of the state's police power ("public safety, health, and welfare"), *id.* at 99, 952 P.2d at 387, and although the law "does not significantly affect the land," *id.* at 100, 952 P.2d at 388, it requires decision-makers to consider environmental impacts in making decisions, and these "procedural and informational requirements" are "incidental" to effect on the land, "not inconsistent" with the interests of Hawaiian Home beneficiaries. *Id.* at 102, 952 P.2d at 390.

[82] *Id.* at 95, 952 P.2d at 383.

[83] *Id.* at 93, 952 P.2d at 381.

[84] *Kepo'o II*, 106 Haw. 270, 103 P.3d 939 (2005).

[85] *Id.* at 274, 103 P.3d at 943.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 283-84, 103 P.3d at 952-53.

[89] *Id.* at 274, 103 P.3d at 943.

process/takings claim by the developer.[90] Justice Acoba held that the individual plaintiffs were aggrieved parties even if they did not comment on the draft EA because the challenge was brought under Hawai'i Revised Statutes section 343-7(b) (a determination by an agency that an EIS is not required), not section 343-7(c), which does require aggrieved parties to have commented on the draft EIS.[91] He further held that the new intervenors, who filed suit four years after DHHL issued the negative declaration, could participate because the original lawsuit by the other individuals was timely filed. After reviewing the purpose of chapter 343,[92] which the court stated required an "extensive environmental review process" to determine if the benefit "outweighs any detriment to the surrounding community,"[93] Justice Acoba reviewed the circuit court's determination that an EIS was required due to the significant effects—such as groundwater withdrawal, fuel consumption, and air pollution—from the 58-megawatt power plant and that it would be a "major source of pollution."[94] Addressing an important threshold issue, he held that the word "may" in "may have a significant effect on the environment" in chapter 343 had the common meaning of "likely,"[95] and that the potential effects from the power plant met that definition.[96]

Hitting the ball out of the park, Justice Acoba then upheld the circuit court's decision to *void* the DHHL lease for the power plant because an EIS was a "condition precedent" and DHHL had not completed a final EIS before entering into a lease for construction.[97] The court found that the legal violation effectively placed the lease "on hold" until the agency and applicant complied with chapter 343.[98] Rejecting the due process and takings claims proffered by Waimana/KCP's lawyers (including future Hawai'i Supreme Court Justice James E. Duffy, Jr., then a solo attorney), the court held that a lease voided for failure to comply with chapter 343, even six years after it was granted, did not deprive the leaseholder's property rights.[99] Absent chapter 343 compliance, DHHL's lease for the project was invalid; thus the project proponents lacked the requisite property interest to assert a due process claim or a takings claim.[100]

In summary, *Kepo'o I* and *Kepo'o II* strongly reinforce the court's earlier ruling in *Kahana Sunset* that chapter 343 has broad reach and must be strictly

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[90] *Id.*
[91] *Id.* at 284-85, 103 P.3d at 953-54.
[92] *Id.* at 291, 103 P.3d at 960.
[93] *Id.* at 287, 103 P.3d at 956.
[94] *Id.* at 288, 103 P.3d at 957.
[95] *Id.* at 288-89, 103 P.3d at 957-58.
[96] *Id.* at 290, 103 P.3d at 959.
[97] *Id.* at 291-92, 103 P.3d at 960-61.
[98] *Id.* at 292, 103 P.3d at 962.
[99] *Id.* at 293, 103 P.3d at 962.
[100] *Id.*

followed, even if it means holding up proposed development or—as in the case of *Kepo'o II*—if it means voiding a six-year-old lease. How do these two cases fit into the public benefit theory offered by this article? On the one hand, *Kepo'o I* and *Kepo'o II* initially involved real citizen plaintiffs—Kepo'o, Dela Cruz, and Tanimoto—who started the case pro se, without any apparent support from community or environmental groups. On the other hand, by the time *Kepo'o I* was before the high court, a powerful new ally was on the plaintiffs' side: a private homeowners' association with prominent lawyers. This additional legal clout undoubtedly changed the quality of the briefing and the perceived equities of the issues before the court. Still, *Kepo'o I* and *Kepo'o II* fit the theory of public benefit because the court seemed struck by the rashness of DHHL's decision to move ahead with a long lease for such a big project despite the fairly obvious need to do a full EIS. One can sense from Justice Acoba's exhaustive ruling in particular that he smelled a rat in the story about how DHHL handled the leasing decision. Thus, the court's conclusion that the full EIS process should have been followed, and more public light brought to bear on the agency's decision-making, comports with the core notion in chapter 343 that public process does matter. Two years later, the court revisited similar issues, again arising from the pressures for development of the Kohala Coast, in *Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i (North Kohala)*.[101]

C. North Kohala: *The Second Decision in the "Big Trigger" Trilogy*

Rolling the clock back to 1999—two years after *Kahana Sunset,* one year after *Kepo'o I,* but six years before *Kepo'o II*—the court's *North Kohala*[102] decision became the second in the renowned trilogy of Hawai'i's "big trigger" cases addressing the applicability of the "use of state or county lands or funds," that is, the wide top of the chapter 343 funnel. Writing for a unanimous court, Justice Robert Klein held that a resort developer's application to the county for an SMA permit for its 387-acre hotel, residential, and golf development triggered chapter 343 review because the project proposed two roadways for golf carts and maintenance vehicles that would be tunneled under Akoni Pule state highway.[103] Relying on *Kahana Sunset,* the court reaffirmed that the proposed underpasses constituted "use of [s]tate lands" and were "integral" parts of the larger development project.[104]

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[101] 91 Haw. 94, 979 P.2d 1120 (1999).

[102] *Id.*

[103] *Id.* at 105, 979 P.2d at 1131.

[104] *Id.*

Similar to *Kahana Sunset*, the *North Kohala* case started when the County had denied a contested case hearing to Citizens for the Protection of the North Kohala Coastline (Citizens) and granted developer Chalon International of Hawai'i Inc.'s SMA permit.[105] In 1993, Citizens challenged the SMA on the basis of chapter 343 violations.[106] Judge Ronald Ibarra ruled against Citizens,[107] finding that Citizens lacked standing, that an EIS was not required, and that the County had properly granted a boundary amendment.[108]

On appeal to the Hawai'i Supreme Court, the case focused on standing, "use," and timing. Justice Klein held that Citizens had adequately demonstrated standing for a declaratory judgment action under H.R.S. section 632-1, which is "less stringent" than standing to challenge a denial of a contested case hearing.[109] Justice Klein reiterated that in the "realm of environmental concerns,"[110] the court had avoided restricting standing in a series of cases.[111] He found that Citizens had members residing "in close proximity"[112] to the area and who were "long time and frequent users"[113] of the coastline affected, even if they were not owners or adjacent owners of the project.[114] He concluded that the "needs of justice"[115] also supported standing and upheld the circuit court's amended standing ruling (that had flipped in favor of plaintiff)[116] regarding declaratory and injunctive relief.[117]

Regarding the chapter 343 violations, Justice Klein first held that based on *Kahana Sunset*, the "construction of two underpasses under a state highway constitutes use of state land for purposes of HRS 343-5(a)(1)," triggering an EIS.[118] The ruling cemented into the law the notion that a substantial physical disturbance of state land would constitute "use," lending even more momentum

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[105] *Id.* at 96, 979 P.2d at 1122. In 1997, Judge Ibarra upheld the County's SMA decision, and the Hawai'i Supreme Court upheld that ruling by summary disposition in 1997. *Id.*

[106] *Id.* This chapter 343 challenge was the second lawsuit filed by Citizens. *Id.*

[107] *Id.* at 95, 979 P.2d at 1121.

[108] *Id.* at 97, 979 P.2d at 1123. After the Hawai'i Supreme Court's decision in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, 79 Haw. 425, 903 P.2d 1246 (1995), the circuit court changed its ruling on standing, but reaffirmed its ruling on the other issues. *North Kohala*, 91 Haw. at 97, 979 P.2d at 1123.

[109] *North Kohala*, 91 Haw. at 100, 979 P.2d at 1126.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 101, 979 P.2d at 1127.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 101-02, 979 P.2d at 1127-28.

[116] *See supra* note 108.

[117] *North Kohala*, 91 Haw. at 101-02, 979 P.2d at 1127-28.

[118] *Id.* at 103, 979 P.2d at 1129.

to *Kahana Sunset* and setting up the future rulings discussed later in this article.[119]

Second, Justice Klein concluded that it was not too early to prepare the EIS given that the underpasses were an "integral" part of the project and that the developer had committed to the underpasses, therefore meeting "the earliest practicable time" requirement for the EIS.[120] He stated that "decisions reflecting environmental considerations can most easily be made when other basic decisions are also being made, that is, during the early stages of project conceptualization and planning."[121] Therefore, the court remanded for further proceedings consistent with the ruling that an EIS was required.[122] Overall, the decision was a major victory for Citizens—and small "c" citizens—and another brick in the wall of Hawai'i Supreme Court cases enforcing a broad interpretation of the chapter 343 funnel.[123]

D. Koa Ridge*: The Third Decision in the Trilogy*

The third decision in the trilogy of major decisions regarding the "use of state or county lands" trigger is the 2006 ruling *Sierra Club v. State Office of Planning*,[124] commonly referred to by its place and project name, "*Koa Ridge*." In that case, Justice James Duffy, writing for a unanimous court, upheld First Circuit Court Judge Elizabeth Hifo's decision that the State Land Use Commission's (LUC) reclassification of 1274 acres in Central O'ahu from agriculture to urban—for Castle & Cooke's "Koa Ridge" development—required at least an EA because the project required tunneling under four state highways for a large sewage line and new water lines.[125]

The massive size and scope of the Koa Ridge development undoubtedly helped to persuade the court that the project triggered the environmental review process. In 2000, Castle & Cooke and Pacific Health Community, Inc. (PHC) petitioned the LUC to amend the land use boundary to allow for the

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[119] *See* Sierra Club v. State Office of Planning (*Koa Ridge*), 109 Haw. 411, 126 P.3d 1098 (2006).

[120] *North Kohala*, 91 Haw. at 104-05, 979 P.2d at 1130-31 (citing NEPA cases).

[121] *Id.* at 105, 979 P.2d at 1131.

[122] *Id.* at 107, 979 P.2d at 1133.

[123] The victory was not 100%, however. The court held that "mere impact" on the shoreline and conservation areas was not sufficient itself to trigger H.R.S. section 343-5(a)(2) or (a)(3) because Chalon's use was not proposed "within" the shoreline area. *Id.* at 105-06, 979 P.2d at 1131-32. The court also upheld the circuit court orders on the other issues (county code compliance and boundary amendment for 14.5 acres). *Id.* at 107, 979 P.2d at 1133.

[124] 109 Haw. 411, 126 P.3d 1098.

[125] *Id.* at 413, 126 P.3d at 1100. In 2003, Judge Hifo ruled in favor of the Sierra Club, vacating the decision of the LUC. *Id.* at 414, 126 P.3d at 1101.

development.[126] The proposed project, still alive today despite substantial community opposition,[127] consisted of "thousands of homes, a commercial center, an elementary school, a park, a church/day care, a recreational center, and the Pacific Health Center."[128] As part of the development, Castle & Cooke planned to build a thirty-six-inch pipeline to transmit sewage to the Waipahu Sewage Treatment Plant and construct a new water transmission line, both of which would require tunneling under Kamehameha Highway, the H-1 Freeway, the H-2 Freeway, and Farrington Highway, all of which are state land.[129]

In 2001, the Sierra Club asked the LUC to stop processing the boundary amendment petition until Castle & Cooke and PHC complied with chapter 343 because the project would use state lands.[130] In a little-noted portion of the record, Castle & Cooke and PHC "admit[ted] that an EA was required but argu[ed] that it would be prepared later."[131] Thus, the issue became a matter of "when," not "whether." With one opposing vote (University of Hawai'i environmental law professor M. Casey Jarman, now Leigh),[132] the LUC denied the Sierra Club's motion and reclassified 762 acres from agriculture to urban without requiring an EA.[133] In 2002, the Sierra Club filed a judicial challenge and, in 2003, Judge Hifo ruled in its favor.[134] Only the State Office of Planning, a party to the LUC proceeding, appealed to the Supreme Court.

The key ruling in *Koa Ridge* focused on the timing of the EA requirement: Was the reclassification process "too soon" for kick-starting the chapter 343 process? The Hawai'i Supreme Court's answer: No. Surprisingly, the case has become renowned not for that ruling but for an issue that was not even disputed: Was chapter 343 triggered by the development's "use" of the state highways? The court's answer: Yes. In fact, the developer admitted that the use triggered chapter 343.[135] Nonetheless, Justice Duffy examined this threshold issue in detail. First, he reviewed the state environmental review

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[126] *Id.* at 413, 126 P.3d at 1100.

[127] Andrew Gomes, *Koa Ridge Project Given Green Light*, HONOLULU STAR-ADVERTISER, Sept. 24, 2010, http://www.staradvertiser.com/news/hawaiinews/20100924_Koa_Ridge_project_given_green_light.html.

[128] *Koa Ridge*, 109 Haw. at 413, 126 P.3d at 1100.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *See* State Land Use Comm'n, In the Matter of the Petition of Castle & Cooke Homes Hawaii, Inc. and Pacific Health Community, Inc. to Amend the Agricultural Land Use District Boundary into the Urban District Land Use District, Docket No. A00-734, Findings of Fact, Conclusions of Law, Decision and Order, June 27, 2002, at 79-80.

[133] *Koa Ridge*, 109 Haw. at 413, 126 P.3d at 1100.

[134] *Id.* at 413-14, 126 P.3d at 1100-01.

[135] *Id.* at 413, 126 P.3d at 1100.

process.[136] He then found, without difficulty, that the proposal was an "action" by an applicant subject to environmental review.[137] He then concluded that the project would use state lands, citing *North Kohala*, which found that the proposed construction of two highway underpasses constituted use of state lands,[138] and *Kahana Sunset*, where the court held that "construction of the sewage and water transmission lines will require tunneling beneath state highways."[139] Accordingly, Justice Duffy found that "the Project is an action that proposes the use of state lands, and an EA that addresses the environmental effects of the entire Project is required."[140] Thus, the decision became the third in the "use" trilogy even though this "use by tunneling" issue was only jurisprudential road-kill on the way to the court's major ruling about timing.

The more notable part of Justice Duffy's *Koa Ridge* decision addressed the sometimes tricky issue of the timing of the environmental review process.[141] The Hawai'i courts have consistently interpreted chapter 343 to require environmental review at the "earliest practicable time," relying on the plain language of the statute. In *Kahana Sunset*, the court had emphasized that the agency "receiving the request for approval"[142] has the responsibility to prepare the EA and could not delegate that process to another agency.[143] In *Koa Ridge*, the developer argued that its reclassification petition to the LUC was too early to start the environmental review process.[144] To the contrary, Justice Duffy found that early environmental review was consistent with the purpose of chapter 343, concluding that the LUC (like the County of Maui in *Kahana Sunset*) was the "receiving" agency with substantial authority over the entire project, that it had an important role,[145] and that its discretionary approval was

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[136] *Id.* at 415, 126 P.3d at 1102.

[137] *Id.*

[138] *Id.* (citing Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai'i (*North Kohala*), 91 Haw. 94, 103, 979 P.2d 1120, 1129 (1999)).

[139] *Id.* at 416, 126 P.3d at 1103 (citing Kahana Sunset Owners Ass'n v. Cnty. of Maui, 86 Haw. 66, 74, 947 P.2d 378, 386 (1997)).

[140] *Id.*

[141] Hawai'i appellate courts have issued four decisions addressing this "timing" issue: Two decisions relating to when to prepare the review document (*Kahana Sunset*, 86 Haw. 66, 947 P.2d 378, and *Koa Ridge*, 109 Haw. 411, 126 P.3d 1098), one on when to prepare supplemental documents (*Unite Here! Local 5 v. City & County of Honolulu* (*Turtle Bay*), 123 Haw. 150, 231 P.3d 423 (2010)) and, indirectly, one on "tiering," that is, linking, earlier and later review documents (*'Ohana Pale Ke Ao v. Board of Agriculture*, 118 Haw. 247, 188 P.3d 761 (App. 2008)).

[142] *Kahana Sunset*, 86 Haw. at 75, 947 P.2d at 387.

[143] *Id.*

[144] *Koa Ridge*, 109 Haw. at 416, 126 P.3d at 1103.

[145] *Id.* at 417, 126 P.3d at 1104. The court found that the LUC did a comprehensive review of the project and imposed a variety of conditions, that the project required the LUC's approval before it could proceed, that the LUC's decision was a "discretionary approval" that the project

required for the project to move forward, even if it did not have final approval authority.[146] Specifically, the court reasoned that reclassification "in and of itself" does not trigger chapter 343,[147] but that the statute applies if the project trips one of the statutory triggers.[148] Here, the reclassification proposed the use of state land; therefore reclassification was "the earliest practicable time" to do the EA.[149]

In reaching this conclusion, Justice Duffy anticipated and addressed an objection commonly heard from the development and consulting community—that early review is, in fact, premature because the contours of the project are not sufficiently developed, putting the developer at risk of a chicken-and-egg process.[150] He found that "early environmental assessment" would avoid the influence that investments of time and money have on later review,[151] explaining that "while projects indeed may change in response to public input, actions of agencies, economic conditions, or other factors, requiring early environmental assessment comports with the purpose of HEPA to 'ensure that environmental concerns are given appropriate consideration in decision making,'[152] and provides a safeguard against a 'post hoc rationalization[] to support action already taken.'"[153]

Ironically, *Koa Ridge* has become a boogeyman in the minds of the development community[154] and an example of the Hawai'i Supreme Court

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needed to move ahead, meeting the requirements of chapter 343, and that nothing exempted the project from the environmental review law. *Id.*

[146] *Id.*

[147] *Id.* at 416, 126 P.3d at 1103 (emphasis omitted).

[148] *Id.*

[149] *Id.* at 416-17, 126 P.3d at 1103-04.

[150] *Id.* at 418-20, 126 P.3d at 1105-07.

[151] *Id.* at 419, 126 P.3d at 1106 (citations omitted). Handing a final loss to the LUC and the developer, Justice Duffy rejected their last-ditch argument that, even if chapter 343 applied, the LUC's process could be substituted for environmental review, thereby giving them an escape from the Sierra Club's lawsuit, implicitly rejecting the functional equivalence doctrine. *Id.* at 420, 126 P.3d at 1107. See *supra* note 63 for more discussion of this doctrine.

[152] *Id.* at 418, 126 P.3d at 1105 (citing HAW. REV. STAT. § 343-1).

[153] *Id.* (citing Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai'i, 91 Haw. 94, 105, 979 P.2d 1120, 1131 (1999) (brackets in original)).

[154] *Koa Ridge* has often been cited by developers as a flawed decision. *See, e.g.*, Derrick DePledge, *Chamber Urging Review Law Exemption*, HONOLULU ADVERTISER, Jan. 20, 2008, *available at* http://the.honoluluadvertiser.com/article/2008/Jan/20/ln/hawaii801200357.html. Two years later, that boogeyman arose again in the Intermediate Court of Appeals (ICA) decision *'Ohana Pale Ke Ao v. Board of Agriculture*, 118 Haw. 247, 188 P.3d 761 (App. 2008). The ICA held that chapter 343 review was required for the State Department of Agriculture's granting of a permit to Mera Pharmaceuticals to import genetically engineered algae for a project at the state-run Natural Energy Laboratory of Hawaii (NELH) facility in Kona because the importation proposal constituted "use of state land," *id.* at 254, 188 P.3d at 768, and section 343-5 "plainly and unambiguously required preparation of an EA before the Board could

going too far on the "use of state or county lands or funds."[155] Yet, as to that ruling, Justice Duffy was well within the clear boundaries of the two prior cases directly on point. The defendants admitted as much. The lesser-examined ruling about timing is the more powerful one. With the court's clarification that "earliest practicable time" means during the zoning stages of development, *Koa Ridge* sets up many possible scenarios where a developer will later be required to supplement the early EA or EIS due to the changes in the project itself or the lapse in time. Large projects, particularly master planned projects that are phased over many years, sometimes decades, fall under this scenario. The court's ruling put all the more pressure on the supplementation process, a controversial issue that would squarely come before the court four years later in the *Turtle Bay* case.[156]

E. Game-Changers and Ferry-Stoppers: Superferry I *and* Superferry II

Arriving on Hawai'i's shores in 2003, the privately owned and operated Hawaii Superferry project involved high-speed catamaran-style vessels that would travel between O'ahu, Maui, Kaua'i, and the island of Hawai'i, using state harbor facilities on each island.[157] The ferries were 350-feet long and capable of carrying 866 passengers and 282 cars per trip.[158] To accommodate the new vessels, the State Department of Transportation (DOT) proposed spending $40 million on harbor improvements, starting with $10 million in upgrades at Kahului Harbor.[159] In February 2005, DOT determined that the project was exempt from environmental review under chapter 343.[160] On March 21, 2005, Sierra Club, Maui Tomorrow Inc., and the Kahului Harbor Coalition filed a complaint in the Second Circuit Court on Maui challenging the lack of an EA.[161] Ultimately, the plaintiffs prevailed in two game-changing and, ultimately, ferry-stopping Hawai'i Supreme Court decisions: *Superferry*

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approve Mera's application." *Id.* This decision, too, has caused great consternation among some, particularly among the university research community. KIM, ANTOLINI & RAPPA, *supra* note 16, at 17.

[155] *See* HAW. REV. STAT. § 343-5(a)(1) (2010).

[156] *See infra* Part II.F.

[157] *Superferry I*, 115 Haw. 299, 305, 167 P.3d 292, 298 (2007). The State Public Utilities Commission granted Superferry an operating permit in 2004, *id.* at 305 n.5, 167 P.3d at 298 n.5, but demurred on whether an EA was required. *See* State Pub. Utils. Comm'n, In the Matter of Application of Hawaii Superferry Inc., for a Certificate of Public Convenience and Necessity To Engage in Operations as a Water Carrier, Docket No. 04-0180 (2004), Decision and Order No. 21524, at 25 (conditioning its approval on compliance with chapter 343).

[158] *Superferry I*, 115 Haw. at 305, 167 P.3d at 298.

[159] *Id.*

[160] *Id.* at 311 n.15, 167 P.3d at 304 n.15.

[161] *Id.* at 311, 167 P.3d at 304.

I,[162] issued by the court in August 2007 on the merits and standing; and two years later, *Superferry II*,[163] decided in March 2009, on the constitutionality of Act 2 and attorneys' fees. Ultimately, the Hawaii Superferry never completed the environmental review process ordered by the court or the "faux" review process required by the Legislature. The Hawaii Superferry went bankrupt.[164]

The *Superferry I* and *II* decisions, both written by Justice Duffy for a unanimous[165] court, were blockbusters in the field of Hawai'i environmental law in five main ways. First, the court took a firm stance in continuing to interpret chapter 343 according to its plain language and in favor of public participation despite the very strong economic and political pressure to do otherwise. Second, the court issued a ground-breaking decision adopting "procedural standing," throwing open the courthouse doors in Hawai'i even more widely to citizen groups in chapter 343 cases. Third, the court boldly declared Act 2, a special law passed to allow Superferry to evade chapter 343—a law vociferously pushed by Superferry and Governor Linda Lingle in a special session and quickly adopted by a cowering legislature—unconstitutional and void. Fourth, the court embraced the powerful private attorney general theory, in addition to the little-used statutory fees statute (H.R.S. section 607-25), in upholding an attorneys' fees award to the plaintiffs against both Superferry and DOT.[166] Finally, the court stuck to its judicial guns in enforcing chapter 343 by shutting down Superferry until it complied with the law—despite heavy political maneuvering, an unprecedented outcry by vocal supporters of the company, and the fact that Superferry actually began operating in utter defiance of the court's order and continued to operate (under Act 2) for over a year before the court issued its final decision. The court showed true judicial grit.

1. Superferry I: *Significant risks and a significant shift in standing jurisprudence*

In the 2007 *Superferry I* decision, Justice Duffy, writing for a unanimous court, issued a forty-four-page opinion that reversed, remanded, and ordered the circuit court to enter summary judgment in favor of the plaintiffs on their request for an EA.[167] Initially, the court issued a "stunningly quick"[168] one

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[162] 115 Haw. 299, 167 P.3d 292.

[163] *Superferry II*, 120 Haw. 181, 202 P.3d 1226 (2009).

[164] *Hawaii Superferry Goes Bankrupt*, N.Y. TIMES, June 1, 2009, *available at* http://www.nytimes.com/ 2009/06/01/us/01ferry.html.

[165] See *infra* note 225 regarding Justice Nakayama and Chief Justice Moon's dissent on the sovereign immunity theory.

[166] *See infra* Part II.E.2.

[167] *Superferry I*, 115 Haw. 299, 167 P.3d 292.

page order,[169] finding a violation of chapter 343 only hours after a high-tension oral argument before the court on August 23.[170] This speedy order and the longer ruling issued one week later[171] were shocking to those unfamiliar with the actual language of chapter 343 and became the spark for a most unusual chain of events that led to a constitutional crisis in Hawai'i state government.

In the full opinion, Justice Duffy spent little time on the merits—finding without much difficulty that DOT violated chapter 343—but he then expended an enormous amount of judicial energy on a ground-breaking ruling on standing. On the merits, he addressed the core issues of applicability, scope, triggers, and exemptions. First, with a tip of the hat to defendants DOT and Superferry, he noted that chapter 343 did not apply to private projects "such as this one where government plays a facilitative role for a private project that itself does not constitute an applicant action."[172] Moreover, he rejected the Sierra Club's claim that the project involved "connected actions," finding that the private Superferry project was not an "action" as defined by chapter 343, and that the plaintiffs had not shown that the ferry required state approval to proceed.[173] The significance of this ruling has been buried, but it is worth pausing to consider. Despite popular perception, it was the *$40 million state harbor project*, and not the Superferry itself, that triggered environmental review.[174]

Second, reaching the heart of the Sierra Club's claims, the court found that DOT erred by looking at the harbor improvement project "in isolation,"[175] and, "[p]urposely or not,"[176] that DOT failed to take "a hard look."[177] In other words, DOT did not think much about examining the broader impacts of the project. Because "DOT did not consider whether its facilitation of the Hawaii Superferry Project will probably have minimal or no significant impacts, both

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[168] Ken Kobayashi & Derrick DePledge, *Impact Study May Delay Superferry*, HONOLULU ADVERTISER, Aug. 24, 2007, *available at* http://the.honoluluadvertiser.com/article/2007/Aug/24/ln/hawaii708240371.html (noting that the court issued its decision five hours after argument).

[169] Sierra Club v. Dep't of Transp., No. 27407, 2007 WL 2428467 (Haw. Aug. 23, 2007).

[170] *See* Brian Perry, *High Court Rules Against Superferry*, MAUI NEWS, Aug. 24, 2007, *available at* http://www.mauinews.com/page/content.detail/id/33481/High-court-rules-against-Superferry.html.

[171] *Superferry I*, 115 Haw. at 305, 167 P.3d at 298.

[172] *Id.* at 338, 167 P.3d at 331.

[173] *Id.* at 336-38, 167 P.3d at 329-31.

[174] *See id.* at 337, 167 P.3d at 330.

[175] *Id.* at 341, 167 P.3d at 334.

[176] *Id.* at 342, 167 P.3d at 335.

[177] *Id.* (citing Price v. Obayashi Haw. Corp., 81 Haw. 171, 182 n.12, 914 P.2d 1364, 1375 n.12 (1996) (citation omitted)).

primary and secondary, on the environment," the agency's exemption determination was invalid.[178] Back to square one? Not yet.

Defendants DOT and Superferry had challenged the Sierra Club's and Maui Tomorrow's standing to bring their chapter 343 case. In foresight, it was perhaps an understandable move in light of the court's 2002 *Sierra Club v. Hawaii Tourism Authority* (*HTA*) decision, where the Sierra Club lost on standing after advocating a cutting-edge procedural standing theory.[179] In hindsight, this was a strategic blunder by the defendants. The court ended up picking up the pieces from the split decision in *HTA* and issuing a game-changing opinion that, while well-grounded in federal NEPA case law,[180] substantially broadened the standing horizons for citizen groups in chapter 343 challenges for the foreseeable future.

In adopting the procedural standing theory that Justice Nakayama had articulated in *HTA*, Justice Duffy carefully and painstakingly explored the history, nature, and contours of substantive versus procedural standing under both Hawai'i and federal environmental review case law. After sixteen pages of analysis, he found that the plaintiffs had both "group" and "individual" standing,[181] under both the traditional "injury in fact" test and the newer "procedural injury" test. Presciently, the court also noted that a "less rigorous" standing test in chapter 343 cases was grounded in the Hawai'i constitutional provision, article XI, section 9, which guarantees a "clean and healthful environment."[182]

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[178] *Id.* at 342, 167 P.3d at 335.

[179] *See* Sierra Club v. Haw. Tourism Auth. (*HTA*), 100 Haw. 242, 257, 59 P.3d 877, 892 (2002). *See* discussion *infra* Part III.

[180] Stewart Yerton, Comment, *Procedural Standing and the Hawaii Superferry Decision: How a Surfer, a Paddler, and an Orchid Farmer Aligned Hawaii's Standing Doctrine with Federal Principles*, 12 ASIAN-PAC. L. & POL'Y J. 330 (2010).

[181] As for group standing, the court explained and embraced the well-accepted federal test that:

> [a]n association may sue on behalf of its members—even though it has not itself been injured—when: (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Superferry I, 115 Haw. at 334, 167 P.3d at 327 (citing Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, Inc., 113 Haw. 77, 95, 148 P.3d 1179, 1197 (2006) (citation omitted)).

[182] *Id.* at 320, 167 P.3d at 313 (citing HAW. CONST. art. XI, § 9). The court squarely addressed the power of article XI, section 9 three years later in the 2010 *Ala Loop* decision, finding—outside of the chapter 343 context—that the constitutional provision packed a real punch, allowing a community group to bring a private right of action to challenge the County of Hawai'i's decision to allow the development of a charter school in violation of state land use laws. Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Haw. 391, 235 P.3d 1103 (2010).

Standing had come up frequently in the court's prior chapter 343 decisions, but never had the court taken such bold steps jurisprudentially. In *North Kohala*, where the plaintiffs sought declaratory relief, the court applied the traditional three-part "injury in fact" test and found that the citizens' group had adequately demonstrated standing to challenge the adverse ruling in the contested case hearing regarding the proposed resort development.[183] Although not a thorough analysis of standing under chapter 343, *North Kohala* reiterated that the Hawai'i courts have generally taken a broad view of standing in environmental cases.[184] Environmental standing had arisen most directly five years earlier in *HTA*, where a fractured court ultimately rejected the Sierra Club's standing to challenge the State's $114 million tourism marketing plan on the basis of a lack of geographic nexus.[185] A majority of the court did, however, adopt in theory the more flexible "procedural standing" test offered in Justice Nakayama's concurrence,[186] and this later became the prevailing theory in *Superferry I*.[187]

Consistent with the theory that the Moon Court viewed beneficial public participation as a normative underpinning of chapter 343, the court articulated a new, more flexible procedural injury test that further lowers the bar for citizens seeking to enter the courtroom. To establish a procedural injury, a plaintiff must show:

> (1) the plaintiff has been accorded a procedural right, which was violated in some way, . . . [such as] a failure to conduct an EA; (2) the procedural right protects the plaintiff's concrete interests; and (3) the procedural violation threatens the plaintiff's concrete interests, thus affecting the plaintiff "personally," which may be demonstrated by showing (a) a "geographic nexus" to the site in question and (b) that the procedural violation increases the risk of harm to the plaintiff's concrete interests.[188]

The court's standing analysis has been described by one commentator as "well-articulated" but "tortured,"[189] and another criticized it as "throwing open the barn door after the horses have been let out."[190]

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[183] Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai'i (*North Kohala*), 91 Haw. 94, 100-02, 979 P.2d 1120, 1126-28 (1999).

[184] *Id.*

[185] Sierra Club v. Haw. Tourism Auth. (*HTA*), 100 Haw. 242, 59 P.3d 877 (2002).

[186] *Id.* at 265-68, 59 P.3d at 900-03 (Nakayama, J., concurring).

[187] *Superferry I*, 115 Haw. at 322, 167 P.3d at 315.

[188] *Id.* at 329, 167 P.3d at 322 (internal citation omitted).

[189] Yerton, *supra* note 180, at 369 (suggesting a simpler test for standing).

[190] Robert Thomas, Superferry EIS Case Summary: Part II, INVERSECONDEMNATION.COM (Sept. 30, 2007), http://www.inversecondemnation.com/inversecondemnation/2007/09/superferry-ei-1.html.

2. Superferry II: *A constitutional show-down and more open doors for citizen plaintiffs*

The story of the Superferry itself after Justice Duffy's blockbuster decision is a legal, political, economic, and social tale almost beyond belief. The controversy included protests in the water and on land, heated and over-heated debates in high circles, a circuit court injunction against Superferry operations, painful legislative arm-twisting, a gubernatorial power-grab, a dissolved injunction, headlines galore, and neighbors arguing with neighbors in Longs Drugs.

Although the court's August 23, 2007 summary opinion had ruled squarely in favor of the plaintiffs and constrained the circuit court to issue summary judgment that defendants had violated chapter 343, the Superferry defiantly set sail with special media and employee passenger runs the day before, on August 22,[191] and again on August 28, with hundreds of public passengers lured by $5 inaugural fares.[192] Chaos ensued. The boat first sailed to Maui, where it was greeted by angry but peaceful protesters.[193] Many drivers off-loaded their cars and trucks, not guessing that they would be stuck there for many days when the Superferry failed to return on schedule.[194] When the Superferry tried to sail into the harbor on Kaua'i, surfers, paddlers, and swimmers blocked its path, prompting the Coast Guard to battle the protesters and eventually forcing the vessel and anxious passengers to turn back to O'ahu.[195] One day after the August 23, 2007 opinion, Circuit Court Judge Cardoza followed the Hawai'i Supreme Court's orders and entered summary judgment in favor of the Sierra

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[191] *See Superferry Takes Virgin Voyage: Guests Kick Back with Free Food, Drinks*, KITV.COM, Aug. 22, 2007, http://www.kitv.com/news/13945640/detail.html.

[192] Dan Nakaso & Christie Wilson, *Hawaii Superferry Starts Tomorrow for $5*, HONOLULU ADVERTISER, Aug. 27, 2007, *available at* http://the.honoluluadvertiser.com/article/2007/Aug/25/ln/hawaii708250354.html ("Flying in the face of possible legal action, the Hawaii Superferry will launch two days ahead of schedule tomorrow with $5 one-way tickets for passengers and $5 one-way tickets for vehicles, the company announced yesterday. Opponents, who plan to seek an injunction against Superferry operations on Monday, reacted angrily, saying the company is defying state laws and acting in bad faith.").

[193] Claudine San Nicholas, *Ferry Passengers Travel by Air Instead*, MAUI NEWS, Aug. 29, 2007, *available at* http://beta100.mauinews.com/page/content.detail/id/33614/Ferry-passengers-travel-by-air-instead-.html?nav=10 ("About a dozen protesters greeted the first paying passengers into Kahului Harbor on Sunday with handmade signs saying 'Respect Our Home' and 'Stupid Ferry, Stupid Riders.'").

[194] *Id.*

[195] *See* Jan TenBruggencate & Rick Daysog, *Surfers Block Hawaii Superferry*, USA TODAY, Aug. 27, 2007, *available at* http://www.usatoday.com/travel/news/2007-08-27-hawaii-superferry_N.htm. *See also* Dan Nakaso & Derrick DePledge, *Hawaii Superferry Halts Kauai Route*, HONOLULU ADVERTISER, Aug. 29, 2007, *available at* http://the.honoluluadvertiser.com/article/2007/Aug/ 29/ln/hawaii708290426.html.

Club.[196] A few days later, on August 27, 2007, the Sierra Club moved ex parte for a temporary restraining order (TRO) to stop DOT and Superferry operations at Kahului Harbor on Maui.[197] Judge Cardoza granted the TRO for ten days "to avoid immediate and irreparable injury" because the Superferry was operating.[198] Judge Cardoza required the Superferry to immediately cease operations at Kahului Harbor and return stranded passengers "home."[199] The entire state seemed in turmoil over the Superferry. That same day, the Sierra Club sought a permanent injunction.[200] On October 9, 2007, after presiding over hearings lasting several weeks, Judge Cardoza granted the Sierra Club's request and permanently enjoined Superferry operations.[201] The judge stated the injunction would remain in place while the EA was prepared and until the environmental review process under chapter 343 "has been lawfully concluded."[202] The judge also voided the operating agreement between DOT and Superferry for Kahului Harbor for lack of compliance with chapter 343.[203] Opening the way for a major ruling on attorneys' fees by the Hawai'i Supreme Court in *Superferry II*, Judge Cardoza then authorized the Sierra Club to request attorneys' fees as the prevailing party.[204]

Shut down and stopped almost literally in the water, Superferry appealed to Governor Lingle for relief.[205] On October 23, 2007, the Governor issued an unusual Proclamation convening both houses of the State Legislature into a special session to dissolve the injunction against the Superferry.[206] The next day, on October 24, 2007, the Legislature convened.[207] A week later, on November 2, 2007, the Legislature passed and advanced to the fifth floor of the Capitol a most unusual bill that Governor Lingle signed as Act 2 of the second special session.[208] The Act waived the chapter 343 requirements for "a large capacity ferry vessel,"[209] created a "faux" environmental review process,[210] and required the Governor to determine whether certain "conditions" were met for

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[196] *Superferry II*, 120 Haw. 181, 187, 202 P.3d 1226, 1232 (2009).

[197] *Id.*

[198] *Id.* at 188, 202 P.3d at 1233.

[199] *Id.* at 189, 202 P.3d at 1234.

[200] *Id.*

[201] *Id.* at 189-90, 202 P.3d at 1234-35.

[202] *Id.* at 190, 202 P.3d at 1235.

[203] *Id.*

[204] *Id.*

[205] *See Auditor Finds Superferry Pressured Officials*, KITV.COM, Apr. 18, 2008, http://www.kitv.com/news/15925418/detail.html.

[206] *Superferry II*, 120 Haw. at 190, 202 P.3d at 1235.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* at 191, 202 P.3d at 1236.

operations.[211] Two days later, the Governor declared the conditions were met and cleared the way for Superferry, now identified as a "large capacity ferry vessel company," to sail yet again.[212] Ironically, five days later on November 9, 2007, Judge Cardoza entered his findings of fact and conclusions of law in favor of Sierra Club, noting that the "monetary loss" incurred by DOT and Superferry "is not a sufficient basis for forbearing to issue an injunction[,]"[213] adding that "[f]inancial losses do not outweigh the interest in environmental protection whenever the two clash, as they often do."[214] But while Judge Cardoza was drafting those findings, Superferry and DOT had already asked him, based on the new Act 2, to dissolve the injunction and order vacating the operating agreement.[215] On the same day, the Sierra Club also asked for final judgment,[216] which the court later granted despite Act 2.[217] Nine days later, Judge Cardoza granted DOT and Superferry's motions, dissolved the order, and un-voided the operating agreement.[218] The court, however, still allowed the Sierra Club to seek fees, which it did.[219] The parties filed cross-appeals, and Judge Cardoza granted the Sierra Club's motion for fees and costs for a total of $91,712.72 based on H.R.S. section 607-25.[220] In April, the parties filed further cross-appeals.[221] In October, the Hawai'i Supreme Court took the appeal and, on December 18, 2008, it held another packed-house oral argument.[222] Thus, after the Superferry encountered months of literal and economic ups and downs[223] of operating under the guise of Act 2, the company

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[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.* at 192, 202 P.3d at 1237.

[216] *Id.*

[217] *Id.* at 193, 202 P.3d at 1238.

[218] *Id.* at 192, 202 P.3d at 1237.

[219] *Id.* at 192-93, 202 P.3d at 1237-38.

[220] *Id.* at 194-95, 202 P.3d at 1238-39.

[221] *Id.* at 195, 202 P.3d at 1240.

[222] *Id.*

[223] The Superferry experienced many weather obstacles, significant operational difficulties, and continued protests during its initial operating period under Act 2, as well as frequent reports of sick passengers. *See* Gene Park, *Aloha for the Alakai*, HONOLULU STAR-BULLETIN, Dec. 14, 2007, *available at* http://archives.starbulletin.com/2007/12/14/news/story01.html (describing rough weather, dock damage, and sick passengers on the prior day's voyage); Gary Kubota, *Boat's Protestors Create a Clamor in Kahului*, HONOLULU STAR-BULLETIN, Dec. 14, 2007, *available at* http://archives.starbulletin.com/2007/12/14/news/story01.html (reporting that about 300 protestors greeted the vessel, including paddlers and surfers, as well as "scores of law enforcement officers," including a helicopter and water patrol); Claudine San Nicolas, *Ride 'Really Really Rough,'* MAUI NEWS, Apr. 8, 2008, *available at* http://www.mauinews.com/page/content.detail/id/502298.html?nav=10 (stating that

ended up right back under the steely gaze of the Hawai'i Supreme Court, this time through Sierra Club's constitutional challenge to Act 2. The Legislature's not-too-cleverly disguised "large capacity ferry vessel" exemption from chapter 343 was now up for judicial examination by a thoroughly un-amused court, which had seen the DOT and Superferry—and now the Governor and Legislature—belligerantly defy its earlier ruling. It took little time for the Hawai'i Supreme Court to declare the law illusory and deliciously skewer Act 2 as unconstitutional.[224]

In *Superferry II*, issued on March 16, 2009, Justice Duffy wrote for a unanimous court on the question of Act 2's unconstitutionality; the court split slightly only on the issue of attorneys' fees.[225] Justice Duffy wrote seventeen dense pages[226] on why the Legislature had violated article XI, section 5 of the Hawai'i Constitution.[227] He found that Act 2 was an exercise of legislative power over state lands at Kahului Harbor,[228] and that it was an illegal "special law" because only the Superferry met the Act's limited requirements and the twenty-one-month sunset provision,[229] creating an "illusory class" of one.[230] Therefore, Act 2 was unconstitutional.[231]

The court then turned to attorneys' fees. Usually litigants in the American legal system must pay their own costs and attorneys' fees whether they win or lose.[232] In the field of environmental law, however, Congress and state legislatures have sought to encourage public interest litigation by setting up a system for judicial awards of fees and costs to the prevailing party to counter-balance the high costs of bringing an enforcement action.[233] Hawai'i's environmental laws do not generally have express fee award provisions similar

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"[p]assengers arriving in Kahului said many of them were puking during the ride" and that the Superferry was out of service for weeks to undergo dry dock repairs for rudder damage).

[224] *Superferry II*, 120 Haw. at 206, 202 P.3d at 1251.

[225] Justice Duffy lost the votes of Justice Nakayama and Chief Justice Moon only on the last issue of whether sovereign immunity protected DOT from attorneys' fees. *Id.* at 231-36, 202 P.3d at 1276-81 (Nakayama, J., concurring and dissenting). Justice Nakayama, joined by Chief Justice Moon, agreed with the entirety of Justice Duffy's analysis and holdings, except for this immunity issue, reasoning that the State cannot waive its immunity. *Id.*

[226] *Id.* at 197-214, 202 P.3d at 1242-59 (majority opinion).

[227] Article XI, section 5 of the Hawai'i Constitution limits the legislative power over state lands to "general laws," *id.* at 231, 202 P.3d at 1276, and prohibits "special" or "illusory" laws in favor of specific parties. *Id.* at 199-214, 202 P.3d at 1244-59.

[228] *Id.* at 198-99, 202 P.3d at 1243-44.

[229] *Id.* at 199-203, 202 P.3d at 1244-48.

[230] *Id.* at 203-14, 202 P.3d at 1248-59.

[231] *Id.* at 214, 202 P.3d at 1259.

[232] *Id.* at 218, 202 P.3d at 1263.

[233] MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS 8-2 (1995).

to those common at the federal level.[234] Justice Duffy, however, found that Judge Cardoza had correctly found the Sierra Club and the other plaintiffs to be the prevailing parties under HRS section 607-25,[235] and that Act 2's attempt to pull the legal rug out from under the plaintiffs had not changed their winning status.[236]

The court then proceeded to address the novel theory raised by the Sierra Club that the plaintiffs were *also* entitled to fees under the private attorney general theory even though Act 2 changed (at least temporarily) the law of the land.[237] In thirteen pages of ground-breaking analysis, Justice Duffy applied the private attorney general doctrine to the plaintiffs' request for reimbursement of attorneys' fees.[238] Using analysis from a case decided a few years before, *Maui Tomorrow v. Board of Land & Natural Resources*,[239] the court recognized its own approval, in principle, of the "equitable rule that allows courts in their discretion to award [attorneys'] fees to plaintiffs who have vindicated important public rights."[240] Although the court had only mentioned but not applied the doctrine in *Maui Tomorrow*, it was primed and ready to do so in *Superferry II*.

The court first set out the three-part test to assess the "strength or societal importance of the public policy vindicated by the litigation," "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff," and "the number of people standing to benefit from the decision."[241] On the first prong, the court agreed with the Sierra Club that the "litigation [was] responsible for establishing the principle of procedural standing in

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[234] Other than HRS section 607-25, the only Hawai'i environmental laws with an explicit attorneys' fees provision are (1) the Hawaii Air Pollution Control Act, HRS chapter 342B, of which section -56 allows for citizens' suits and subsection -56(f) allows for attorneys' fees and costs, and (2) Hawai'i's environmental response law, HRS chapter 128D, which also allows for citizens' suits and fees at section -21. HRS chapter 195, Hawai'i's endangered species law, allows for citizens' suits, but does not provide for fees. For more on the lack of Hawai'i citizens' suits and attorneys' fees, see David Frankel, *Enforcement of Environmental Laws in Hawaii*, 16 U. HAW. L. REV. 85, 136-141 (1994).

[235] In 1986, the Hawai'i Legislature enacted what became Hawai'i Revised Statutes section 607-25, providing that successful citizen-plaintiffs in some limited situations could seek a reasonable award of attorneys' fees from a defendant found to have violated a permitting law. Until *Superferry II*, plaintiffs had not been successful in using section 607-25 to recover fees. *Superferry II*, 120 Haw. at 214-17, 202 P.3d at 1259-62.

[236] *Id.* at 218, 202 P.3d at 1263.

[237] *Id.*

[238] *Id.* at 218-31, 202 P.3d at 1263-76.

[239] 110 Haw. 234, 131 P.3d 517 (2006).

[240] *Superferry II*, 120 Haw. at 218, 202 P.3d at 1263 (citing *Maui Tomorrow*, 110 Haw. at 244, 131 P.3d at 527 (quoting *In re* Water Use Permit Applications, 96 Haw. 27, 29, 25 P.3d 802, 804 (2001))).

[241] *Id.* at 218, 202 P.3d at 1263.

environmental law in Hawai'i and clarifying the importance of addressing the secondary impacts of a project in the environmental review process pursuant to HRS chapter 343."[242] On the second prong, the court again agreed with the Sierra Club that the plaintiffs "were solely responsible for challenging DOT's erroneous application of its responsibilities under HRS chapter 343."[243] Showing its displeasure with DOT's behavior, the court stated: "in this case DOT wholly abandoned that duty ['to consider both the primary and secondary impacts of the Superferry project on the environment'] by issuing an erroneous exemption to Superferry."[244] On the last prong, directly addressing the public benefit theory, the court again agreed with the plaintiffs, citing back to the *Superferry I* quote that leads off this article, emphasizing that everyone benefits from public participation. Formally, the court adopted the private attorney general doctrine and concluded that the Sierra Club met its requirements.[245] The court, however, was not quite done with the defendants.

The court then addressed DOT and Superferry's arguments that H.R.S. section 607-25 was the exclusive means for an attorneys' fees award for violations of chapter 343 and that, under that statute and sovereign immunity, only Superferry and not DOT was subject to a fee award.[246] Superferry also continued to argue it was not subject to any fee award. The court showed no mercy. It concluded that H.R.S. section 607-25 was not the "the exclusive means" for awarding fees,[247] that the section did not prevent an award of fees against Superferry under the private attorney general doctrine,[248] and that sovereign immunity did not prevent an award against DOT.[249] The court agreed with Superferry that the company's use of facilities already constructed (by DOT) did not fit the term "development" under H.R.S. section 607-25,[250] rendering Superferry not subject to *that* fee statute.[251] Nonetheless, the court imposed attorneys' fees on Superferry under the private attorney general theory.[252] The court observed that

> in this case[,] Superferry worked hand-in-hand with DOT throughout the planning and implementation of the Superferry project and throughout this

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[242] *Id.* at 220, 202 P.3d at 1265.

[243] *Id.*

[244] *Id.* at 221, 202 P.3d at 1266.

[245] *Id.*

[246] *Id.*

[247] *Id.* at 222, 202 P.3d at 1267.

[248] *Id.*

[249] *Id.* at 222, 225-30, 202 P.3d at 1267, 1270-75.

[250] *Id.* at 225, 202 P.3d at 1270.

[251] *Id.*

[252] *Id.* ("[W]e see no reason not to apply the private attorney general doctrine to a private defendant.").

> litigation, in promoting its own private business interests. Under these facts, we see no unfairness in requiring Superferry, jointly with DOT, to pay Sierra Club's attorney's fees awarded by the circuit court.[253]

Superferry II not only was a resounding endorsement of the public benefit theory applied to chapter 343, it changed the landscape of this already lively field of litigation. Undoubtedly, environmental groups in the future will be encouraged to be even bolder in seeking judicial review. If the potential public benefit is large enough, even the slim hope of attorneys' fees can magnify the incentive to bring a difficult chapter 343 case.

F. Turtle Bay*: The Citizen Watchdog Never Sleeps*

Most Hawai'i court decisions under chapter 343 focus on the top of the "applicability funnel," that is, determining when the law applies and the breadth of projects subject to its scope. If the environmental review process moves along competently, from drafts and final EAs to drafts and final EISs (FEISs), the opportunities for successful citizen suits diminish rapidly. Once the agency has accepted a final EIS, the chances for a winning citizen suit are slim but not zero. The Hawai'i Supreme Court's 2010 decision in what is commonly known as the "*Turtle Bay*" case, and officially as *Unite Here! Local 5 v. City and County of Honolulu*,[254] represents another monumental decision by the Moon Court, this time authored by Chief Justice Moon himself. The case indicates that the citizen watchdog under chapter 343 never truly sleeps; it endorses the right of citizens to keep the review process alive in certain circumstances long after the completion of the FEIS.[255]

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[253] *Id.*

[254] Unite Here! Local 5 v. City & Cnty. of Honolulu (*Turtle Bay*), 123 Haw. 150, 231 P.3d 423 (2010).

[255] Although not directly a "supplemental" case, the ICA decision in *'Ohana Pale Ke Ao v. Board of Agriculture*, 118 Haw. 247, 188 P.3d 761 (App. 2008), addressed a related issue of the role of initial and subsequent environmental review (called "programmatic" and "tiering" in the federal NEPA system). The Natural Energy Laboratory of Hawaii (NELH) prepared EISs during its early years about the state research facility itself, and had anticipated that more specific review of particular research projects would follow. *Id.* at 249, 188 P.3d at 763. Essentially, by ordering the EA on Mera's proposed biopharm-algae project, the court was requiring a tiered EA, where the project-specific impacts would be addressed in the framework of the overall impacts. *See id.* at 255, 188 P.3d at 769.

The State Department of Business, Economic Development & Tourism (DBEDT) and the federal Department of Energy are currently preparing a programmatic joint state-federal EIS for the undersea energy cable project connecting the Lana'i and Moloka'i wind farms with O'ahu energy grids. Notice of Intent To Prepare a Programmatic Environmental Impact Statement for the Hawaii Interisland Renewable Energy Program: Wind (DOE/EIS-0459), Dec. 14, 2010, *available at* http://www.federalregister.gov/articles/2010/12/14/2010-31310/notice-of-intent-to-

Turtle Bay addresses when citizen plaintiffs may successfully re-open an otherwise moribund environmental review process. The Turtle Bay Resort EIS had been completed in 1985 for an economically ambitious master plan expansion—including 1,450 new hotel units, 2,063 new condominium units, two golf courses, large commercial centers, and related amenities.[256] Various components of the project started, then stopped, including the pouring of now-unearthly concrete pilings for one of the hotels proposed near Kawela Bay.[257] Due to economic volatility, the master development lay dormant for the next twenty years until the efforts of the Kuilima Resort Company, the newest owners, to restart the project sparked public protest and lawsuits. Writing for a unanimous court, Chief Justice Moon agreed with the plaintiffs that the administrative rules required a supplemental EIS (SEIS), consistent with public policy and the purpose of chapter 343.[258] The court stated that an EIS cannot remain valid "in perpetuity"[259] and found that ignoring the implicit time frame in an EIS would allow unlimited delays in projects and negative impacts on the environment to go unchecked.[260]

The initial plaintiff in *Turtle Bay* was labor union Unite Here! Local 5, which in early 2006 was in contract negotiations with the venture capital owners of the Turtle Bay Resort. The resort had begun to revive its old master plan by asking for a subdivision of the property from the City and County of Honolulu.[261] When the union began to settle the lawsuit and labor negotiations simultaneously, two citizens' groups—Keep the North Shore Country and the Sierra Club—stepped in to file a "back up" lawsuit in May and June 2006.[262]

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prepare-a-programmatic-environmental-impact-statement-for-the-hawaii-interisland. This PEIS will be followed by site-specific EAs or EISs for particular sited projects. *See* Frequently Asked Questions, InterislandWind.com, http://www.interislandwind.com/FAQ.aspx#A5-1 ("These site-specific environmental studies by the two wind farm developers, Hawaiian Electric and Maui Electric companies and the State of Hawaii are to be tiered under the umbrella programmatic EIS for the Interisland Wind project."). Thus, this issue of downstream environmental review will likely continue to be a very hot issue in Hawai'i until best practices emerge as they have done at the federal level under NEPA.

[256] GROUP 70, REVISED ENVIRONMENTAL IMPACT STATEMENT, VOLUME 1: KUILIMA RESORT EXPANSION 24 (Oct. 7, 1985), *available at* http://www.defendoahucoalition.org/eis/eis05%20-%20part%20iii.pdf.

[257] *Turtle Bay*, 123 Haw. at 157, 231 P.3d at 430 ("Over the next twenty years, only certain aspects of the [p]roject were completed."); the comment regarding the pilings for the first hotel reflects the author's personal observations from visits to the area in the early 1990s through recent years at Kawela Bay.

[258] *Id.* at 154, 231 P.3d at 427.

[259] *Id.* at 181-82, 231 P.3d at 454-55.

[260] *Id.* at 179, 231 P.3d at 452.

[261] *Id.* at 160, 231 P.3d at 433.

[262] The union dismissed its case, as predicted, in August 2006, leaving only the KNSC/Sierra Club action, *id.*, although the caption was never changed.

The groups expressed concern about the lack of an SEIS given the staleness of the original 1985 EIS and the subsequent developments in environmental conditions, particularly traffic congestion, the resurgence of the threatened green sea turtle (for which Turtle Bay was named), and the re-appearance in the area of the endangered Hawaiian monk seal.[263] Community groups had vigorously opposed the expansion back in the 1980s as part of the "Keep the Country Country" movement,[264] but when the project went dormant due to changing owners and the economic downturn, the community focused on other battles. That is, until about 2005, when new owners decided to re-start the subdivision process in an effort to maximize the resale value of what would be smaller, packaged-for-development pieces of the 426-acre makai parcel.[265]

The sleeping community giant awoke, galvanizing broad support to stop the expansion. The union and environmental groups' lawsuits focused on whether Kuilima's 2005 subdivision application to the City and County of Honolulu's Department of Planning and Permitting (DPP) to facilitate the parceling of the expansion of the resort—from one existing hotel to six hotels and several condominium projects that would bring an average of "4,783 persons on any given day" to the North Shore[266]—triggered the need for a SEIS, pursuant to Hawai'i Administrative Rules sections 11-200-26 and -27.[267] In 1985, DPP's predecessor agency, the Department of Land Utilization, had accepted an EIS for the Kuilima resort expansion.[268] The plaintiffs argued that DPP should require a supplemental analysis to update the twenty-year-old document before reviewing the subdivision application because the initial time frame for the project and EIS analysis had been exceeded and new information had emerged about impacts of the resort expansion on traffic and protected species.[269]

Then-Circuit Court Judge Sabrina McKenna entered summary judgment for Kuilima Resort and the City,[270] agreeing with the defendants that under H.A.R. sections 11-200-26 and -27, "a SEIS is required *only* when there is a substantive project change and determined that, as a matter of law, the timing

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[263] *Id.* at 164, 231 P.3d at 437-38.

[264] For a history of the Keep the Country Country movement, see Curt Sanburn, *Keeping the Country Country: A North Shore Couple's Never-Ending Battle with the City*, HONOLULU WEEKLY, Mar. 2, 2011, *available at* http://honoluluweekly.com/cover/2011/03/keeping-the-country-country/. For background on the current coalition of local groups involved in opposing the resort expansion, see the web sites of Ko'olauloa North Shore Alliance (www.knsalliance.org), Defend Oahu Coalition (www.defendoahucoalition.org), and Keep the North Shore Country (www.keepthenorthshorecountry.org).

[265] *Turtle Bay*, 123 Haw. at 159, 231 P.3d at 432.

[266] *Id.* at 155, 231 P.3d at 428.

[267] *Id.* at 171, 231 P.3d at 444.

[268] *Id.* at 155, 231 P.3d at 428.

[269] *Id.* at 164-65, 231 P.3d at 437-38.

[270] *Id.* at 154, 231 P.3d at 427.

of the project had not substantially changed."[271] On appeal to the Intermediate Court of Appeals (ICA), however, the panel split in a May 2009 opinion. Writing for the majority, Judge Dan Foley and Acting Chief Judge Corinne Watanabe agreed with Judge McKenna and found that DPP did not need to require a SEIS because there had not been a substantive change in the project.[272] Judge Craig Nakamura dissented.[273] Looking to the "overriding purpose of HEPA[,] . . . [i.e.,] to ensure that an agency is provided with relevant information about the environmental impacts of a proposed project so that the agency can make informed decisions about the project,"[274] Judge Nakamura found that, even if a project has not itself changed, it can become "an essentially different action" because of changed circumstances and "the discovery of new information."[275]

Examining the SEIS issue on appeal, Chief Justice Moon engaged in a two-step inquiry: (1) due to the change in timing, was there essentially a different action under consideration, and (2) if so, was the change in the project "significant"?[276] He answered both questions in the affirmative.[277] In some of the strongest language the court has used in chapter 343 cases, Chief Justice Moon excoriated the City for its poor decision-making process and for cutting the public out of the discussion. He concluded that "the plaintiffs have clearly presented 'new' evidence that was not considered at the time the 1985 EIS was prepared and that could likely have a significant impact on the environment."[278] He hammered the point home: "Any other result would be absurd and contrary to public policy in Hawai'i."[279] Citing Judge Nakamura's dissent, Chief Justice Moon criticized the notion that a permitting process without specific deadlines could "remain valid in perpetuity."[280] He emphasized: "Indeed, ignoring the implicit time condition dictated by the anticipated life of the project upon which an original EIS has been based would allow unlimited delays and, in turn, permit possible resulting negative impacts on the environment to go unchecked."[281]

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[271] *Id.* at 167, 231 P.3d at 440 (emphasis in original).

[272] Unite Here! Local 5 v. City & Cnty. of Honolulu, 120 Haw. 457, 209 P.3d 1271 (App. 2009).

[273] *Id.* at 468, 209 P.3d at 1282 (Nakamura, J., dissenting).

[274] *Id.* at 471, 209 P.3d at 1285 (citing HAW. REV. STAT. § 343-1 (1993)).

[275] *Id.*

[276] *Turtle Bay*, 123 Haw. at 177-79, 231 P.3d at 450-52.

[277] *Id.* at 178-80, 231 P.3d at 451-53.

[278] *Id.* at 177, 231 P.3d at 450 (citation omitted).

[279] *Id.*

[280] *Id.* at 179, 231 P.3d at 452 (citing *Unite Here! Local 5*, 120 Haw. at 472, 209 P.3d at 1286 (Nakamura, J., dissenting)) (emphasis omitted).

[281] *Id.*

When focusing on DPP's lack of a "hard look" at the subdivision application, Chief Justice Moon indicated that the agency had stuck its head in the sand, perhaps deliberately. He stated that "DPP ignored the most obvious fact that the 1985 EIS was based on detailed information *current as of 1985*, *i.e.*, that the conditions upon which the 1985 EIS was based were over twenty years old."[282] He called DPP's assumption that conditions had not changed in twenty years "unreasonable,"[283] finding that its "unreasonable and seemingly cursory consideration of whether a SEIS was warranted" was arbitrary and capricious.[284] In his concurring opinion, Justice Acoba emphasized that "the DPP had a duty to make an independent determination as to whether the EIS contained sufficient information to enable it to make an informed decision regarding the subdivision application."[285] Moreover, Justice Acoba (who later dissented on the motion for reconsideration)[286] concluded the agency had relied on projections of "questionable value."[287]

Prior to chastising DPP, Chief Justice Moon repeated the now-familiar theme of chapter 343 that "environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole."[288] Thus, *Turtle Bay* completes, for now, the long line of chapter 343 cases where the court strongly endorses the value of citizen participation, even decades after the initial EIS is complete. Although the legal analysis of *Turtle Bay* falls squarely within the statutory ambit, the implications of latent public challenges to slow-moving development projects—particularly master planned communities—could be profound.

Already, the new owners of the Turtle Bay Resort have announced that they "support the SEIS undertaking,"[289] and have begun to revamp the master plan,

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[282] *Id.* at 181, 231 P.3d at 454 (emphasis in original).

[283] *Id.*

[284] *Id.*

[285] *Id.* at 183, 231 P.3d at 456 (Acoba, J., concurring). On July 20, 2010, the court denied a motion for reconsideration by defendants. Unite Here! Local 5 v. City & Cnty. of Honolulu, No. 28602, 2010 WL 2844362 (Haw. July 20, 2010). The majority reaffirmed the earlier decision, tersely ordering the supplemental review, *id.* at *1, in spite of a dissent by Justice Acoba, where he argued that the DPP should be given the opportunity to make a new determination on requiring the SEIS. *Id.* at *1-8 (Acoba, J., dissenting).

[286] *Unite Here! Local 5*, 2010 WL 2844362, at *1-8.

[287] *Turtle Bay*, 123 Haw. at 184, 231 P.3d at 457.

[288] *Id.* at 180, 231 P.3d at 453 (majority opinion) (citing Kahana Sunset Owners Ass'n v. Cnty. of Maui, 86 Haw. 66, 70, 947 P.2d 378, 382 (1997) (citation omitted)); *see* Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai'i, 91 Haw. 94, 104 n.11, 979 P.2d 1120, 1130 n.11 (1999) (citation omitted); *see also Superferry I*, 115 Haw. 299, 327, 342, 167 P.3d 292, 320, 335 (2007) (citation omitted).

[289] Letter from Drew Stotesbury, Replay Resorts Inc./Turtle Bay Resort, to the community (Jan. 28, 2011) (on file with author) ("While the SEIS was a result of a decision by the Hawai'i

trying to start afresh with the community.[290] DPP has apparently created a new system for keeping track of when SEISs are warranted on projects undergoing discretionary approvals within the department.[291] The *Turtle Bay* decision will not cause the collapse of Hawai'i's economy, as claimed by the defendants and amicus curiae in the flood of briefs on the post-decision motion for reconsideration,[292] but the decision should give serious pause to agencies and developers who have issued open-ended discretionary permits as well as to phased developments with latent permits and approvals.[293] Until no further agency discretion remains to be exercised, the projects may continue to be subject to public scrutiny under chapter 343.

Turtle Bay was not just about supplemental EISs, however. The decision also contained some very strong language endorsing the authority of the citizen-based State Environmental Council, which is authorized under chapter 341 to promulgate the administrative rules for chapter 343. Although prior cases had acknowledged the role of the Environmental Council in promulgating rules for chapter 343, not until *Turtle Bay* did the court directly examine the scope of the Council's authority to interpret the statute. The governance issue arose because the defendants challenged the validity of the Council's rules regarding supplemental impact statements, which are not expressly referred to in chapter 343.[294] The court noted that the Legislature not only directed the Council to promulgate rules, but also gave it authority to further interpret the statute.[295]

Supreme Court, just as importantly, it reflected the coordinated efforts of various stakeholders motivated to ensure the responsible development of the resort. We support the SEIS undertaking.").

[290] Curt Sanburn, *Shoreganized*, HONOLULU WEEKLY, Apr. 6, 2011, *available at* http://honoluluweekly.com/diary/2011/04/shoreganized/.

[291] David Arakawa, Exec. Dir., Land Use Research Found., Presentation for the Hawaii State Bar Association Annual Meeting's Panel on Turtle Bay (Sept. 17, 2010) (author's observations).

[292] *See* Defendant/Counterclaim-Plaintiff/Appellee Kuilima Resort Co.'s Motion for Reconsideration at 24, Unite Here! Local 5 v. City & Cnty. of Honolulu, No. 28602, 2010 WL 2844362 (Haw. July 20, 2010), *available at* http://keepthenorthshorecountry.org/Documents/SC%20-%20Motion%20to%20Reconsider.pdf) (referring to the amicus curiae brief of First Hawaiian Bank, stating that "such litigation would certainly cause a lengthy construction delay and cause construction to come to a grinding halt").

[293] As Kuilima's attorneys have stated: "[T]he Decision has, at a minimum[,] armed any 'concerned citizen' with the legal authority under the SEIS Rules to challenge developments that are outside of the time frame analyzed in its EIS, and which ha[ve] not received all of its governmental approvals, regardless of the depth and breadth of other review of project impact, or other state and federal laws governing and protecting the area." Motion for Reconsideration, *supra* note 292, at 23-24.

[294] *See* Unite Here! Local 5 v. City & Cnty. of Honolulu (*Turtle Bay*), 123 Haw. 150, 174, 231 P.3d 423, 447 (2010).

[295] *Id.* at 175-76, 231 P.3d at 448-49.

Citing established administrative law principles, the court noted that agencies have "implied powers that are reasonably necessary to carry out the powers expressly granted" and found that the Council's SEIS rules were consistent with chapter 343.[296]

This little-noticed ruling could have significant implications for the future of chapter 343. Although the Environmental Council was stymied in its efforts to promulgate rule changes during the Lingle Administration, and the Council suspended all meetings for over a year out of frustration over this and other political roadblocks,[297] the newly re-started and re-invigorated Environmental Council appears to have considerable interest in taking an active role in shaping chapter 343 policy and practice.[298] Although not directly linked to citizen suits for chapter 343 violations, the court's endorsement of the role of the all-volunteer citizen Environmental Council—which includes representatives from many sectors, including business, military, planning, and conservation, as well as the new OEQC Director, former Senator Gary Hooser[299]—adds to the overall checks and balances in the state environmental review system.

Moreover, *Turtle Bay* kept the door widely ajar for citizen suits in an area that often trips them up[300]—the appropriate application of the statute of limitations under chapter 343. The defendants challenged whether the plaintiffs had filed their lawsuit seeking a supplemental EIS within the required time frame under H.R.S. section 343-7.[301] Noting that section 343-7 does not expressly address the question of supplemental documents, the court applied the 120-day limitation of -7(a), running the time from the date of DPP's approval of the subdivision application.[302] The court rejected the defendants'

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[296] *Id.* at 176, 231 P.3d at 449 (emphasis and citation omitted) ("Moreover, the SEIS process established by the Environmental Council is consistent with HEPA and its objectives—*i.e.*, 'environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole,' HRS § 343-1—and furthers environmental review.").

[297] Sean Hao, *Delays in State Waivers Stall Environmental Projects*, HONOLULU STAR-ADVERTISER, Aug. 1, 2010, *available at* http://www.staradvertiser.com/news/20100801_Delays_in_state_waivers_stall_environmental_projects.html ("The volunteer Environmental Council suspended work last August, complaining, among other things, that the state was not providing it with adequate resources such as meeting rooms and staff support.").

[298] *See, e.g.*, Senate Committee on Energy and Environment, Standing Committee Report No. 1276 on Governor's Message Nos. 547, 548, 550, 573, 609, 610, and 638, 2011 Sess. (Haw. 2011) (Environmental Council appointments), http://www.capitol.hawaii.gov/session2011/CommReports/GM550_SSCR1276_.HTM.

[299] Léo Azambuja, *Hooser Appointed to Office of Environmental Quality Control*, THE GARDEN ISLAND.COM, Feb. 8, 2011, *available at* http://thegardenisland.com/news/local/govt-and-politics/article_9e9362ac-3421-11e0-803d-001cc4c03286.html.

[300] *See supra* note 32.

[301] *Turtle Bay*, 123 Haw. at 174, 231 P.3d at 447.

[302] *Id.* at 173-74, 231 P.3d at 446-47.

arguments that either the thirty-day time limit of -7(b), which would have required that the DPP file a notice with OEQC of a "negative declaration,"[303] or the sixty-day time limit of -7(c), for reviewing a decision to require an EIS, applied.[304] The court also rejected the defendants' argument that the time frame ran from the date of the plaintiffs' "actual knowledge" of the DPP's decision not to require an SEIS.[305] Because the plaintiffs had filed "well before" the 120-day period after the DPP's formal decision, the lawsuit was not barred.[306]

In short, *Turtle Bay* deserves to be among the ranks of ground-breaking chapter 343 cases like *Kahana Sunset* and *Superferry I* and *II*. The Hawai'i Supreme Court again united to strongly endorse the power of the chapter 343 process and the beneficial role of citizens' groups. The court's endorsement for citizen participation does, however, have sensible boundaries.

III. BOUNDARIES: BALANCING THE BENEFITS OF PUBLIC PARTICIPATION UNDER CHAPTER 343 AGAINST THE RISK OF NEW EXPANSES OF ENVIRONMENTAL REVIEW

Two of the Moon Court's environmental review decisions signal that, despite the string of resounding victories for environmental plaintiffs, the court has set boundaries on the reach of the fundamental public participation principles that support chapter 343. In *Sierra Club v. Hawaii Tourism Authority* and *Nuuanu Valley Association v. City and County of Honolulu*, the court looked over the precipice and declined to parachute into a world that might have allowed much wider application of chapter 343. Both cases provide citizens' groups, agencies, and developers a clearer picture of what chapter 343 litigation theories are less likely to succeed and, more importantly, how facts really do matter.

A. HTA*: Peering over the Procedural Standing Precipice*

In 2002, in *Sierra Club v. Hawaii Tourism Authority* (*HTA*),[307] the Hawai'i Supreme Court issued a rare fractured opinion, cracking open the door for later adoption of procedural standing in *Superferry I*. The *HTA* case involved an innovative argument by the Sierra Club that a tourism marketing plan proposed

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[303] A "negative declaration," meaning that the agency determines that a full EIS is *not* required, is now called a "finding of no significant impact." HAW. REV. STAT. § 343-2 (2010).

[304] *Turtle Bay*, 123 Haw. at 173, 231 P.3d at 446.

[305] *Id.* at 174, 231 P.3d at 447.

[306] *Id.*

[307] 100 Haw. 242, 59 P.3d 877 (2002).

by the State required review under chapter 343.[308] A two-justice plurality of the court rejected the Sierra Club's standing altogether—both on traditional and procedural injury grounds.[309] A three-justice majority of the court supported the proposed "procedural injury" theory,[310] but only two of them found that the Sierra Club met the standard in this case.[311] The Sierra Club lost the battle but it would later win the war.

In 1999, the Hawai'i Tourism Authority (HTA) drafted a strategic marketing plan for the State (Tourism Strategic Plan or TSP),[312] held public meetings and received public input on the draft TSP,[313] issued a request for proposals, selected the winning bidder, and signed the contract for $117 million in February 2000 with the Hawai'i Visitors and Convention Bureau.[314] Concerned about the impacts of bringing even more tourists to Hawai'i, in June 2000, the Sierra Club brought a chapter 343 lawsuit directly to the Hawai'i Supreme Court[315] for failure to prepare an EA.[316]

In their plurality decision, Justices Acoba and Ramil found that "[w]hile we are not unsympathetic to the concerns it raises," the Sierra Club did not meet the traditional three-part injury-in-fact test for standing to challenge HTA's tourism marketing plan for lack of an EA.[317] The plurality found that the Sierra Club: did not establish an actual or threatened injury as a result of the marketing services proposed by HTA; did not establish that the actual or

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[308] *Id.* at 245, 59 P.3d at 880.

[309] *Id.* (Justices Acoba and Ramil rejecting Sierra Club's standing).

[310] *Id.* at 265-66, 275, 59 P.3d at 900-01, 910 (Chief Justice Moon and Justice Levinson supporting the "procedural injury" theory with Justice Nakayama concurring).

[311] *Id.* at 275-81, 59 P.3d at 910-16 (Moon, C.J., dissenting).

[312] *Id.* at 245-46, 59 P.3d at 880-81 (plurality opinion).

[313] *Id.* at 246, 59 P.3d at 881.

[314] *Id.* at 247, 59 P.3d at 882. As the plurality noted, chapter 343 applies to use of state "funds" not just "lands" (the "language clearly indicates that HRS § 343-5(a)(1) applies to more than just land related matters"). *Id.* On the other hand, Justice Nakayama found the "use" trigger is restricted to land-related impacts: "It is clear that the legislature contemplated that the expenditure of funds must have a direct correlation to the use of lands designated in HRS §§ 343-5(a)(2)-(8). Therefore, I would hold that HRS § 343-5(a)(1) does not support standing to challenge the failure to conduct an EA when a state or county agency simply expends funds. Rather, HRS § 343-5(a)(1) requires an EA for those projects that have a sufficient nexus to the purposes intended by the legislature in enacting HEPA." *Id.* at 270, 59 P.3d at 905 (Nakayama, J., concurring).

[315] The lawsuit was brought under a special provision of the statute establishing the HTA (H.R.S. § 201B-15). *Id.* at 247-48, 59 P.3d at 882-83 (plurality opinion). Note that the Legislature removed this direct appeal provision in the next legislative session. *Id.* at 247-48 n.8, 59 P.3d at 882-83 n.8.

[316] HTA challenged the Sierra Club's standing in its answer to the complaint; in March 2000 the parties filed cross motions for summary judgment on standing. *Id.* at 249-50, 59 P.3d at 884-85.

[317] *Id.* at 245, 59 P.3d at 880.

threatened injury would be fairly traceable to the expenditures; and did not show that such injury, if it occurred, would likely be remedied by a favorable judicial decision.[318] The plurality also rejected the theory that "informational injury" is sufficient to confer standing[319] and concluded that the Sierra Club had not established a procedural right to protect its interest and so could not rely on "procedural standing."[320]

The middle ground, later embraced by the court in *Superferry I*, was presented by Justice Nakayama. She adopted the Sierra Club's proposed procedural standing test, but agreed with the plurality that the Sierra Club did not meet that test because of the lack of correlation between the HTA plan and the Sierra Club's alleged adverse environmental effects.[321] She first found that procedural standing is appropriate under chapter 343: "federal courts' construction of procedural standing is appropriate as applied to HEPA because, similar to its federal counterpart, NEPA, HEPA sets forth various requirements that are inherently procedural."[322] She added: "Consequently, HEPA does not confer substantive rights or remedies. To insist that a prospective plaintiff demonstrate substantive standing pursuant to a statute that confers only procedural rights ignores the plain language of HRS § 343-7(a)."[323] Therefore, the plaintiff should not have to meet the "normal standards for redressability and immediacy."[324]

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[318] *Id.* The plurality found that the HTA program was designed to increase visitor spending not arrivals, and that the Sierra Club's affidavits lacked specific link to impacts from the HTA program as opposed to "general laments." *Id.* at 251, 59 P.3d at 886. The plurality distinguished other environmental cases where it found standing. *Id.* at 252-53, 59 P.3d at 887-88.

[319] *Id.* at 257, 59 P.3d at 892. Justices Acoba and Ramil further noted that the issue was a matter of first impression, and they agreed with the D.C. Circuit 1991 *Lyng* decision that rejected informational standing in NEPA cases. *Id.* (citing Found. on Econ. Trends v. Lyng, 943 F.2d 79 (D.C. Cir. 1991)). They also observed that the procedural standing issue had barely been raised in the briefs but had "been seized upon by the concurrence and dissent." *Id.* at 258, 59 P.3d at 893.

[320] *Id.* at 245, 59 P.3d at 880. The court concluded:

> It is evident that the federal construct of a procedural right is not germane in this case because (1) HRS § 343-7, the Hawai'i statute at issue, establishes who and under what circumstances the lack of an EA, may be challenged, and (2) federal cases recognizing this standard are inapposite, as they rest on non-analogous statutes. Thus, Petitioner cannot be afforded so-called "procedural standing" under HRS § 343-7(a).

Id. at 260, 59 P.3d at 895. However, the plurality did seem to bend backwards to declare its track record that it has consistently ruled in favor of standing of environmental plaintiffs, citing a string of pro-plaintiffs environmental cases. *Id.* at 256, 59 P.3d at 891.

[321] *Id.* at 265, 59 P.3d at 900 (Nakayama, J., concurring).

[322] *Id.* at 266, 59 P.3d at 901.

[323] *Id.* at 267, 59 P.3d at 902.

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

But Justice Nakayama concluded that the Sierra Club's case tripped up on the facts; it did not meet even that lower standard: "Sierra Club's allegation that it has a geographic nexus to various sites on the island that may be affected by increased visitor traffic as a result of HTA's marketing plan is not sufficient to establish such a concrete interest in this case."[325] The Sierra Club did not prove that "it has a concrete interest because the nexus between the HTA's proposed marketing plan and the alleged environmental effects is dependent upon the decisions of independent acts of prospective visitors."[326] With three justices holding "no standing," the Sierra Club lost the proverbial battle.

Chief Justice Moon and Justice Steven Levinson dissented, finding that the procedural injury rule should be adopted by the court *and* that the Sierra Club met that test. As Chief Justice Moon explained:

> the plurality raises the standing hurdle higher than even the showing necessary for success on the merits of Sierra Club's claim, insofar as Sierra Club need show only that: (1) HTA was required to conduct an EA; (2) HTA failed to do so; and (3) as a result, Sierra Club's plaintiff members—not the environment—have been or will be harmed.[327]

He reminded the plurality that the Hawai'i courts have liberally granted standing: "we have recently reiterated that, 'where the interests at stake are in the realm of environmental concerns, "we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements."'"[328]

Because the focus of chapter 343 is procedural, not substantive,

> any alleged injury resulting from HTA's purported failure to follow the provisions of chapter 343 is in the nature of a "procedural" injury. In other words, the alleged injury is that the agency acts without considering potentially "significant effects" of the environmental consequences of its actions, irrespective of whether there is actual environmental harm.[329]

Chief Justice Moon drove home the point of chapter 343: "The failure to follow the applicable procedures increases the risk that significant environmental effects will be overlooked by the relevant decision-makers. The injury—the increased risk of significant environmental effects due to uninformed decision making—is precisely the type of injury that Chapter 343

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[325] *Id.* at 269, 59 P.3d at 903.

[326] *Id.* at 270-71, 59 P.3d at 904-05.

[327] *Id.* at 271, 59 P.3d at 906 (Moon, C.J., dissenting).

[328] *Id.* (quoting Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Hawai'i (*North Kohala*), 91 Haw. 94, 100-01, 979 P.2d 1120, 1126-27 (1999) (quoting Mahuiki v. Planning Comm'n, 65 Haw. 506, 512, 654 P.2d 874, 878 (1982))).

[329] *Id.* at 272, 59 P.3d at 907.

was designed to prevent."[330] Presaging its ground-breaking 2010 opinion in *County of Hawai'i v. Ala Loop Homeowners* (*Ala Loop*),[331] Chief Justice Moon then referenced a little-used provision in the Hawai'i constitution to support liberalized standing:[332]

> With respect to the legislative and constitutional declarations of policy relevant to Sierra Club's claim that the HTA failed to do an EA as required under HRS § 343-5(b), article XI, section 9 of the Hawai'i Constitution states unambiguously that "each person has the right to a clean and healthful environment" and that "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." Moreover, the legislature has clearly declared the policy of this state with respect to the environmental review process in HRS § 343-1 . . . .[333]

In short, Chief Justice Moon strongly supported adopting the procedural standing test proposed by the Sierra Club,[334] paving the way for the *Superferry I* and *Ala Loop* decisions. In almost summary fashion, he found that the Sierra Club affidavits met that new test.[335]

In summary, *HTA* counts as a temporary loss for environmental plaintiffs who might have reached too far with difficult facts given the diffuse nature of the marketing plan's harm. Skeptical of the long chain of causality between the HTA marketing plan and the plaintiff's injuries, the court pulled back.

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[330] *Id.* at 276, 59 P.3d at 911. Contrary to the plurality's view that HEPA standing is narrower than NEPA standing, *id.* at 261, 59 P.3d at 986 (plurality opinion), according to Chief Justice Moon, "this court had also made it clear that its own standing requirements, particularly in the realm of environmental litigation, may be less stringent than the federal requirements." *Id.* at 276, 59 P.3d at 911 (Moon, C.J., dissenting) (citing *North Kohala*, 91 Haw. at 100, 979 P.2d at 1126 (noting that "standing principles are governed by 'prudential' considerations.")).

[331] 123 Haw. 391, 235 P.3d 1103 (2010).

[332] *HTA*, 100 Haw. at 276, 59 P.3d at 911 (Moon, C.J., dissenting).

[333] *Id.* (quoting HAW. CONST., art. XI, § 9).

[334] The Moon/Levinson test stated:

> Consistent with the analogous federal law in this area, I would formulate the injury in fact test in this case as follows. First, Sierra Club must demonstrate that HTA failed to conduct an EA before undertaking its tourism marketing plan. Second, tracking the statutory purpose of an EA, Sierra Club must demonstrate that HTA's failure to conduct the EA resulted in an increased risk that its marketing plan may have a "significant effect" on environmental quality, as defined in HRS § 343-2. Third, in order to ensure that the injury is concrete and particularized, Sierra Club must show that the increased risk of a significant effect on environmental quality injures its members personally by demonstrating a "geographic nexus" between individual members and the site of the injury. Finally, Sierra Club's purported injury must be within the "zone of interests" sought to be protected by HEPA.

Id. at 281, 59 P.3d at 916.

[335] *Id.* at 285, 59 P.3d at 920.

Ultimately, the court concluded that chapter 343 was not well suited to this particular factual claim, but the rulings of the majority adopting procedural standing came roaring back—to the Sierra Club's benefit—just a few years later in *Superferry I.*

B. Nuuanu Valley Association*: Setting the Boundaries of the "Use" Trilogy*

In 2008, two years after *Koa Ridge*, Justice Nakayama wrote *Nuuanu Valley Association v. City and County of Honolulu*[336] for a unanimous bench,[337] pulling the court back from the precipice of an unlimited definition of "use of state or county lands" that might have resulted from an extreme interpretation of the *Kahana Sunset*, *North Kohala*, and *Koa Ridge* trilogy. She held that a proposed connection to existing city drainage and sewage lines by the forty-five acre Laumaka subdivision in Nu'uanu Valley for nine residential lots on land zoned "residential" since 1943 did *not* constitute the "use" of state or county lands.[338]

The neighborhood controversy started in early 2005 when the non-profit Nuuanu Valley Association (NVA) expressed concern about the proposed development on the steep mountainside slopes of the valley. NVA asked to examine various reports in DPP's files related to the subdivision application of the prior owner, Pu'u Paka DP LLC.[339] DPP declined to provide the requested reports to NVA.[340] DPP deferred the subdivision application and, after it expired, Pu'u Paka sold the property to Laumaka LLC, which proceeded with the subdivision plans.[341] NVA again submitted a request for engineering reports related to the project.[342]

After DPP initially declined to release a geotechnical report due to the deliberative process privilege, NVA notified DPP of its intent to sue.[343] DDP then "accepted" the report and made it available to the public[344] and released a requested drainage report.[345] In May 2006, after the circuit court denied NVA's preliminary injunction request, DPP approved the tentative subdivision

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[336] 119 Haw. 90, 194 P.3d 531 (2008).

[337] Justice Acoba wrote a brief concurrence that emphasized the lack of showing by the plaintiff on "use," not differing significantly from the majority opinion. *Id.* at 107-08, 194 P.3d at 548 (Acoba, J., concurring).

[338] *Id.* at 94, 194 P.3d at 535 (majority opinion).

[339] *Id.*

[340] *Id.*

[341] *Id.*

[342] *Id.*

[343] *Id.*

[344] *Id.* at 94-95, 194 P.3d at 535-36.

[345] *Id.* at 95, 194 P.3d at 536.

for the parcel.[346] One year later, after disposing of further motions, the circuit court entered final judgment against NVA on all counts, including that an EA was not required because there was no "use" of state or county lands.[347]

On appeal, Justice Nakayama's decision primarily addressed the issues of public records and administrative law, ruling partially in favor of the plaintiff.[348] With regard to chapter 343, Justice Nakayama examined the project's proposed connection to existing city drainage and sewer utilities and rejected the plaintiff's expansive position that chapter 343 applied "[s]o long as there is a 'use' of city or state lands," without regard to "the size of the 'use' and comparisons to the scope and size of the overall project."[349] Referring to, and circumscribing, the implications of the trilogy of *Kahana Sunset*,[350] *North Kohala*, and *Koa Ridge*, Justice Nakayama emphasized the extensive nature of the tunneling or construction proposed in those cases and held they did not reach as far as the plaintiffs suggested.[351] She stated: "This court has not held that *merely connecting* privately-owned drainage and sewage lines to a state or county-owned drainage and sewage system is sufficient to satisfy HEPA's requirement of 'use of state or county lands.'"[352] Absent "tunneling or construction" of some significance, she concluded, there was no "use."[353]

The court declined to apply the "ordinary meaning" of the word "use," which would have resulted in the state or county lands trigger being applied "no matter what or how benign that 'use may be.'"[354] In her view, the Legislature did not intend such "countless possibilities of 'uses.'"[355] "[D]rainage and sewer lines [that] merely connect" to existing utilities "without requiring

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[346] *Id.*

[347] *Id.* at 95-96, 194 P.3d at 536-37. The case skipped the ICA when, at plaintiff's request, the Supreme Court transferred the case under Hawai'i Revised Statutes section 602-58(a)(1)-(b)(1) on the basis that it raised an important or novel question. *Id.* at 96, 194 P.3d at 537.

[348] The court held that, prior to acceptance, the engineering report submitted by the developer to (and commented upon by) DPP was not a "public document," and therefore DPP did not need to release it to the public under the State Uniform Information Practices Act (UIPA). *Id.* at 96-98, 194 P.3d at 537-39. The court did find, however, that DPP violated the Hawaii Administrative Procedure Act (HAPA), *id.* at 98-99, 194 P.3d at 539-40, when DPP "refus[ed] to make available to the public any unaccepted engineering reports and written comments thereon." *Id.* at 99-100, 194 P.3d at 540-41.

[349] *Id.* at 101, 194 P.3d at 542.

[350] Justice Nakayama noted that the "use" of state or county lands in *Kahana Sunset* was "undisputed between the parties." *Id.*

[351] *Id.* at 101-02, 194 P.3d at 542-43.

[352] *Id.* at 103, 194 P.3d at 544 (emphasis added). *See also id.* at 103-04, 194 P.3d at 544-55 (discussing the trilogy, again emphasizing the extent of the use).

[353] *Id.* at 103, 194 P.3d at 544. Justice Nakayama noted that the cases had "so far been limited to projects that require tunneling or construction beneath state or county land." *Id.*

[354] *Id.*

[355] *Id.*

construction or tunneling beneath state or county lands" did not trigger chapter 343.[356] The court further rejected the argument that a "slope stability analysis" performed on state forestry land above the subdivision was a "use," again citing the trilogy.[357] It also declined to find that a Territory of Hawai'i-era hiking easement within the subdivision itself constituted a "use."[358]

On the one hand, *Nuuanu* is a decision where the complaining homeowners lost. Even though the court viewed NVA's concerns about the risks of the subdivision as "understandable," the court viewed the plaintiff's view of "use" as too far to stretch the law, stating, "[W]e must remain mindful of our duties to follow the law."[359] On the other hand, the court firmly reinforced its prior rulings in the *Kahana Sunset* trilogy that it meant what it said—chapter 343 applied when the connections involved non-de minimis tunneling or construction on state or county lands. This ruling was bitter for the plaintiff but bittersweet for the broader environmental community.

Like in *HTA*, where the causal chain was too attenuated in the court's view, a major factor that may have influenced the court's narrower view of *Nuuanu* was the smaller size of the proposed development. Unlike the large new development proposed in *Kahana Sunset* (312 multi-family units), *North Kohala* (387-acre resort plan), and *Koa Ridge* (1274-acre reclassification), the subdivision in *Nuuanu* involved nine lots (potentially eighteen homes) that the court noted had been zoned for residential use "since approximately 1943."[360] While not unsympathetic to the risks cited by the plaintiff,[361] the court was unwilling to force development in an area zoned for residential development over sixty years ago through the chapter 343 process when, in the court's view, the factual connection was tenuous and the impact did not rise to the level that the Legislature had in mind for triggering environmental review. Thus, the top of the chapter 343 "use" funnel gained definite boundaries in the little-acknowledged *Nuuanu* decision.

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[356] *Id.* at 104, 194 P.3d at 545. NVA argued that the connection did involve construction or tunneling, but had not provided sufficient support for that assertion to support reconsideration by the court. *Id.* at 104-05, 194 P.3d at 545-46. *See also id.* at 108, 194 P.3d at 548 (Acoba, J., concurring) ("[T]here was a lack of evidence as to whether the subdivision hookup to the sewer system would be constructed under state or county land.").

[357] *Id.* at 105, 194 P.3d at 546 (majority opinion).

[358] *Id.*

[359] *Id.* at 104, 194 P.3d at 545.

[360] *Id.* at 94, 102, 194 P.3d at 535, 543.

[361] *Id.* at 104, 194 P.3d at 545.

C. Harder Boundaries, When Quixotic Plaintiffs Lose: Price *and* Morimoto

During the Moon era, the court handed losses to plaintiffs in only two environmental review decisions: *Price v. Obayashi Hawaii Corp.*[362] and *Morimoto v. Board of Land and Natural Resources*.[363] Even though these cases involved major controversial land developments—the Obayashi Corp. (or "Lihi Lani") project on the North Shore of O'ahu in the *Price* case, and the Saddle Road realignment on the island of Hawai'i in the *Morimoto* case—the court turned down the plaintiffs' request for more process in light of the extensive proceedings and reviews already vetted for the proposed developments.

1. Price*: Quixotic "fly-specking"*[364]*?*

The court's unanimous 1996 decision in *Price*, written by Justice Ramil, found that the plaintiff's request for additional environmental review under chapter 343 was unwarranted.[365] After allowing Kamuela Price, an eccentric North Shore resident, to overcome the strict circuit court filing barriers and spending some time chastising the circuit court clerk's office,[366] Justice Ramil began examining the court's decision on the merits of Price's chapter 343 claim by reviewing the fundamental goals of the EIS process.[367] The fatal flaw in Price's case was his primary theory that "disagreement between experts" merited re-opening the FEIS.[368] This theory is almost always a losing argument in the world of environmental review law when there is an extensive record of review and no glaring omissions or procedural errors. The court reasoned that the EIS process was not intended to resolve conflicting views but rather to "provide information to the deciding agency."[369] The court concluded,

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[362] 81 Haw. 171, 914 P.2d 1364 (1996).

[363] 107 Haw. 296, 113 P.3d 172 (2005).

[364] *See infra* note 373 and accompanying text.

[365] The Hawai'i courts have made similar sufficiency findings in only two other cases. *See* Life of the Land v. Ariyoshi, 59 Haw. 156, 577 P.2d 1116 (1978) (rejecting plaintiffs' request that the court enjoin construction of the Central Maui Water Transmission System due to an inadequate EIS, finding that the claim lacked support in the administrative record); Medeiros v. Hawaii Cnty. Planning Comm'n, 8 Haw. App. 183, 797 P.2d 59 (1990) (stating in dicta that an EA for a proposed geothermal research project did not need to analyze the impact of future geothermal energy businesses on the environment).

[366] *Price*, 81 Haw. at 179, 914 P.2d at 1372.

[367] *Id.* at 180, 914 P.2d at 1373.

[368] *Id.* at 181, 914 P.2d at 1374.

[369] *Id.* (citing Anson v. Eastburn, 582 F. Supp. 18, 24 (S.D. Ind. 1983)); *see also id.* at 181 n.10, 914 P.2d at 1374 n.10 (citing Residents in Protest-I-35E v. Dole, 583 F. Supp. 653, 662 (D. Minn. 1984) (stating that NEPA "does not require scientific unanimity")).

therefore, that the adequacy of an EIS was a question of law that could be "properly addressed through the summary judgment procedure."[370] Applying the "rule of reason" standard of review for the adequacy of an EIS,[371] the court slammed the door on Price's complaints.[372] Justice Ramil concluded that the statute and administrative rules were designed "to give latitude" to the agencies about the details of the contents of the EIS document.[373]

Turning to Price's core argument, the court noted that he had challenged twelve different aspects of the EIS.[374] The court emphasized the "breadth and depth" of Obayashi's EIS,[375] listing the numerous topics covered[376] and finding they were adequately covered in the EIS itself or through accompanying technical studies.[377] Justice Ramil concluded that Obayashi's FEIS—which the court specifically noted was more than 400 pages long and accompanied by

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[370] *Id.* at 182, 914 P.2d at 1375.

[371] *Id.* (citing Life of the Land v. Ariyoshi, 59 Haw. 156, 164, 577 P.2d 1116, 1121 (1978)).

[372] *Id.* at 184, 914 P.2d at 1377. Justice Ramil reiterated that an EIS:

> need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

Id. at 182, 914 P.2d at 1375 (citing *Ariyoshi*, 59 Haw. at 164, 577 P.2d at 1121); *see also id.* at 182 n.11, 914 P.2d at 1375 n.11 (proposing that "it is not possible to draft an EIS that is perfect in all respects") (citing Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army, 342 F. Supp. 1211, 1217 (E.D. Ark. 1972)). Justice Ramil also noted the well-known 1982 decision by the U.S. District Court for the District of Hawai'i, *Stop H-3 Association v. Lewis*, 538 F. Supp. 149 (D. Haw. 1982), where Judge Sam King found that the courts' role in reviewing a complete EIS was "very narrow." *Id.* at 182, 914 P.2d at 1375.

[373] *Id.* at 183, 914 P.2d at 1376. The court then mentioned a famous pro-defendant metaphor from a 1982 federal case, that courts are "not to 'fly speck' EISs." *Id.* at 182 n.12, 914 P.2d at 1375 n.12 (citing Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 695 (9th Cir. 1986) (citation omitted)).

[374] *Id.* at 183 n.13, 914 P.2d at 1376 n.13. The court quickly stated that review would be limited under H.R.S. § 343-7(c) to the five concerns raised in his comments on the draft EIS. *Id.* at 183, 914 P.2d at 1376.

[375] *Id.* at 184 n.15, 914 P.2d at 1376 n.15.

[376] *Id.* On Price's first areas of concern, infrastructure and water supplies, the court noted that the EIS had "an entire section" on each of the topics of concern, where the issues were discussed "in detail" and that the FEIS had a "comprehensive discussion of traffic impacts." *Id.* at 184, 914 P.2d at 1377. The court concluded on this issue that the EIS's discussion was "in good faith" and "sufficient." *Id.* at 184-85, 914 P.2d at 1377-78. Price's concerns about the other issues—pesticides/herbicides, flooding/erosion, and Native Hawaiian archaeological sites—were also addresssed, in the view of the court. *Id.* at 185, 914 P.2d at 1378.

[377] *Id.* at 183-85, 914 P.2d at 1376-78.

twenty-four technical reports—supported the agency's recommendations and complied with H.R.S. chapter 343 and the administrative regulations.[378]

In short, *Price* is the bookend example for the court's chapter 343 cases. The opinion provides a clear boundary to the court's willingness to step into the muck of an agency's decision-making process. It also signals that the uphill battle of challenging an FEIS can be very hard, particularly for an individual plaintiff like Price who had limited community support. Justice Ramil's reasoning further underscores the theme of this article that where the additional public process requested does not offer a substantial benefit, the court will take a dim view of the plaintiff's chapter 343 claims. Nine years later, the court reinforced this message in the *Morimoto* case.

2. Morimoto: *No match for a mountain of process*

In 2005, with Justice Acoba writing the unanimous opinion, the Moon Court reviewed similar issues to *Price* in a case that was not a straight chapter 343 challenge but an attack on a state Conservation District Use Application (CDUA) for a federal highway project. In *Morimoto*, the court affirmed a Third Circuit Court judgment upholding BLNR approval of a DOT and Federal Highway Administration (FHA) application to use state conservation district land for the upgrade of Saddle Road on the Island of Hawai'i.[379] Two individual plaintiffs, Daniel Morimoto, M.D. and Kats Yamada, were somewhat isolated voices in their challenge to the Saddle Road realignment.[380] The selected federal-state alternative route (called PTA-1),[381] which proposed to cross 206 acres of state conservation-zoned land, had undergone a full environmental review process, jointly undertaken by DOT and FHA in compliance with chapter 343 and NEPA. In addition, because of the seven endangered species impacted—including the litigation-famed Palila[382]—the U.S. Fish and Wildlife Service (FWS) had conducted a formal consultation

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[378] *Id.* at 185, 914 P.2d at 1378. The decision reflected the court's lack of empathy for Price on the merits, but the court did not throw this essentially pro se plaintiff under the bus. At the very end of the opinion, in response to Obayashi's request for sanctions against Price and his attorney, the court declined to entertain the request, finding that "Price presented a good faith, although unsuccessful, argument." *Id.* at 185 n.18, 914 P.2d at 1378 n.18.

[379] Morimoto v. Bd. of Land & Natural Res., 107 Haw. 296, 297-98, 113 P.3d 172, 173-74 (2005).

[380] Vicky Mouze, *Hawaii's PTA protects natural resources*, WWW.ARMY.MIL: THE OFFICIAL HOMEPAGE OF THE UNITED STATES ARMY (June 10, 2010), http://www.army.mil/-news/2010/06/10/40685-hawaiis-pta-protects-natural-resources/.

[381] *Morimoto*, 107 Haw. at 298, 113 P.3d at 174; National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f) (2006).

[382] For a discussion of the litigation history of the Palila, see Oliver Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331 (2004).

with FHA under Section 7 of the Endangered Species Act,[383] resulting in a thorough Biological Opinion (BO).[384] The BO called for the addition and restoration of 10,000 acres of new habitat on Mauna Kea as mitigation for the loss of 100 acres of Palila critical habitat, the relocation of the highway to avoid certain endangered plants, and other mitigation measures.[385] In 1999, the FHA issued a Record of Decision (ROD) selecting PTA-1 and legally binding the agency and the state DOT to implement the selected mitigation measures.[386] Of particular importance to the court's ultimate view of the case, Justice Acoba noted that "[t]he mitigation plan in the ROD received wide support from scientific, regulatory agency, and environmental communities, and segments of the local community."[387]

Justice Acoba explained that mitigation measures identified in the joint EIS must be considered by BLNR in its review of the CDUA.[388] Similarly, the court dismissed the plaintiffs' other arguments about BLNR's failure to consider impacts on the Palila.[389] In short, the court found that the EIS mitigation could be considered for the CDUA and that substantial evidence supported the BLNR's conclusion that the project would not cause substantial adverse effect of the natural resources of the area.[390]

Although not a true chapter 343 case, *Morimoto* echoes many of the same themes underlying the court's decision in *Price*. The road to challenging an

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[383] *Morimoto*, 107 Haw. at 299, 113 P.3d at 175. *See also* Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2006).

[384] *See* 16 U.S.C. § 1536(c) (requiring biological opinions).

[385] *Morimoto*, 107 Haw. at 299, 113 P.3d at 175.

[386] *Id.* at 299-300, 113 P.3d at 175-76.

[387] *Id.* at 300, 113 P.3d at 176. The court emphasized the extensive public review process undertaken before the BLNR approved the realignment. In April 2000, BLNR held a public hearing that turned into a contested case hearing, in which the plaintiffs participated. *Id.* In October 2001, BLNR issued the CDUP subject to certain conditions, including all of the conditions in the Final EIS. *Id.* When the plaintiffs appealed, the Third Circuit Court upheld the BLNR decision. *Id.* at 301, 113 P.3d at 177. With those four strikes against them (similar to those in *Price*), Morimoto and Yamada, who were asking for further agency process on the mitigation, faced a skeptical Hawai'i Supreme Court.

[388] In fact, BLNR itself had expressly linked the two processes. *Id.* at 303-04, 113 P.3d at 179-80 (mitigation in an EA or EIS [is] an automatic condition of a CDUP). Therefore, BLNR could consider those measures without the further rulemaking called for by the plaintiffs. *Id.* at 304, 113 P.3d at 180.

[389] *Id.* at 304-06, 113 P.3d at 180-82. Justice Acoba found that the record supported the BLNR's finding that the endangered species "would not suffer substantial adverse impact," noting the substantial mitigation measures adopted for Palila, including restoration of 10,000 acres of "new" habitat. *Id.* at 308, 113 P.3d at 184.

[390] *Id.* at 308, 113 P.3d at 184. No Hawai'i judicial decision has yet addressed the more direct questions of concern to most stakeholders in cases like this, which are the specificity and enforceability of mitigation measures in an EIS.

agency's decision that is based on a full good-faith review process is treacherous. The joint federal-state EIS process, the completed federal Section 7 process, and the extent of the Palila mitigation in particular appeared quite damaging to Morimoto's and Yamada's prospects in challenging the downstream BLNR decision. Like *Price*, *Morimoto* presents a cautionary tale for future challenges to completed chapter 343 processes that appear to lack procedural flaws and are undergirded (as in *Morimoto*) by parallel agency examination of sensitive environmental issues.

CONCLUSION

This review of the chapter 343 cases decided during the Moon Court era indicate a consistent and strong commitment by the court to follow the Legislature's intent to support robust public participation in the environmental review process, even when that participation may disrupt some decisions of agencies and settled expectations of developers. Taken together, those cases form a remarkably uniform body of case law that strongly encourages citizens to resort to judicial review to ensure compliance with chapter 343. From the merits, to standing, to attorneys' fees, the Moon Court has cleared the judicial review pathway of the many obstacles that substantially impede almost all other kinds of state environmental litigation in Hawai'i.[391]

The major exception to this otherwise well-fitted line through the Hawai'i Supreme Court's environmental review opinions since 1993 was the court's split decision in *HTA*.[392] The court teetered at the edge of a sweeping pro-environmental standing ruling but ended up badly fractured over whether to liberalize standing for environmental plaintiffs.[393] Five years later, however, in *Superferry I*,[394] the court gave in to temptation and ruled wholeheartedly in favor of the Sierra Club on procedural standing.

A key condition of the court's endorsement of public participation has also been its *sotto voce* concern that such participation will likely be "beneficial," even if it might be disruptive. In numerous decisions, such as the blockbusters *Kahana Sunset*, *Superferry I* and *II*, and *Turtle Bay*, the court required a fresh round of public process despite the protests of the county and state agencies who had prematurely approved the projects and despite developers' loud claims of adverse economic impacts and even takings.[395]

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[391] In this author's experience, chapter 343 litigation in Hawai'i constitutes probably seventy-five percent of all filed and reported cases by citizens' groups.

[392] *See* Sierra Club v. Haw. Tourism Auth. (*HTA*), 100 Haw. 242, 59 P.3d 877 (2002).

[393] *Id.*

[394] *Superferry I*, 115 Haw. 299, 167 P.3d 292 (2007).

[395] Conversely, in the two cases where the citizen plaintiffs flat out lost, *Price v. Obayashi Hawaii Corp.*, 81 Haw. 171, 914 P.2d 1364 (1996), and *Morimoto v. Board of Land & Natural*

Perhaps the icing on the cake of the Moon Court's chapter 343 decisions is, ironically, a decision that did not involve chapter 343. In 2010, the Moon Court flung the courthouse doors open even more broadly for environmental citizens' groups in *County of Hawai'i v. Ala Loop Homeowners*.[396] In that case, the majority enthusiastically embraced the Hawai'i State Constitution's provision in article XI, section 9 referring to a "clean and healthful environment" as conferring a broad private right of action for environmental wrongs.[397] *Ala Loop* further reinforces the notion that the Moon Court has consistently supported the beneficial role of citizen-plaintiffs in Hawai'i environmental review specifically, and environmental cases generally. Given that the author of *Ala Loop* was current Chief Justice Recktenwald, who was appointed to the high seat by Governor Lingle, the judicial generosity toward citizen participation that was strongly reinforced by the Moon Court in the chapter 343 cases may well continue for the foreseeable future.

Resources, 107 Haw. 296, 113 P.3d 172 (2005), the common thread of the court's treatment of the alleged chapter 343 violations seems to be that the quixotic individuals involved would not have brought beneficial light to the review process. In those cases, the court also seemed convinced that the agency or applicant had already extensively engaged the public in the environmental review process.

[396] 123 Haw. 391, 235 P.3d 1103 (2010) (finding that article XI, section 9 creates a private right of action to enforce a chapter 205 challenge to a proposed charter school and finding that the plaintiff homeowners' association had standing under the traditional injury-in-fact test).

[397] *Id.* at 425, 235 P.3d at 1137.

The Moon Court, Land Use, and Property: A Survey of Hawai'i Case Law 1993-2010

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I. INTRODUCTION

The buying, selling, and regulation of interests in property has generated as much litigation in Hawai'i over the past two decades as it had in the previous forty years. Little of economic consequence occurs in the state without affecting land.[1] As a result, although Hawai'i remains on the whole non-litigious, legal disputes about land continue to arise, often raising fundamental constitutional issues, but also frequently dealing with the mundane. Into the first category fall disputes concerning property taken under the state's power of eminent domain (triggering constitutional analyses on public use, compensation, and regulatory takings) and state constitutional guarantees of Native Hawaiian traditional and customary rights; into the second category fall condominium or homeowner association disputes.

In deciding the dozens of cases in these categories, the state supreme court over which retired Chief Justice Moon presided rendered decisions in which some trends are readily discernible. First, the court resumed a practice arguably commenced during the Richardson years (but interrupted during the Lum Court)[2] of deciding a handful of important cases on grounds neither briefed nor argued by the parties. The Richardson Court did so in both *Robinson v. Ariyoshi*[3] and (arguably) *County of Kauai v. Pacific Standard Life Insurance Co. (Nukolii)*,[4] while the Moon court did so in *Public Access Shoreline Hawaii*

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[1] *See generally* DAVID L. CALLIES, REGULATING PARADISE (2d ed. 2010); DAVID KIMO FRANKEL, PROTECTING PARADISE: A CITIZEN'S GUIDE TO LAND & WATER USE CONTROLS IN HAWAII (1997).

[2] *See* David L. Callies, Donna H. Kalama & Mahilani E. Kellett, *The Lum Court, Land Use, and the Environment: A Survey of Hawai'i Case Law 1983 to 1991*, 14 U. HAW. L. REV. 119 (1992).

[3] 65 Haw. 641, 658 P.2d 287 (1982).

[4] 65 Haw. 318, 653 P.2d 766 (1982).

v. Hawai'i County Planning Commission (PASH).[5] In at least two such cases, the court denied motions for rehearing so the parties could brief and argue issues presented by that new ground. Second, the Moon Court decided some of the state's most important property and related environmental and Native Hawaiian rights cases in favor of the various non-governmental organizations bringing them (Sierra Club, Earthjustice, Hawaii's Thousand Friends, and the Native Hawaiian Legal Corporation) approximately eighty-two percent of the time,[6] sixty-five percent of which reversed the Intermediate Court of Appeals

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[5] 79 Haw. 425, 903 P.2d 1246 (1995).

[6] This percentage was calculated from important land use and property cases, in which there was a clear interest by either a developer or environmental group. *See* Maunalua Bay Beach Ohana 28 v. State, No. 28175, 2010 WL 2329366, 2010 Haw. LEXIS 119 (June 9, 2010) (denying certiorari to private landowners' inverse condemnation claim for the loss of a property interest in existing accretions to shoreline property); Unite Here! Local 5 v. City & Cnty. of Honolulu (*Turtle Bay*), 123 Haw. 150, 231 P.3d 423 (2010) (holding that the timing of development could constitute a substantial change requiring a new environmental impact statement); Save Diamond Head Waters LLC v. Hans Hedemann Surf, Inc., 121 Haw. 16, 211 P.3d 74 (2009) (holding that a beach equipment rental store was not a valid prior nonconforming use); Sierra Club v. Dep't of Transp. (*Superferry II*), 120 Haw. 181, 202 P.3d 1226 (2009) (holding that a special session act authorizing immediate commencement of an interisland ferry was unconstitutional); Cnty. of Hawai'i v. C & J Coupe Family Ltd. P'ship (*Coupe I*), 119 Haw. 352, 198 P.3d 615 (2008) (holding that a bypass road did not qualify as a public purpose and that the county impermissibly used its eminent domain authority); Brescia v. N. Shore Ohana, 115 Haw. 477, 168 P.3d 929 (2007) (holding the larger shoreline setback applicable); Kelly v. 1250 Oceanside Partners, 111 Haw. 205, 140 P.3d 985 (2006) (holding that the trial court erred in finding that the developers breached their public trust duty to protect waters adjacent to the property); Leslie v. Bd. of Appeals, 109 Haw. 384, 126 P.3d 1071 (2006) (holding that a Special Management Area (SMA) permit must be obtained prior to tentative subdivision approval); Sierra Club v. Office of Planning, 109 Haw. 411, 126 P.3d 1098 (2006) (holding that a district boundary amendment triggered the requirement for an environmental assessment); Kepo'o v. Kane, 106 Haw. 270, 103 P.3d 939 (2005) (holding that the lease of state lands for a power plant was a use of state lands requiring an environmental impact statement); Morimoto v. Bd. of Land & Natural Res., 107 Haw. 296, 113 P.3d 172 (2005) (holding that the Board of Land and Natural Resources could approve mitigation measures to upgrade a state road); T-Mobile USA, Inc. v. Cnty. of Hawai'i Planning Comm'n, 106 Haw. 343, 104 P.3d 930 (2005) (holding that a concealed cellular telephone tower and equipment building were permitted uses in the agricultural district); Bremer v. Weeks, 104 Haw. 43, 85 P.3d 150 (2004) (reversing the lower court and finding evidence of ancient or historic use of a trail); Morgan v. Planning Dep't, 104 Haw. 173, 86 P.3d 982 (2004) (holding that the planning commission had the authority to amend a condition of an approved SMA permit); Haw. Elec. Light Co. v. Dep't of Land & Natural Res., 102 Haw. 257, 75 P.3d 160 (2003) (holding that the Board of Land and Natural Resources denial of a conditional use permit was invalid because there were insufficient votes to support the action); Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 7 P.3d 1068 (2000) (holding that the Land Use Commission failed to ensure that legitimate customary and traditional practices of native Hawaiians were protected to the extent feasible); Curtis v. Bd. of Appeals, 90 Haw. 384, 978 P.2d 822 (1999) (holding that Hawai'i Revised Statutes section 205-4.5(a) did not permit cellular telephone towers as of

(ICA).[7] Third, the court increasingly rendered lengthy opinions,[8] many triple the length of those from the Lum Court and often describing the context in which the case arose procedurally even when the process was not an issue. That said, the court certainly set a high bar for thoroughness and explanatory analysis. For example, its decision in *Save Sunset Beach Coalition v. City & County of Honolulu*[9] is a model of clarity and organization reminiscent of the style of opinions written by retired ICA Judge Walter Heen[10] and retired ICA Chief Judge James Burns.[11]

The court continued a trend of the Lum Court[12] in two cases reinforcing the importance of plans and planning to our system of land use regulation. Noting that plans have the force of law in Hawai'i,[13] the court held that in the event of conflict between plans and other land use controls, such as zoning, the most

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right); Young v. Planning Comm'n, 89 Haw. 400, 974 P.2d 40 (1999) (holding that the use of larger vessels in conjunction with a tour operation required an SMA use permit); GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998) (holding that in the coastal zone, the more restrictive use specified in the county zoning or general plan controls); Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (*PASH*), 79 Haw. 425, 903 P.2d 1246 (1995) (holding that the planning commission has an obligation to protect Native Hawaiian rights to the extent reasonable when issuing a SMA use permit); Mauna Kea Power Co. v. Bd. of Land & Natural Res., 76 Haw. 259, 874 P.2d 1084 (1994) (holding that the ex parte communication of some members of the Board of Land and Natural Resources did not deny due process of law to the developer); Hawaii's Thousand Friends v. City & Cnty. of Honolulu, 75 Haw. 237, 858 P.2d 726 (1993) (holding that a proposed demolition of structures in a county park would have a significant environmental impact that required an SMA use permit).

[7] Cases in which the Moon Court reversed the ICA include: *Brescia*, 115 Haw. 477, 168 P.3d 929; *Coupe I*, 119 Haw. 352, 198 P.3d 615; *GATRI*, 88 Haw. 108, 962 P.2d 367; *Hawaii's Thousand Friends*, 75 Haw. 237, 858 P.2d 726; *Ka Pa'akai O Ka 'Aina*, 94 Haw. 31, 7 P.3d 1068; *Morgan*, 104 Haw. 173, 86 P.3d 982; *Save Diamond Head Waters LLC*, 121 Haw. 16, 211 P.3d 74; *Superferry II*, 120 Haw. 181, 202 P.3d 1226; *Sierra Club v. Office of Planning*, 109 Haw. 411, 126 P.3d 1098; and *Turtle Bay*, 123 Haw. 150, 231 P.3d 423.

The cases in which the Moon Court affirmed the ICA include: *Curtis*, 90 Haw. 384, 978 P.2d 822; *Kepo'o*, 106 Haw. 270, 103 P.3d 939; *Leslie*, 109 Haw. 384, 126 P.3d 1071; *Mauna Kea Power Co.*, 76 Haw. 259, 874 P.2d 1084; *PASH*, 79 Haw. 425, 903 P.2d 1246; and *Young*, 89 Haw. 400, 974 P.2d 40.

[8] *E.g.*, *PASH*, 79 Haw. 425, 903 P.2d 1246; Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Haw. 217, 953 P.2d 1315 (1998); *In re* Water Use Permit Applications (*Waiāhole I*), 94 Haw. 97, 9 P.3d 409 (2000); Save Sunset Beach Coal. v. City & Cnty. of Honolulu (*Sunset Beach*), 102 Haw. 465, 78 P.3d 1 (2003); *Turtle Bay*, 123 Haw. 150, 231 P.3d 423.

[9] 102 Haw. 465, 78 P.3d 1.

[10] *See, e.g.*, Topliss v. Planning Comm'n, 9 Haw. App. 377, 842 P.2d 648 (1993).

[11] *See, e.g.*, Whitesell v. Houlton, 2 Haw. App. 365, 632 P.2d 1077 (1981). Noted particularly for its incisive brevity, the case is widely cited elsewhere in the United States, demonstrating that an opinion need not be exhaustive or voluminous to be a respected landmark.

[12] *See* Lum Yip Kee, Ltd. v. City & Cnty. of Honolulu, 70 Haw. 179, 767 P.2d 815 (1989).

[13] GATRI v. Blane, 88 Haw. 108, 114, 962 P.2d 367, 373 (1998).

restrictive in terms of permitted uses will control.[14] The court also continued a trend that is appropriately harsh on landowners who knowingly violate land use controls, whether public or private, particularly height covenants.[15] The court thus required a Buddhist temple to remove a section of its roof that exceeded local bulk zoning height standards, denying an after-the-fact variance.[16] However, the court continued to rigorously examine the language of covenants,[17] holding that in the event of ambiguity, the dispute would be resolved against restriction and in favor of the free use of land.[18]

Turning to coastal zone law, the Moon Court continued to decide cases in favor of coastal zone protection. In one case, the court disallowed an attempt by Honolulu's Department of Parks and Recreation to "piecemeal" a project in order to avoid obtaining a Special Management Area (SMA) permit.[19] In another, the court held that in a coastal zone, a restrictive plan trumped a less restrictive zoning ordinance.[20] Finally, the court continued to expand standing, holding that a Native Hawaiian group with no nearby property interest could intervene in an SMA permit hearing.[21] The court also virtually rewrote the state environmental impact statement (EIS) law to protect coastal resources at Turtle Bay.[22]

The court continued the expansion of Native Hawaiian rights to both land and water at the expense of landowners. It reinforced the exercise of traditional and customary rights guaranteed by the state constitution,[23] but did so as to virtually all land not fully developed, thereby gratuitously launching a direct

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[14] *Sunset Beach*, 102 Haw. 465, 78 P.3d 1.

[15] *E.g.*, Sandstrom v. Larsen, 59 Haw. 491, 583 P.2d 971 (1978) (requiring a homeowner to remove the top story of his home because it violated a restrictive height covenant on the property); *see also* Pelosi v. Wailea Ranch Estates, 91 Haw. 478, 985 P.2d 1045 (1999) (establishing a "balancing of the equities" test for enforcing restrictive covenants against innocent successors to original covenantors).

[16] Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Haw. 217, 953 P.2d 1315 (1998).

[17] *See* Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd., 75 Haw. 370, 376-77, 862 P.2d 1048, 1054-55 (1993). This case straddled the transition from the Lum Court to the Moon Court. Originally heard by the Lum Court, with Chief Justice Lum recused, the case was decided on November 19, 1993 by the Moon Court.

[18] Hiner v. Hoffman, 90 Haw. 188, 977 P.2d 878 (1999).

[19] Hawaii's Thousand Friends v. City & Cnty. of Honolulu, 75 Haw. 237, 858 P.2d 726 (1993).

[20] GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998).

[21] Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (*PASH*), 79 Haw. 425, 903 P.2d 1246 (1995).

[22] Unite Here! Local 5 v. City & Cnty. of Honolulu (*Turtle Bay*), 123 Haw. 150, 231 P.3d 423 (2010).

[23] *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982). *Kalipi* is the Richardson Court's seminal opinion on traditional and customary rights.

attack on "western concepts" of property like the concept of fee simple.[24] While the court later retreated from its original sweeping language,[25] one suspects that the near-unanimous and hostile reception of Moon Court decisions by the U.S. Supreme Court in, for example, *Hawaii v. Office of Hawaiian Affairs*[26] is probably somewhat due to such stances, which vary from the language in earlier U.S. Supreme Court decisions.[27]

In the area of water rights, the court ignored both statute and plans in elevating the rights of Native Hawaiians over commercial agricultural uses, largely through a breathtakingly expansive definition and use of the public trust doctrine,[28] reminiscent of the Richardson Court in *Robinson v. Ariyoshi*.[29] The court in *Robinson* prompted even the Ninth Circuit to wring its collective hands for years before finally conceding that Hawai'i could define its property and land use laws so long as it compensates under the U.S. Constitution's Fifth Amendment for the taking of any property rights thereby.

The court expanded the rights of private landowners in the event of a physical taking by eminent domain: the defense of pretextuality—appearing only in a concurrence in the now-infamous *Kelo v. City of New London*[30]—must be considered virtually whenever raised even if the condemnation is for the universally accepted public use of constructing a public road.[31] Because pretextuality has rarely arisen in reported cases, and then only in public *purpose* (not public *use*) cases involving economic revitalization,[32] the decision can only be described as an anomaly.

Finally, for the rest—easements and condominiums—the court encountered generally mundane factual situations, but still set forth useful, if not remarkable, opinions.

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[24] *PASH*, 79 Haw. at 447, 903 P.2d at 1268. This is a concept close to the heart of the U.S. Supreme Court. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (holding that a land use regulation that strips a landowner of "all economically beneficial use" constitutes a taking requiring compensation unless the regulation codifies a nuisance or is part of a state's "background principles" of its law of property, such as customary or public trust law).

[25] State v. Hanapi, 89 Haw. 177, 970 P.2d 485 (1998).

[26] 556 U.S. 163 (2009).

[27] *See Lucas*, 505 U.S. 1003.

[28] *Waiāhole I*, 94 Haw. 97, 9 P.3d 409 (2000).

[29] 65 Haw. 641, 658 P.2d 287 (1982).

[30] 545 U.S. 469, 490-93 (Kennedy, J., concurring).

[31] *Coupe I*, 119 Haw. 352, 198 P.3d 615 (2008), *modified by* Cnty. of Hawai'i v. C & J Coupe Family Ltd. P'ship (*Coupe III*), 124 Haw. 281, 242 P.3d 1136 (2010).

[32] 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1125 (C.D. Cal. 2001).

II. PLANNING AND ZONING

One of the Moon Court's most significant land use law decisions was its expansion of environmental review requirements in *Unite Here! Local 5 v. City and County of Honolulu* (*Turtle Bay*).[33] The significance of the opinion is especially apparent given that Hawai'i's land use regulatory scheme is already the most restrictive and complex in the country.[34]

With state and local governments often involved "in excruciating detail[,]" nearly all development is "complex, lengthy, expensive, and very often uncertain."[35] While some of the difficulties of developing land in Hawai'i go with the territory,[36] some of the Moon Court's decisions—including *Turtle Bay*—have only added to Hawai'i's reputation for hostility to economic development.[37] Consistent with the Moon Court's general trend toward lengthening the environmental review process,[38] *Turtle Bay*'s significance

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[33] 123 Haw. 150, 231 P.3d 423 (2010).

[34] CALLIES, *supra* note 1, at 1. Hawai'i has a state-level land district classification system in addition to county zoning schemes. *Id.* At the state level, all land in Hawai'i is divided into four districts: urban, rural, agricultural, and conservation. *Id.* With forty-eight percent of the state's land designated conservation and forty-seven percent designated agricultural, much development requires costly and reclassification at the state level into the urban (currently five percent of state land) or rural (less than half a percent) districts. *Id.* at 21-22 (citing STATE OF HAW., DEP'T OF BUS., ECON. DEV. & TOURISM, STATE OF HAWAII DATA BOOK 2009 (2010), *available at* http://hawaii.gov/dbedt/info/economic/databook/db2009/section06.pdf (with data current as of Dec. 31, 2006)).

[35] Kenneth R. Kupchak, Gregory W. Kugle & Robert H. Thomas, *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i*, 27 U. HAW. L. REV. 17, 17 (2004). The article notes the problems with developing land in Hawai'i and examines vested rights and zoning estoppel as a "measure of certainty in an otherwise uncertain process and attempt to minimize the risk that the rug can be pulled out unexpectedly from a property owner after the government has given the green light to a use and the owner has started down the path in reliance." *Id.* at 63.

[36] The discovery of Native Hawaiian burials, for example, halts construction and triggers special procedures. *See, e.g.*, HAW. REV. STAT. § 6E-43.6 (2009) (governing procedure after inadvertent discovery of burial sites); *see generally* CALLIES, *supra* note 1, at 280-86.

[37] *See, e.g.*, Jay Fidell, *Labyrinthine Land-Use Laws Suffocating Isle Economy*, HONOLULU STAR-ADVERTISER, Mar. 1, 2011, *available at* http://www.staradvertiser.com/business/20110301_Labyrinthine_land-use_laws_suffocating_isle_economy.html.

[38] *See, e.g.*, Sierra Club v. Office of Planning, 109 Haw. 411, 126 P.3d 1098 (2006). In *Sierra Club*, the court held that the requirement under Hawai'i Revised Statutes section 343-5 that an environmental assessment be prepared at the earliest practical time also pertains to a district boundary amendment (DBA). This result, however, runs contrary to the nature of the DBA, which "provides a landowner with considerable discretion in future uses of the land making it often impossible to so much as speculate about [its] the effects." CALLIES, *supra* note 1, at 30.

stems from the uncertainty it adds to Hawai'i's land use regulatory scheme and the decision's potential to disrupt development.[39]

The Moon Court also considered a number of zoning cases, such as the scope of the Director of the Honolulu Department of Planning and Permitting's (DPP) authority to respond to zoning violations and withhold declaratory orders and variances. In *Save Sunset Beach Coalition v. City & County of Honolulu* (*Sunset Beach*),[40] the court held that a zoning map amendment is unequivocally a legislative act and that in the event of a contradiction between a zoning designation and a development plan, the more restrictive measure controls.[41]

A. Supplemental Environmental Review

Litigation in *Turtle Bay* involved the proposed expansion of the Turtle Bay Resort, a project traceable to the 1980s and delayed largely due to Hawai'i's economic downturn during the 1990s.[42] The project's environmental impact statement (EIS) was prepared pursuant to the Hawai'i Environmental Policy Act (HEPA)[43] and originally accepted by the Department of Land Utilization[44] in 1985.[45] The question before the Moon Court was whether the developer's

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[39] As argued by the developer on appeal, the *Turtle Bay* ruling provides anyone the "legal authority under the SEIS Rules to challenge [any] developments that are outside of the time frame analyzed in its EIS . . . regardless of the depth and breadth of other reviews of project impact, or other state and federal laws governing and protecting the area." Kuilima Resort Company's Motion for Reconsideration at 21, Unite Here! Local 5 v. City & Cnty. of Honolulu (*Turtle Bay*), 123 Haw. 150, 231 P.3d 423 (2010) (No. 28602), *available at* http://www.inversecondemnation.com/files/kuilimarecon.pdf.

[40] 102 Haw. 465, 78 P.3d 1 (2003).

[41] *Id.* at 482, 78 P.3d at 18 ("Because the uses allowed in country zoning[] are prohibited from conflicting with the uses allowed in a State agriculture district, only a more restricted use as between the two is authorized.").

[42] *See* UNIV. OF HAW., ENVIRONMENTAL IMPACT STATEMENT FOR WAIALEE LIVESTOCK RESEARCH CENTER 24 (July 24, 1980), *available at* http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Oahu/1980s/1980-07-OA-EIS-Waialee-Livestock-Research-Center.pdf (noting that Kuilima's 20-year development plan was known of by 1980).

[43] HEPA is designed to provide environmental impact information only, and does not obligate the government or its agencies to act upon that information. Not all actions affecting the environment "trigger" an EIS. The statute lists those that do, like proposed development on state land, or changing the state designation of conservation land to a less protective classification.

[44] The Department of Planning and Permitting is the Department of Land Utilization's successor agency. Note the operative language is "accepted" and not "approved." It is not a discretionary act. The sole question for an "accepting" agency is whether the EIS complies with a statutory checklist.

[45] Unite Here! Local 5 v. City & Cnty. of Honolulu (*Turtle Bay*), 123 Haw. 150, 154, 231 P.3d 423, 427 (2010).

subsequent application for subdivision approval, filed in 2005, triggered a requirement to file a supplemental EIS (SEIS).[46] The Hawai'i Supreme Court ultimately reversed the circuit court and the ICA, both of which had held that an SEIS was not required. The court's opinion, by Chief Justice Moon, substantially expanded the ability of development opponents to challenge the sufficiency of an accepted EIS and delay or derail projects altogether.

After rejecting Kuilima's arguments that the statute of limitations had run and that the Environmental Council lacked the authority to promulgate HEPA rules, the court considered the threshold issue of when an SEIS is required under HEPA regulations.[47] However, instead of clearly stating when an SEIS is required,[48] the court held that because it found a substantive change in the timing of the project, together with changes extrinsic to the project, the next step would be to consider whether the change "may have a significant effect."[49] In so holding, the court significantly expanded the type of change, here the timing of development, that could qualify as "substantial."[50] Thus, every EIS is now subject to a timing condition.

Having found a "substantial change" to the project, the court proceeded to consider whether the change in timing "may have a significant effect" on the environment.[51] However, the court set a low bar for the fulfillment of the "significant effect" requirement under HEPA, reasoning that the "plaintiffs 'need not show that significant effects will in fact occur' but instead need only 'raise[] substantial questions whether a project may have a significant effect[].'"[52] The court ultimately held that this case "clearly 'raises substantial questions[]' . . . regarding changes in the project area and its impact on the surrounding communities."[53]

The court specifically considered the issue of traffic impacts, finding that "the Kuilima expansion project [would] result in traffic impacts that were not contemplated by the 1985 EIS, which predicted impacts only through the year

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[46] *Id.* at 159, 231 P.3d at 432.

[47] *Id.* at 171-77, 231 P.3d at 444-50.

[48] *See* Emily E. Klatt, Traffic, Turtles, and Public Controversy: The Hawaii Environmental Policy Act and Supplemental Environmental Review 23 (May 2010) (unpublished J.D. thesis, Univ. of Haw.) (on file with co-author Klatt) (arguing that the court should have clarified the law on this issue).

[49] *Turtle Bay*, 123 Haw. at 178, 231 P.3d at 451 (quoting HAW. CODE R. § 11-200-26 (1996)).

[50] *Id.* at 177, 231 P.3d at 450.

[51] *Id.* at 178, 231 P.3d at 451.

[52] *Id.* (quoting Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 562 (9th Cir. 2006)) (emphasis omitted). Co-author Klatt argues that this standard is too low of a burden to determine whether an SEIS is warranted. *See* Klatt, *supra* note 48, at 29.

[53] *Turtle Bay*, 123 Haw. at 178, 231 P.3d at 451 (citations omitted).

2000."[54] According to the court, although the traffic impact created by the project itself had not changed, the mere fact that traffic levels have increased since 1985 was sufficient to raise substantial questions about significant effect and thereby necessitate an SEIS.[55] Under such a relaxed standard, virtually any change could establish a new impact. Take, for example, the plaintiff's argument that there may be an increased impact to endangered and threatened species, such as the monk seal and green sea turtle.[56] The court found that post-1985 reports on the monk seals and green sea turtles "clearly qualif[y] as 'new' information or circumstances that were 'not originally disclosed,' not previously considered, and could have a substantial effect on the environment."[57] Finding a "substantial effect," the court reversed the ICA and required that Kuilima file an SEIS.

The Moon Court's decision in *Turtle Bay* both construes the requirement to process an SEIS broadly and lowers the burden of those alleging a HEPA violation. Large-scale development, particularly in the State of Hawai'i, often spans lengthy timelines[58] and is particularly vulnerable to renewed scrutiny of an accepted EIS. The result in *Turtle Bay* undermines finality in the SEIS process, making it a potent tool to halt development otherwise fully approved. Regrettably, this is not an isolated example; the Moon Court has expanded and broadened environmental protection in a number of cases.[59]

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[54] *Id.*

[55] *Id.* at 179, 231 P.3d at 452.

[56] *Id.*

[57] *Id.*

[58] Examples of development spanning decades are common in Hawai'i. The developers of Ko Olina, a 642-acre master-planned resort and residential community in West O'ahu, first submitted an EIS in 1980. Ko Olina Resort and Marina Home Page, Overview, http://www.koolina.com/overview (last visited Mar. 18, 2011); W. BEACH RESORTS, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED WEST BEACH RESORT (Sept. 1980), *available at* http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Oahu/1980s/1980-09-OA-FEIS-West-Beach-Resort.pdf. The Ko Olina plan called for 1680 residential units, 7520 hotel/condominium units, and various other improvements. *Id.* The most recent building in the project, Disney's Aulani Resort, broke ground in 2010—thirty years after the original EIS was accepted. The development of the central O'ahu community of Mililani took over forty years to complete, and even relatively small scale government infrastructure work, such as sewer projects, can routinely take over ten years. Janis L. Magin, *Court's Turtle Bay Ruling Could Affect Other Hawaii Projects*, PAC. BUS. NEWS, Apr. 16, 2010, *available at* www.bizjournals.com/pacific/stories/2010/04/19/story7.html.

[59] *See, e.g.*, Brescia v. N. Shore Ohana, 115 Haw. 477, 168 P.3d 929 (2007) (holding the larger shoreline setback applicable); GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998) (holding that in the coastal zone, the more restrictive use specified in the county zoning or general plan controls); Hawaii's Thousand Friends v. City & Cnty. of Honolulu, 75 Haw. 237, 858 P.2d 726 (1993); *Superferry II*, 120 Haw. 181, 202 P.3d 1226 (2009) (holding that a proposed demolition of structures in a county park would have a significant environmental impact and required an SMA use permit); Sierra Club v. Office of Planning, 109 Haw. 411, 126

B. Zoning Controls

The Moon Court considered a variety of zoning cases, but perhaps its most noteworthy contribution was its extension of the role of the land use plan as the basis for land use control in *Save Sunset Beach Coalition v. City & County of Honolulu* (*Sunset Beach*).[60] The court under Chief Justice Lum had previously established that zoning must conform to development plans in the 1989 decision *Lum Yip Kee, Ltd. v. City and County of Honolulu*.[61] The holding in *Lum Yip Kee* made Hawai'i one of the "states in the forefront of the requirement that zoning must conform to and be based upon comprehensive planning."[62] In *Sunset Beach*, the Moon Court reiterated the important role of planning in Hawai'i land use law. The court held that in the event of a contradiction between a plan and zoning designation, the more restrictive of the two controls, and that both plan map and zoning map amendments are legislative acts.[63]

In *Sunset Beach*, the primary issue on appeal was the plaintiffs' challenge[64] to the Honolulu City Council's grant of rezoning from agricultural to country.[65] The court rejected the plaintiffs' initial argument that rezoning and amendment of a development plan via county ordinance for the benefit of a specific property are quasi-judicial actions, holding instead that both are *always* legislative acts.[66] This result is significant because it affords both zoning and development plans a deferential standard of judicial review and a presumption of validity.[67]

The court thus expanded the consistency doctrine established in *GATRI v. Blane*,[68] which requires that the more restrictive permitted use between a zoning designation and a development plan controls, but only in the coastal zone.[69] *Sunset Beach* explicitly requires compliance with the most restrictive use of the three tiers of land use controls—state land use districts, county zoning, and development plans—anywhere in the state, not just in the coastal

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P.3d 1098 (2006) (holding that a district boundary amendment triggered the requirement for an environmental assessment).

[60] 102 Haw. 465, 469, 78 P.3d 1, 5 (2003).

[61] 70 Haw. 179, 767 P.2d 815 (1989).

[62] Callies, Kalama & Kellett, *supra* note 2, at 123.

[63] *Sunset Beach*, 102 Haw. at 469, 78 P.3d at 5.

[64] *Id.* at 468, 78 P.3d at 4. The plaintiffs included two interest groups, Save Sunset Beach Coalition and Life of the Land, and individual residents of the North Shore. *Id.*

[65] *Id.* at 472, 78 P.3d at 8.

[66] *Id.* at 473-74, 78 P.3d at 9-10.

[67] *Id.* at 468, 78 P.3d at 4.

[68] GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998). The holding in *GATRI* applied only to the coastal zone, largely on the ground that the applicable statute so required.

[69] *Sunset Beach*, 102 Haw. at 482, 78 P.3d at 18.

zone. This outcome is consistent with the recognition of the comprehensive plan as law in *Lum Yip Kee*.

Another important case illustrated that the court would strictly uphold land use controls. In *Korean Buddhist Dae Won Sa Temple v. Sullivan*, the Moon Court considered a challenge to the Director of the Department of Land Utilization's (DLU) refusal to issue a declaratory order or variance to cure a building height violation.[70] The building was a Korean temple's hall, which included an unpermitted extra floor and exceeded the maximum building height allowed by the building permit.[71] The temple was unsuccessful in its first attempt to obtain a variance from the Director of the DLU as well as in its appeal of his decision to the Zoning Board of Appeals (ZBA).[72] The temple subsequently filed a separate variance application; the Director again denied it and the temple unsuccessfully appealed to the ZBA and later the circuit court.[73] The Hawai'i Supreme Court reasoned that the Director's refusal to issue a declaratory ruling did not rise to the applicable standard of "arbitrary and capricious."[74] The court also found that the Director relied on sufficient evidence so that he did not abuse his discretion in denying the variance application.[75] Lastly, the court considered and rejected the temple's claim of a violation on First Amendment free exercise grounds.[76] Despite the harsh result of a requirement to tear down the offending portion of the structure, the court deferred to the Director's ruling and refused to modify it.[77]

III. COASTAL ZONE MANAGEMENT PROTECTION LAW

A. SMA Permits: Clarification of Obligations to Meet Requirements

Given the tension between development of the coastal area and protection of coastal environmental resources, it is unsurprising that the Special Management Area (SMA) permitting process was the focus of a number of Moon Court cases.[78]

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[70] 87 Haw. 217, 953 P.2d 1315 (1998).

[71] *Id.* at 222, 953 P.2d at 1320.

[72] *Id.* at 223, 953 P.2d at 1321.

[73] *Id.* at 227, 953 P.2d at 1325.

[74] *Id.* at 230-31, 953 P.2d at 1328-29.

[75] *Id.* at 235, 953 P.2d at 1333.

[76] *Id.* at 247, 953 P.2d at 1345.

[77] *Id.* at 249, 953 P.2d at 1347.

[78] Morgan v. Planning Dep't, 104 Haw. 173, 86 P.3d 982 (2004); GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998); Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (*PASH*), 79 Haw. 425, 903 P.2d 1246 (1995); Hawaii's Thousand Friends v. City & Cnty. of Honolulu, 75 Haw. 237, 858 P.2d 726 (1993).

In *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (*PASH*), the court held that the Coastal Zone Management Act (CZMA) imposes an obligation to "preserve and protect" Native Hawaiian rights to the extent "reasonable" when issuing an SMA use permit.[79] The court specified that "in order for any conditions placed on a SMA permit issued by the [Hawai'i County Planning Commission] on remand to be deemed 'reasonable,'"[80] they must pass the heightened scrutiny test formulated in *Nollan v. California Coastal Commission*[81] and *Dolan v. City of Tigard*.[82] *PASH* establishes that the requirements of an essential nexus to a legitimate state interest (set forth in *Nollan*) and rough proportionality to the impact of the proposed development (set forth in *Dolan*) apply to conditions placed on land development under the CZMA.[83] The decision is also notable for its extended treatment of Native Hawaiian traditional and customary rights guaranteed by the 1978 State Constitution even though the issue before the court was largely one of standing to participate in a county contested case hearing.[84]

In *GATRI v. Blane*,[85] the Hawai'i Supreme Court held that a party seeking an SMA permit must demonstrate general plan and zoning consistency under Hawai'i Revised Statutes section 205A-26(2)(C).[86] GATRI, a Hawai'i limited partnership, applied for an SMA permit to develop a commercial building on land located within Maui's SMA area.[87] The Maui County Department of Planning Director denied the permit,[88] and the trial court reversed,[89] finding that development consistent with the governing zoning ordinance was per se consistent with the general plan.[90] However, the Hawai'i Supreme Court ultimately rejected the trial court's interpretation of the statute, finding it inconsistent with fundamental principles of statutory construction.[91] The Moon Court specified that county general plans have the "force and effect of law insofar as the statute requires that a development within the SMA must be

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[79] *PASH*, 79 Haw. at 435, 903 P.2d at 1256.

[80] *Id.* at 436, 903 P.2d at 1257.

[81] 483 U.S. 825 (1987).

[82] 512 U.S. 374 (1994).

[83] *PASH*, 79 Haw. at 436, 903 P.2d at 1257.

[84] *See id.* at 437-51, 903 P.2d at 1258-72.

[85] 88 Haw. 108, 962 P.2d 367 (1998).

[86] Hawai'i Revised Statutes section 205A-26(2)(C) requires "[t]hat the development [be] consistent with the county general plan and zoning. Such a finding of consistency does not preclude concurrent processing where a general plan or zoning amendment may also be required."

[87] *GATRI*, 88 Haw. at 109, 962 P.2d at 368.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 114, 962 P.2d at 374.

consistent with the general plan."[92] Thus, after *GATRI*, SMA permits are subject to a double consistency requirement.

B. SMA Permits and Process: Strict Construction of Procedural Requirements

The Moon Court continued to construe the procedural requirements of the CZMA strictly.[93] In *Hawaii's Thousand Friends v. City & County of Honolulu*,[94] the City and County of Honolulu's (City) Department of Land Utilization (DLU) determined that the City's Department of Parks and Recreation (DPR) was not required to obtain an SMA use permit for its proposed demolition of several structures on a parcel within the coastal zone management area.[95] Hawaii's Thousand Friends (Friends), a community organization, sought a declaratory order that an SMA use permit was required for the demolition.[96] The First Circuit Court held that "where demolition of existing structures is part of an overall project, and where such project may have a significant environmental impact on the special management area, the demolition is 'development' within the meaning of chapter 25," and thus an SMA permit is required.[97] The Hawai'i Supreme Court rejected the City's contention that Friends was required to exhaust its administrative remedies by seeking review by the Zoning Board of Appeals (ZBA) prior to appealing its case to the circuit court.[98] The court reasoned that the jurisdiction of the ZBA did not include SMA review, because section 6-909(a) of the Honolulu Charter "restricts appeals to the ZBA from those DLU actions concerning 'the administration of the zoning and subdivision ordinances[.]'"[99] The court also rejected the City's second jurisdictional argument that because Friends had available to it the statutory remedy provided in Hawai'i Revised Statutes section 205A-6, the circuit court erred in granting jurisdiction to consider relief by declaratory judgment under Hawai'i Revised Statutes section 632-1.[100]

In *Morgan v. Planning Department*, the Kaua'i County Planning Commission granted an SMA use permit to build a rock revetment on shoreline property, but the landowner instead built a seawall.[101] Several years later,

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92 *Id.*
93 Callies, Kalama & Kellett, *supra* note 2, at 134.
94 75 Haw. 237, 858 P.2d 726 (1993).
95 *Id.* at 238-39, 858 P.2d at 728.
96 *Id.* at 239, 858 P.2d at 728.
97 *Id.* at 241, 858 P.2d at 729.
98 *Id.* at 244, 858 P.2d at 730.
99 *Id.*
100 *Id.* at 245, 858 P.2d at 731.
101 104 Haw. 173, 175, 86 P.3d 982, 984 (2004).

neighboring landowners complained that the revetment had caused the erosion of beach area in front of their properties.[102] After a number of public hearings, "the Planning Commission issued its findings of fact, conclusions of law, decision and order[,]" and modified a condition of the original SMA permit.[103] On appeal, the circuit court held that the Planning Commission lacked authority to modify an SMA permit.[104] The Hawai'i Supreme Court reversed, reasoning that a Hawai'i planning commission "has authority to reconsider a validly issued SMA [u]se permit, inasmuch as the Planning Commission's enabling statute requires that the Planning Commission carry out the policies and objectives of the [Coastal Zone Management Act.]"[105]

IV. PUBLIC TRUST DOCTRINE

The concept of the public trust is a common law doctrine that requires the state to hold title to certain natural resources in trust for the public. Hawai'i's public trust doctrine evolved under a "complex interweaving of unique principles of Hawai'i law . . . [with] shared aspects of American jurisprudence," and can conceptually be traced back to the ancient Hawaiian system of water rights.[106] In 1899, the Republic of Hawai'i's high court introduced the U.S. Supreme Court's rule from *Illinois Central Railroad Co. v. Illinois*[107] to Hawai'i, holding that title to the submerged lands of Honolulu Harbor were "held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[108] Subsequent cases illustrated the firm establishment of the doctrine in Hawai'i's jurisprudence.[109]

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[102] *Id.* at 176, 86 P.3d at 985.

[103] *Id.* at 177, 86 P.3d at 986.

[104] *Id.*

[105] *Id.* at 182, 86 P.3d at 991.

[106] Keala C. Ede, *He Kanawai Pono No Ka Wai (A Just Law for Water): The Application and Implications of the Public Trust Doctrine in In Re Water Use Permit Applications*, 29 ECOL. L.Q. 283, 288 (2002).

[107] 146 U.S. 387 (1892). The U.S. Supreme Court noted that it was "the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found." *Id.* at 435. *See generally* Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 ARIZ. ST. L.J. 849 (2001).

[108] King v. Oahu Ry. & Land Co., 11 Haw. 717, 723 (1899) (quoting *Illinois Central R.R. Co.*, 146 U.S. at 452).

[109] *See, e.g.*, State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) ("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.").

Groundwater resources, however, were not recognized as part of the State's public trust. Historically, Hawai'i's territorial courts instead recognized "absolute [private] ownership" over groundwater, so that an overlying landowner could pump

> all of the water that naturally flows from the well or that can be drawn therefrom by any pump, however powerful, and . . . he may use the water as he pleases and may conduct it to supply lands and communities at any distance from his own piece or parcel of land and may even waste it.[110]

The rule of absolute ownership was abandoned in 1929, when the court adopted a "correlative rights" rule: an overlying landowner could use as much groundwater as was needed for the overlying property, so long as such usage did not interfere with the rights of other surface owners.[111] Correlative rights remained a cornerstone of Hawai'i water law for over seventy years, until the Moon Court's voluminous *Waiāhole I* decision in 2000.[112]

The litigation surrounded the Waiāhole Ditch System, which had diverted groundwater from windward to central O'ahu for sugar cultivation since the early 1900s.[113] After the O'ahu Sugar Company, a primary user of the ditch system, announced it would cease operations in 1993, various groups petitioned for use or conservation of the newly available water.[114] Over two dozen applications from leeward farmers, windward community associations, and surface owners, among others,[115] were sent to a newly-established Water Resource Management Commission and eventually consolidated into one exhaustive contested case hearing lasting nearly a year.[116] The Commission allocated the water largely to leeward agricultural and non-agricultural uses and "system losses," for "proposed agricultural reserve," or a "non-permitted ground water buffer" to be released in windward streams.[117] Several parties appealed the allocation, including the nonagricultural users widely perceived to have "won" before the Commission.

The Hawai'i Supreme Court criticized not only portions of the Commission's allocation, but also its "permissive view towards stream diversion."[118] Noting that it had "rejected the idea of public streams serving as convenient reservoirs

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[110] City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912, 922 (1929), *overruled by Waiāhole I*, 94 Haw. 97, 177, 9 P.3d 409, 489 (2000).

[111] *City Mill Co.*, 30 Haw. at 923-28.

[112] *Waiāhole I*, 94 Haw. 97, 9 P.3d 409 (2000). *See generally* David L. Callies & Calvert G. Chipchase, *Water Regulation, Land Use and the Environment*, 30 U. HAW. L. REV. 49 (2007).

[113] *Waiāhole I*, 94 Haw. at 111, 9 P.3d at 423.

[114] *Id.* at 112, 9 P.3d at 424.

[115] Callies & Chipchase, *supra* note 112, at 67.

[116] *Waiāhole I*, 94 Haw. at 113, 9 P.3d at 425.

[117] *Id.* at 118, 9 P.3d at 430.

[118] *Id.* at 160, 9 P.3d at 472.

for offstream private use,"[119] the court found that the Commission's decision had "largely defeat[ed] the purpose of the instream use protection scheme set forth in [the Hawai'i Water Code]"[120] and reiterated that "[e]very cessation to immediate offstream demands made by the Commission increases the risk of unwarranted impairment of instream values, ad hoc planning, and arbitrary distribution."[121] In so finding, the court remanded the case to the Commission for additional findings and conclusions regarding the evidence and methodology used by the Commission in making its allocations.[122] Ultimately, the Hawai'i Supreme Court vacated most of the Commission's commercial allocations, including many initially provided to leeward O'ahu farmers. Although the majority of growth (as projected by O'ahu's general and development plans, with which the Water Commission was required to comply) was to occur in leeward O'ahu, the court nevertheless found such allocations unsupported by the record.[123]

More important than the allocations, however, was the court's dramatic expansion of the public trust and its use to trump the statutory hierarchy painstakingly established in the Hawai'i Water Code. The court uncritically accepted the Commission's view that the public trust applied to all "water resources" within the state, regardless of navigability.[124] It relied on (1) Hawai'i constitutional amendments that the court "interpreted" as extending the public trust to underground water,[125] and (2) a historical interpretation that the Kingdom of Hawai'i had reserved title to water to itself, so that groundwater rights did not transfer with changes in ownership.[126] The court committed itself to balancing public and private purposes with a presumption in favor of public use, access, and enjoyment, while paying scant attention to the water code's careful hierarchical allocation framework coupled with statutorily required reliance on county plans.[127] New standards were also created. Surface owners in non-designated areas were required to obtain Commission approval for any requested withdrawal to determine whether it was "necessary for reasonable use."[128] This effectively put surface owners in no better position than any other applicant.

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[119] *Id.* at 155, 9 P.3d at 467.
[120] *Id.* at 154, 9 P.3d at 466.
[121] *Id.*
[122] Callies & Chipchase, *supra* note 112, at 69.
[123] *Id.* at 72.
[124] *Waiāhole I*, 94 Haw. at 128-35, 9 P.3d at 440-47.
[125] Callies & Chipchase, *supra* note 112, at 69.
[126] *Waiāhole I*, 94 Haw. at 128-35, 9 P.3d at 440-47.
[127] *Id.* at 142, 9 P.3d at 454.
[128] *Id.* at 178, 9 P.3d at 490.

Both premises relied upon by the court are seriously flawed. First, the constitutional amendments of the 1970s cannot "inform private property rights established over a hundred years earlier" during the Great Māhele.[129] Thus, "[t]he titles that passed to private owners from the Kingdom of Hawai'i cannot be rewritten to exclude what at the time of transfer was an appurtenance of real property."[130] Second, Hawai'i territorial decisions held that the Kingdom did *not* retain ownership of groundwater when real property was transferred to a private owner.[131] Therefore, groundwater *was* owned by private individuals, subject to the usage limitations of correlative rights. The court's *Waiāhole I* decision, broadening the public trust and reducing a surface owner's ability to make reasonable use of underlying water, ultimately marked the loss of an individual owner's property rights, resulting in a "taking" in every sense of the word.

V. EMINENT DOMAIN

In a bow to securing private property rights, the court added a substantive requirement for every governmental exercise of eminent domain: consideration of a pretextuality defense, added on the strength of a brief line in a concurring opinion from the U.S. Supreme Court.[132] The remaining cases in this category dealt with problems raised by the 1967 Land Reform Act,[133] which used condemnation to transfer fee title in real property from lessors to lessees in an attempt to eradicate what the Hawai'i Legislature deemed the "social and economic evils of a land oligopoly."[134]

A. "Public Use," "Public Purpose," and Pretext

The significance of the Moon Court's decision in *County of Hawai'i v. C & J Coupe Family Limited Partnership* (*Coupe I*)[135] requires a basic understanding of eminent domain, the government's ability to take a private citizen's land or an interest in land. The main constitutional protections to such an action are provided by the Fifth Amendment to the U.S. Constitution, requiring that any private property taken must be for "public use" and accompanied by payment of "just compensation."[136]

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[129] Callies & Chipchase, *supra* note 112, at 73.

[130] *Id.*

[131] *Id.* at 74.

[132] *See* Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring).

[133] HAW. REV. STAT. ch. 516 (2006 & Supp. 2010).

[134] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241-42 (1984).

[135] 119 Haw. 352, 198 P.3d 615 (2008).

[136] U.S. CONST. amend. V.

However, following the U.S. Supreme Court's virtual elimination of the public use clause of the Fifth Amendment in *Hawaii Housing Authority v. Midkiff*,[137] and the subsequent confirmation in *Kelo v. City of New London* that not only did public use equal public purpose, but that "economic revitalization" or "rejuvenation" constituted such a public purpose,[138] one check arguably remained on the use of eminent domain: pretext.[139] Although a condemnation need only be "rationally related to a conceivable public purpose," a transfer of property via eminent domain that "intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits . . . [remained] forbidden by the Public Use Clause."[140]

The poster child case of pretextual condemnation involved the condemnation of one retailer to placate another, more influential, retailer in California. In *99 Cents Only Stores v. Lancaster Redevelopment Agency*,[141] Costco moved into a shopping mall as an anchor tenant, followed by a 99 Cents Only Store into a nearby vacant space.[142] Costco later demanded that it be allowed to expand into the space leased by the 99 Cents Only Store.[143] Unable to reach an agreement, the city ultimately initiated "friendly eminent domain proceedings" to acquire the space for Costco's expansion.[144] The U.S. District Court for the Central District of California noted the low *Midkiff* standard of "rationally related to a conceivable public purpose," but found that "[n]o judicial deference is required . . . where the ostensible public use is demonstrably pretextual."[145] The condemnation of the 99 Cents Only Store was nothing more than the "naked transfer of property from one private party to another."[146] The court also rejected the city's feeble argument that losing Costco could result in "future blight" to the area[147] and enjoined the condemnation.[148]

While the purpose of some condemnations for urban renewal and economic revitalization may well prove to be pretextual, most condemnations for *use by the public* are unequivocally *not* pretextual, such as condemnation to build or expand public roads. Overturning all courts below, the Moon Court[149] found

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[137] 467 U.S. at 241.

[138] 545 U.S. 469, 483 (2005).

[139] *Id.* at 490 (Kennedy, J., concurring).

[140] *Id.*

[141] 237 F. Supp. 2d 1123, 1125 (C.D. Cal. 2001).

[142] *Id.* at 1126.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 1129.

[146] *Id.*

[147] *Id.* at 1130.

[148] *Id.* at 1131.

[149] Chief Justice Moon dissented from the majority's holding that the "asserted public purpose was pretextual." *Coupe I*, 119 Haw. 352, 390, 198 P.3d 615, 653 (2008) (Moon, C.J.,

public use road condemnations potentially pretextual in *Coupe I*.[150] There, as part of the statutorily-authorized development agreement[151] to develop the Hokuli'a luxury golf-course community project on the island of Hawai'i,[152] the developer had agreed to construct a bypass road to alleviate traffic congestion and create additional access from existing roads.[153] After the developer failed to procure all the necessary land through negotiation, the developer requested that the County initiate condemnation proceedings for the hold-out parcels in accordance with the terms of its statutory development agreement with the County of Hawai'i, which had planned for such a bypass road for decades.[154] In challenging the government's use of eminent domain, a hold-out landowner claimed that the condemnation was "instituted for the private benefit of [the developer]," in violation of the public use clause of the U.S. Constitution.[155]

In an opinion at odds with nearly all jurisdictions, including the U.S. Supreme Court,[156] a three-justice majority of the Hawai'i Supreme Court[157] held that a public highway was not necessarily a public *use*. According to the court, "although our courts afford substantial deference to the government's asserted public purpose for a taking in condemnation proceeding, where there is evidence that the asserted purpose is pretextual, courts should consider a landowner's defense of pretext."[158] Requiring courts to consider a pretext argument for a public use—here a road condemnation—is at odds with decades of precedent.[159] The U.S. Supreme Court stated as early as 1923: "That a

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dissenting).

[150] 119 Haw. 352, 198 P.3d 615. *See generally* Robert H. Thomas, *Recent Developments in Public Use and Pretext in Eminent Domain*, 41 URB. LAW. 563, 565-68 (2009).

[151] *See generally* DAVID L. CALLIES, DANIEL J. CURTIN, JR. & JULIE A. TAPPENDORF, BARGAINING FOR DEVELOPMENT 95-115 (2003) (discussing development agreements); HAW. REV. STAT. § 46-123 (1993). During the development approval process, developers and local government face two problems: the local government's inability to exact dedications of land or fees to mitigate the impact of the development without establishing a clear connection between the proposed development and the dedication or fee, and the developer's inability to rely on a vested right to continue the development until the project begins. Development agreements, often authorized by statute (as in Hawai'i), can address both problems. *Id.* at 95.

[152] *Coupe I*, 119 Haw. at 356, 198 P.3d at 619.

[153] *Id.*

[154] *Id.* at 359, 198 P.3d at 622.

[155] *Id.*

[156] *See* Rindge Co. v. Los Angeles Cnty., 262 U.S. 700 (1923).

[157] The majority consisted of Justices Nakayama, Acoba, and Duffy. Justice Levinson joined in Chief Justice Moon's dissent.

[158] *Coupe I*, 119 Haw. at 357, 198 P.3d at 620.

[159] *See, e.g.*, Rogren v. Corwin, 147 N.W. 517, 519 (Mich. 1914) ("That private property may be constitutionally taken for public highways cannot be doubted, and is not denied."); Rodgers Dev. Co. v. Town of Tilton, 781 A.2d 1029, 1034 (N.H. 2001) ("It is well settled that whenever property is taken for a highway, it is for the public use[.]") (internal quotation marks

taking of property for a highway is a taking for public use has been universally recognized, from time immemorial."[160]

Nevertheless, the Hawai'i Supreme Court remanded to the circuit court to take evidence on pretext. That court ultimately found that the County's asserted public purpose was *not* pretext for a primarily private benefit.[161] Citing cases from several jurisdictions, the court unsurprisingly found "the record reflect[ed] that [the developer] was not the only entity that stood to benefit from the construction of the Bypass."[162] In fact, over the decades, many studies and plans undertaken by the County had recognized the public's need for the bypass.[163] While the pretext claim in *Coupe I* ultimately failed, the fact that it was so much as entertained by the Hawai'i Supreme Court over condemnation of land for a public road demonstrates that pretext is now a feasible property owner's defense to *any* condemnation in Hawai'i.

B. Eminent Domain for "Land Reform"

The other major eminent domain cases during the Moon era addressed issues initially raised by the 1967 Land Reform Act,[164] a statute that effectively used condemnation to transfer fee title in real property from lessors to lessees. The Legislature had found that a mere twenty-two landowners owned 72.5% of fee simple titles on O'ahu, and that across the state seventy-two private landowners owned 47% of the state's land.[165] In order to reduce the "social and economic evils of a land oligopoly," the Legislature passed the Act to force the transfer of fee simple interests to the lessee-owners of the respective residences atop the leasehold.[166] The U.S. Supreme Court upheld this scheme in *Hawaii Housing Authority v. Midkiff*, stating that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers . . . ."[167] Thus, with the confusing conflation of police power and public use in *Berman v. Parker*,[168] transfers of title under the Land Reform Act passed the public use test even though the result was to transfer an interest in land from one private owner to another, thereby opening the door for arguments equating public *use* (the constitutional term in the Fifth Amendment) with public *purpose*.

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and citation omitted).

[160] *Rindge Co.*, 262 U.S. at 706.

[161] *Coupe III*, 124 Haw. 281, 242 P.3d 1136 (2010).

[162] *Id.* at 298, 242 P.3d at 1153.

[163] *Id.* at 298-99, 242 P.3d at 1153-54.

[164] HAW. REV. STAT. ch. 516 (2006 & Supp. 2010).

[165] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984).

[166] *Id.* at 241-42.

[167] *Id.* at 242.

[168] 348 U.S. 26 (1954).

The Moon Court took up several subsequent challenges to lease-to-fee conversions. In *Richardson v. City and County of Honolulu*, plaintiffs challenged the Honolulu City Council's enactment of the county-level version of the Land Reform Act.[169] Plaintiff landowners alleged that the City lacked authority to pass the ordinance because of preemption by various state statutes and because the State had not delegated such authority to the City.[170] The *Richardson* court rejected such arguments, instead finding the allegedly conflicting statutes "neither limit the counties' (and therefore the City's) general power of eminent domain . . . nor divest them of the authority to enact ordinances allowing for the condemnation of land for any particular public purpose."[171] The court also found that the City had not improperly delegated its power of eminent domain to the Department of Housing and Community Development:[172] the Department was empowered merely to designate land for condemnation, facilitating the City's actual exercise of the power of eminent domain.[173]

In *Housing Finance and Development Corp. v. Castle*,[174] the court addressed whether the Hawai'i Land Reform Act "remained constitutional, *i.e.*, whether the HLRA continues to comport with the 'public use' clauses" of the U.S. and Hawai'i Constitutions.[175] Trustees of the Castle Estate, which held the leased fee interest in the residential houselots subject to the condemnation, brought the challenge.[176] Up against the unfavorable precedent of *Midkiff*[177] and *Lyman*,[178] which upheld the constitutionality of the Act, plaintiffs argued that "[n]either [*Midkiff* nor *Lyman*] held that henceforth or forever into the future every condemnation of a leased fee pursuant to [the HLRA] would necessarily be for a public purpose."[179] The trustees urged that condemnation of the specific houselots in question did not satisfy the public use requirement, but the court rejected the contention that "HLRA can vacillate in and out of constitutionality depending upon the condition of the residential real estate market in Hawai'i at

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[169] 76 Haw. 46, 51-52, 868 P.2d 1193, 1198-99 (1994). This was codified as chapter 38 of the Honolulu Revised Ordinances and applies to multi-family developments held as condominiums, cooperative housing developments, and planned unit developments. HONOLULU, HAW., REV. ORDINANCES ch. 38 (1992).

[170] *Richardson*, 76 Haw. at 53, 868 P.2d at 1200.

[171] *Id.* at 57, 868 P.2d at 1204.

[172] *Id.* at 58-59, 868 P.2d at 1205-06.

[173] *Id.*

[174] 79 Haw. 64, 898 P.2d 576 (1995).

[175] *Id.* at 73, 898 P.2d at 585.

[176] *Id.* at 78, 898 P.2d at 590.

[177] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

[178] Haw. Hous. Auth. v. Lyman, 68 Haw. 55, 704 P.2d 888 (1985).

[179] *Hous. Fin. & Dev. Corp.*, 79 Haw. at 86, 898 P.2d at 598.

any given moment."[180] Instead, the court reiterated that under the U.S. Supreme Court's standard in *Midkiff*, "it is irrelevant whether the legislature was empirically correct in the first place, so long as the legislature *rationally could have believed* that it was."[181]

The court later rejected a church's federal Religious Land Use and Institutionalized Persons Act (RLUIPA) defense to eminent domain under the Act in *City & County of Honolulu v. Sherman*.[182] Plaintiff church claimed lease-to-fee conversion was a land use regulation that impermissibly interfered with the church's exercise of religion.[183] The court found instead that chapter 38 condemnation was not a "land use regulation" under RLUIPA,[184] demonstrating the gap in RLUIPA under which a regulation is subject to strict scrutiny but an appropriation of land is apparently permissible.[185] The *Sherman* court also addressed the church's claim that the City had improperly delegated the power of eminent domain to the City Department of Community Service (DCS).[186] The church attempted to distinguish the *Richardson* holding on the issue as mere facial consideration, and in practice, the DCS's determination to condemn land was being interpreted by the City as a legal mandate to initiate the condemnation proceedings.[187] The court found that *Richardson*'s holding was still applicable and that DCS's actions merely facilitated the City's ultimate act of condemnation.[188]

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[180] *Id.* at 87, 898 P.2d at 599.

[181] *Id.* at 90, 898 P.2d at 602 (emphasis in original).

[182] 110 Haw. 39, 129 P.3d 542 (2006). RLUIPA is a federal statute designed to protect religious institutions from regulations—specifically including zoning—which adversely affect the practice of religion. For a detailed explanation of RLUIPA and a survey of cases, see RLUIPA READER: RELIGIOUS LAND USES, ZONING, AND THE COURTS (Michael S. Giaimo & Lora A. Lucero eds., 2009).

[183] *Sherman*, 110 Haw. at 55-56, 129 P.3d at 558-59.

[184] *Id.* at 61, 129 P.3d at 564.

[185] *See id.*; *see also* Robert H. Thomas, *2006 Land Use in Review: Land Reform Revisited*, INVERSECONDEMNATION.COM (Dec. 30, 2006), http://www.inversecondemnation.com/inversecondemnation/2006/12/2006_land_use_i_3.html ("It does seem odd for Congress to have excluded an outright *appropriation* of a church's property, while requiring strict scrutiny for mere *regulation*. If onerous regulatory decisions should be judged strictly by the courts to insure they do not interfere with the free exercise of religion, how is that actually depriving a church of its property should be immune from such scrutiny?" (emphases in original)).

[186] *Sherman*, 110 Haw. at 69, 129 P.3d at 572.

[187] *Id.*

[188] *Id.* at 70, 129 P.3d at 573.

VI. CONDOMINIUM APARTMENTS[189]

By way of an introduction, the characteristics of a condominium property regime are (1) individual ownership of a unit in the project, (2) an undivided interest in the common elements of the project (the swimming pool, parking lot, and underlying land, for example), and (3) some form of agreement between the owners regulating how the project will be run. It becomes easy to see that these characteristics present unique challenges.[190] With Hawai'i having the highest percentage of condominium unit occupancy in the nation, it is no surprise that the Moon Court took several cases to flesh out the mechanics of condominium associations.

Because condominium ownership is characterized by mixed joint and separate ownership, determining the proper party to bring a lawsuit is not always clear. In *Alford v. City and County of Honolulu*,[191] owners in a condominium project sued the City in an attempt to restore the real property tax classification of their units from "hotel and resort" back to "apartment."[192] The case turned on whether the Board of Directors had standing to authorize a representative to bring appeals on behalf of the owners.[193] Acknowledging that the statutory directive allowed a board to bring an action that related to more than one apartment, the City argued that county law giving only a taxpayer the right to bring an appeal should prevail.[194] The Hawai'i Supreme Court rejected this argument and held that the Board of Directors of the condominium association had standing to authorize a representative to bring tax appeals on behalf of the owners of fee units.[195]

Condominium operations procedure, in terms of how an association meeting should be conducted, also came before the court. Association meetings usually abide by parliamentary procedure, most commonly as laid out by *Robert's Rules of Order*.[196] In *Alvarez Family Trust v. Association of Apartment Owners of Kaanapali Alii*,[197] a board's voting mechanism was challenged.[198]

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[189] "Condominium" is a form of ownership, not a residential unit, as any careful real estate lawyer knows, but for the purposes of this section we use it as the vernacular noun it has become.

[190] *State Savings & Loan Ass'n v. Kauaian Dev. Co.*, 50 Haw. 540, 445 P.2d 109 (1968), was the first case to apply "condominium law" in Hawai'i. The opinion paved the way for condominiums to be received in the common law system in Hawai'i.

[191] 109 Haw. 14, 122 P.3d 809 (2005).

[192] *Id.* at 17, 122 P.3d at 812.

[193] *Id.* at 23-24, 122 P.3d at 818-19.

[194] *Id.* at 24, 122 P.3d at 819.

[195] *Id.* at 25, 122 P.3d at 820.

[196] 1 GARY A. POLIAKOFF, LAW OF CONDOMINIUM OPERATIONS § 3:49 (1988).

[197] 121 Haw. 474, 221 P.3d 452 (2009).

[198] *Id.* at 478, 221 P.3d at 456.

Of the seven directors present at the meeting regarding "a 'pricing policy' setting the price at which the Association would sell its leased fee interests to its members,"[199] three voted "for," two voted "against," and two abstained.[200] The Board deemed the policy approved.[201] The court found that the pricing policy was not validly passed because the Association's bylaws adopted a "members present" requirement for the Board to act,[202] so that the presence of members must be taken into account when calculating the majority.[203] Because there were seven directors at the meeting, four affirmative votes were required to pass the measure.[204] In so holding, the court rejected the owners' argument that, pursuant to *Robert's Rules of Order*,[205] because the two members who abstained did so due to a conflict of interest, their presence should not have been counted.[206] The court held that the Association's adoption of the "members present" method of tabulating votes was allowed by *Robert's*, and was therefore proper.[207]

In *Association of Apartment Owners of Maalaea Kai, Inc. v. Stillson*,[208] the Association brought a foreclosure action against the owners for failure to pay the monthly conversion surcharge after the Association purchased the leased fee interest.[209] The defendants claimed the measure was not validly passed based on how the association calculated owner votes.[210] Overruling the trial court, the Hawai'i Supreme Court held that seventy-five percent ownership approval was statutorily sufficient,[211] and that the Association could rely on the *method* of voting specified by their bylaws.[212] Furthermore, the court found that even if there had been a defect in procedure, the purchase of the leased fee interests by over seventy-five percent of the owners in the condominium project constituted ratification.[213]

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[199] *Id.* at 476, 221 P.3d at 454.

[200] *Id.* at 479, 221 P.3d at 457.

[201] *Id.* at 478, 221 P.3d at 456.

[202] *Id.* at 484, 221 P.3d at 462.

[203] *Id.*

[204] *Id.*

[205] Hawai'i law requires that all association and board of directors meetings shall be conducted in compliance with the most current edition of *Robert's Rules of Order*. HAW. REV. STAT. § 514A-82(a)(16) (Supp. 2010).

[206] *Alvarez*, 121 Haw. at 484, 221 P.3d at 464.

[207] *Id.*

[208] 108 Haw. 2, 116 P.3d 644 (2005).

[209] *Id.* at 4, 116 P.3d at 646.

[210] *Id.* at 5-7, 116 P.3d at 647-49.

[211] *Id.* at 7, 116 P.3d at 649. Hawai'i Revised Statutes section 514C-6(a) requires seventy-five percent approval.

[212] *Id.* at 9, 116 P.3d at 651.

[213] *Id.* at 15, 116 P.3d at 657.

Finally, in *Arthur v. Sorensen*,[214] the issue was whether Hawai'i's Condominium Property Act[215] governed a particular transaction.[216] The plaintiffs sold options in a condominium project to defendant buyers, with final payment due upon issuance of the final public report or a year after execution of the reservation and sales agreements.[217] After a final report was issued, the buyers sought to back out of the transaction, claiming the letter agreement was invalid.[218] The buyers claimed the Condominium Property Act governed the sale of the options they purchased and that they could escape their obligations because they entered the agreement before the developer issued its final report.[219] Although the court found the buyers were not bound to perform under the reservation and sales agreements, they could not rely on the Act to nullify the letter agreements.[220] The clear intent of the Act was to protect prospective purchasers from "unscrupulous and/or fiscally irresponsible developers by requiring all deposits to be placed in escrow."[221] The court found that these references to "escrow" belied the buyer's argument that they fell within the protected class because (1) their money was not placed in escrow, and (2) upon cancellation there would be nothing to return to the buyers since they had purchased an opportunity rather than actual apartments.[222] Therefore, any lost opportunity costs associated with the purchase of the options had to fall upon the buyers rather than the sellers.[223]

VII. EASEMENTS

In two cases, the court demonstrated its proclivity for preserving access at the expense of a landowner's right to exclude.

A. Easements Based on Ancient or Historical Use

The Hawai'i Supreme Court in 2004 addressed easements and kuleana access rights in *Bremer v. Weeks*.[224] The plaintiff, who owned kuleana land, claimed a right of way over a portion of a trail owned by defendant.[225] The

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[214] 80 Haw. 159, 907 P.2d 745 (1995).
[215] HAW. REV. STAT. ch. 514A (Supp. 2010).
[216] *Arthur*, 80 Haw. at 163, 907 P.2d at 749.
[217] *Id.* at 161, 907 P.2d at 747.
[218] *Id.*
[219] *Id.* at 163, 907 P.2d at 749.
[220] *Id.* at 166, 907 P.2d at 752.
[221] *Id.* at 166-67, 907 P.2d at 752-53.
[222] *Id.*
[223] *Id.* at 167, 907 P.2d at 753.
[224] 104 Haw. 43, 85 P.3d 150 (2004).
[225] *Id.* at 48, 85 P.3d at 155.

plaintiff's claim was based on ancient or historical use under Hawai'i Revised Statutes section 7-1[226] as well as an easement based on necessity, despite having access via another trail.[227]

Reversing the lower court, the Hawai'i Supreme Court acknowledged that "[n]o Hawai'i cases specifically set out the parameters for defining what is sufficient to constitute 'ancient' or 'historic' use for purposes of establishing a claim to a right of way under [Hawai'i Revised Statutes section] 7-1."[228] The court rejected the lower court's suggestion that such a "stringent evidentiary showing" was required.[229] Rather than require evidence of "*who* opened the trail, *when* that event took place, under *what authority,* for *whose benefit,* the *duration* of any use, the *cessation* of any use and the *connection* between the trail and Plaintiff's *kuleana* in terms of use,"[230] the court found that the plaintiff had raised a genuine issue of material fact as to ancient or historic usage based in part on a 1908 map showing a horse trail that allegedly represented historical access.[231] Thus, although the plaintiff did not introduce any evidence regarding use of the trail by predecessors or others, as was presented in the 1968 case *Palama v. Sheehan*,[232] the court found that summary judgment was not appropriate.[233]

The court also found the plaintiff's necessity claim was ripe,[234] since the agreements with the previous owners constituted a mere revocable license.[235] According to the court, "a claim of easement by necessity will not be defeated on the basis that an alternate route to the claimant's land exists where the claimant does not have a legally enforceable right to use the alternate route."[236]

B. Undefined Easements

In *Clog Holdings, N.V. v. Bailey*, the owners of ocean cliff property on Maui subdivided their land and created a pedestrian access easement across one lot in

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[226] Section 7-1 recognizes Native Hawaiian gathering rights, specifically "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 . . . . The people shall also have a right to drinking water, and running water, and the right of way." HAW. REV. STAT. § 7-1 (2009).

[227] *Bremer*, 104 Haw. at 48-49, 85 P.3d at 155-56.

[228] *Id.* at 64, 85 P.3d at 171.

[229] *Id.* at 65, 85 P.3d at 172.

[230] *Id.* (emphases added).

[231] *Id.* at 64-65, 85 P.3d at 171-72.

[232] 50 Haw. 298, 440 P.2d 95 (1968) (recognizing kuleana landowner access rights).

[233] *See Bremer*, 104 Haw. at 65, 85 P.3d at 172.

[234] *Id.* at 69, 85 P.3d at 176.

[235] *Id.*

[236] *Id.* at 67, 85 P.3d at 174.

favor of two other lots.[237] Their intent was twofold: to create a marketing strategy to ensure there was beach and ocean access to the other lots, and to ensure their own access to the beach and ocean should they retain any of their property.[238] Former Beatle George Harrison ultimately purchased the servient estate, and, apparently unaware of the encumbrance, built a house within one hundred feet of the public easement.[239] While his realtor claimed Harrison had been informed, and the real estate sales contract noted the easement, Harrison's title insurance indicated the lot was free of any encumbrances and it failed to appear in the deed.[240] Harrison, now with a Maui home considerably less private than he expected, challenged the existence of the easement.[241]

The court first found that Harrison had actual notice of the easement based on the sales contract.[242] Because there were conflicts in the documents surrounding the transaction, the court stated that "[i]t was unreasonable to disregard these discrepancies in the documents simply because a limited title search failed to reveal the easement. Rather, the discrepancies should have prompted the escrow company to notify the parties to conduct an in-depth investigation to ascertain the truth."[243] The court also found that the circuit court erred in finding the description of the easement to be ambiguous.[244] The court ultimately held that a court can relocate an easement only when the easement is *not* located in the grant or reservation.[245] Just because Harrison failed to do his title homework did not constitute grounds upon which the court could adjust the easement.

VIII. COVENANTS, CONDITIONS, AND RESTRICTIONS

The use of covenants, conditions, and restrictions (CCRs) to control land use in common interest communities and other developments is standard practice across the United States.[246] Restrictive covenants are utilized in most multi-lot residential projects to control land development, architectural design,

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[237] 92 Haw. 374, 379-80, 992 P.2d 69, 74-75 (2000). Notably, this opinion is of no precedential value as it was ultimately withdrawn from publication. *See id.* at 374, 992 P.2d at 69.

[238] *Id.* at 380, 992 P.2d at 75.

[239] *Id.* at 382, 992 P.2d at 77.

[240] *Id.* at 381-82, 992 P.2d at 76-77.

[241] *Id.* at 382, 992 P.2d at 77.

[242] *Id.* at 388, 992 P.2d at 83.

[243] *Id.*

[244] *Id.* at 394, 992 P.2d at 89.

[245] *Id.*

[246] *See* David L. Callies et al., *Ramapo Looking Forward: Gated Communities, Covenants, and Concerns*, 35 URB. LAW. 177, 178 (2003).

landscaping, height restrictions, and other aspects of land use.[247] Perhaps reflecting this prevalence, the Moon Court considered a number of cases relating to disputes over the application of CCRs.[248] The court generally resolved ambiguities in favor of the free use of land.

Consistent with the precedent set in 1978 by *Collins v. Goetsch*[249] and *Sandstrom v. Larsen*,[250] the court continued to consider extrinsic evidence as a method to interpret ambiguous covenants in *Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd.*[251] There, JMK Associates sold a lot in Waikīkī, identified as tax map lot 48, to MNS Ltd. subject to a condition limiting the maximum building height.[252] The restrictive covenant, however, did not specifically name the benefited property and it was not included in the recorded deed.[253] The Tom family held all of the stock in JMK and the Aina Luana Apartment-Hotel; the Aina Luana hotel owned tax map lot 269, which was adjacent to lot 48.[254] Aina Luana subsequently sold lot 269 to Outrigger Hotels Hawai'i, the operator of the former Waikiki Malia Hotel (WMH).[255] Outrigger later sold lot 269 to Lucky Hotels U.S.A. Co.[256] WMH, as cross-appellant, subsequently attempted to enforce the height restriction covenant against Kinkai Properties Limited Partnership, the successor in interest to MNS.[257]

Faced with ambiguous language regarding the intent of the covenanting parties, the court evaluated extrinsic evidence of intent in order to determine that while there was a valid covenant benefiting lot 269 and burdening lot 48,[258] at best, WMH was the beneficiary of a covenant in gross, a disfavored type of covenant in Hawai'i. The court held that WMH could not enforce the covenant against MNS and lot 48 because it had no interest in the benefitted property,

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[247] Callies, *supra* note 1, at 17.

[248] *See, e.g.*, Pelosi v. Wailea Ranch Estates, 91 Haw. 478, 985 P.2d 1045 (1999); Hiner v. Hoffman, 90 Haw. 188, 977 P.2d 878 (1999); Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd., 75 Haw. 370, 862 P.2d 1048 (1993).

[249] 59 Haw. 481, 488 n.3, 583 P.2d 353, 358 n.3 (1978) (comparing appellant's structure to others in the subdivision, but ultimately finding that this extrinsic evidence did not resolve the ambiguous covenant).

[250] 59 Haw. 491, 496, 583 P.2d 971, 976 (1978) (considering the height of other structures in the subdivision, but finding that this extrinsic evidence did not prove abandonment of the height covenant).

[251] *See Waikiki Malia*, 75 Haw. 370, 862 P.2d 1048; J. David Breemer, Note, *Hiner v. Hoffman: Strict Construction of a Common Restrictive Covenant*, 22 U. HAW. L. REV. 621, 633-34 (2000).

[252] *Waikiki Malia*, 75 Haw. at 376-77, 862 P.2d at 1054-55.

[253] *Id.* at 381 n.3, 862 P.2d at 1056 n.3.

[254] *Id.* at 376, 862 P.2d at 1054.

[255] *Id.* at 376 n.1, 862 P.2d at 1054 n.1.

[256] *Id.*

[257] *Id.* at 374-77, 862 P.2d at 1053-54.

[258] *Id.* at 385, 862 P.2d at 1058.

but also because the facts demonstrated that there was an enforceable covenant benefitting the nearby hotel parcel, the burden of which Kinkai had already amicably resolved.[259]

In *Hiner v. Hoffman*, the court held a covenant restricting building height unenforceable due to ambiguity in its language.[260] The dispute arose when the Hoffman family purchased a lot in the Pacific Palisades subdivision in Pearl City on the island of O'ahu and planned to construct a three-story dwelling.[261] Each of the 119 lots in the subdivision, including that owned by the Hoffmans, were burdened by a covenant that provided: "No dwelling shall be erected, altered, placed[,] or permitted . . . which exceeds two stories in height."[262] After construction began, the owners of two lots located mauka of the Hoffmans' lot filed a complaint seeking a declaratory judgment that the Hoffmans' house violated the restrictive covenant.[263] Despite the pending litigation and warnings from neighbors and the local homeowners association, the Hoffmans completed the three-story dwelling.[264] The circuit court granted the plaintiffs' motion for summary judgment and issued a mandatory injunction requiring the Hoffmans to remove the third story of the dwelling.[265]

On appeal, Chief Justice Moon, writing for the majority, emphasized that the intentions of the parties to a covenant "are normally determined from the language of the deed,"[266] but that, as in *Waikiki Malia*, "substantial doubt or ambiguity is resolved against the person seeking its enforcement."[267] Despite finding that "the undisputed purpose and intent of . . . [the covenant] is to restrict the height of a home built on the property"[268] the court found the term "two stories in height" to be ambiguous on its face and vacated and remanded the case to the circuit court.[269] In contrast to the court's willingness to resolve the ambiguous language of the covenant in *Waikiki Malia*,[270] the court in *Hiner* declined to resolve the ambiguity in favor of the party seeking enforcement of the covenant.[271]

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[259] *Id.* at 396, 862 P.2d at 1063.

[260] 90 Haw. 188, 189, 977 P.2d 878, 879 (1999).

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Id.* at 190, 977 P.2d at 880.

[266] *Id.* (citing Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd., 75 Haw. 370, 384, 862 P.2d 1048, 1057 (1993)).

[267] *Id.*

[268] *Id.*

[269] *Id.* at 196, 977 P.2d at 886.

[270] 75 Haw. at 385, 862 P.2d at 1058.

[271] *Hiner*, 90 Haw. at 189, 977 P.2d at 879.

Finally, in *Pelosi v. Wailea Ranch Estates*, the court considered the appropriate remedy for the violation of a restrictive covenant.[272] Pelosi, who owned Lot 28 of the Maui Meadows Unit III Subdivision, sought to enforce a covenant that burdened each lot in the subdivision against the parties in interest to the adjacent Lot 29.[273] The subject covenant prohibited the construction of non-residential structures and limited residential structures to one-and-a-half-story residential buildings.[274] Specifically, Pelosi sought damages and a mandatory injunction to remove the roadway and tennis court built on Lot 29 by developers who had constructed the subject improvements to service a separate subdivision, Wailea Ranch Estates.[275] Pelosi also included subdivision lot owners as Doe defendants in the complaint.[276] Pelosi argued that under *Sandstrom*,[277] relative hardship to the parties was irrelevant and that an injunction was mandatory.[278] The court held, however, that balancing the equities was appropriate because defendant lot owners had not intentionally breached the covenant.[279] In balancing the equities, the court found that removal of the roadway would "entail a gross disproportion" between the harm to the defendants and the benefit to Pelosi.[280] The court ultimately awarded damages and an order to remove the tennis court, but permitted the roadway to remain.[281]

IX. NATIVE HAWAIIAN PROPERTY RIGHTS

In contrast to the relatively few opinions addressing Native Hawaiian rights during the Lum Court,[282] the Moon Court considered such rights in a number of significant cases. These cases, most notably *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (PASH)*,[283] *State v. Hanapi*,[284] and *Ka Pa'akai O Ka 'Aina v. Land Use Commission*,[285] generally extend the scope

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[272] 91 Haw. 478, 481, 985 P.2d 1045, 1048 (1999).

[273] *Id.* at 483, 985 P.2d at 1050.

[274] *Id.* at 482, 985 P.2d at 1049.

[275] *Id.* at 481, 985 P.2d at 1048.

[276] *Id.* at 483, 985 P.2d at 1050.

[277] *See supra* note 15.

[278] *Pelosi*, 91 Haw. at 487-88, 985 P.2d at 1055-56.

[279] *Id.* at 488-89, 985 P.2d at 1056-57.

[280] *Id.* at 492, 985 P.2d at 1059.

[281] *Id.* at 494, 985 P.2d at 1061.

[282] *See* Melody K. MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992).

[283] 79 Haw. 425, 903 P.2d 1246 (1995).

[284] 89 Haw. 177, 970 P.2d 485 (1998).

[285] 94 Haw. 31, 7 P.3d 1068 (2000).

and breadth of native Hawaiian traditional and customary rights guaranteed in article XII, section 7 of the State Constitution as amended in 1978.[286]

In *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (*PASH*), the court addressed several issues, including the standing of Native Hawaiians to intervene in development projects,[287] the obligations of reviewing authorities under the CZMA, the Hawai'i State Constitution, Hawai'i common law, and the doctrine of customary rights.[288] The case arose when Nansay Hawai'i, Inc. sought an SMA use permit from the Hawai'i County Planning Commission (HPC) to develop a resort complex.[289] PASH, an unincorporated public interest membership organization, and Angel Pilago, a private citizen, opposed the project and requested contested case proceedings before the HPC.[290] The HPC denied the requested contested case proceedings to both parties on standing grounds and subsequently issued the SMA use permit to Nansay.[291]

The court held that Native Hawaiians who exercise customary rights within an ahupua'a have interests distinguishable from the general public that afford them standing to oppose development in that ahupua'a.[292] Specifically, the court found that "issues relating to the subsistence, cultural, and religious practices of [N]ative Hawaiians amount to interests that are clearly distinguishable from those of the general public[.]"[293] The easing of standing requirements for Native Hawaiians arguably applies to all permits subject to contested case hearings.

Although barely raised in the briefs of the parties, the court also found that HPC must protect Native Hawaiian traditional and customary rights "to the extent [applicable] under the Hawai'i Constitution and relevant statutes"[294] and then wrote a small treatise on the subject in a spectacular display of judicial

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[286] "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." HAW. CONST. art. XII, § 7.

[287] 79 Haw. at 432, 434, 903 P.2d at 1253, 1255. The standing issue was the principle question before the court. *Id.*

[288] *Id.* at 434-51, 903 P.2d at 1255-72. The court significantly expanded its review despite the paucity of treatment by the briefs.

[289] *Id.* at 429, 903 P.2d at 1250.

[290] *Id.*

[291] *Id.* PASH and Pilago then brought a case before the circuit court, which remanded to the HPC with instructions to hold contested case hearings. *Id.* "[T]he ICA affirmed the circuit court's order with respect to PASH[, but] reversed it with respect to Pilago." *Id.* The Hawai'i Supreme Court unanimously affirmed the ICA's decision.

[292] *Id.* at 434 n.15, 903 P.2d at 1255 n.15.

[293] *Id.*

[294] *Id.* at 437, 903 P.2d at 1258.

hubris. The court specifically cited article XII, section 7 of the Hawai'i State Constitution and Hawai'i Revised Statutes section 1-1.[295] The court also incorporated the traditional and customary rights discussed in *Kalipi v. Hawaiian Trust Co.*[296] and *Pele Defense Fund v. Paty*.[297] The court found that "[o]ur examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i."[298] *PASH* firmly established that reviewing agencies must protect traditional and customary rights as established by the Hawai'i Constitution, relevant statutes, and case law.

Three years after *PASH*, the Moon Court again considered traditional and customary rights in *State v. Hanapi*[299] and substantially retreated from some of its extreme language in *PASH*. Alapa'i Hanapī, a Native Hawaiian resident of Moloka'i, was convicted of second degree criminal trespass for attempting to halt grading on an adjacent lot that featured two fishponds.[300] On appeal, Hanapī claimed that he had a privilege as a Native Hawaiian to remain lawfully on the subject property to engage in a constitutionally protected activity.[301] The court formulated a three-factor test to determine constitutional protection of traditional and customary rights, finding that Hanapī did not meet its requirements[302] that the party seeking constitutional protection must: (1) be a "[N]ative Hawaiian" as established by *PASH*, (2) "establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice[,]" and (3) demonstrate that the exercise of the traditional or customary right "occurred on undeveloped or 'less than fully developed property.'"[303] The court clarified *PASH* with respect to factor three by specifying that "if property is deemed 'fully developed,' i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always 'inconsistent' to permit the practice of traditional and customary [N]ative Hawaiian rights on such property."[304] The three-factor test

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[295] *Id.*

[296] 66 Haw. 1, 656 P.2d 745 (1982).

[297] 73 Haw. 578, 837 P.2d 1247 (1992).

[298] *PASH*, 79 Haw. at 447, 903 P.2d at 1268 (citations omitted). This "western concept" is made applicable to the states by no less an authority than the U.S. Supreme Court: "[W]e hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979).

[299] 89 Haw. 177, 970 P.2d 485 (1998).

[300] *Id.* at 178, 970 P.2d at 486.

[301] *Id.* at 182, 970 P.2d at 490.

[302] *Id.* at 184-85, 970 P.2d at 492-93.

[303] *Id.* at 186, 970 P.2d at 494.

[304] *Id.* at 186-87, 970 P.2d at 494-95 (emphasis omitted).

established by *Hanapi* continues to control the exercise of traditional and customary Native Hawaiian rights.

The Moon Court's third significant case dealing directly with Native Hawaiian traditional and customary rights was *Ka Pa'akai O Ka 'Aina v. Land Use Commission*.[305] The case was a consolidated appeal arising out of the State of Hawai'i's Land Use Commission's (LUC) grant of a petition to reclassify approximately 1009 acres of land on the Big Island of Hawai'i from a conservation district to an urban district.[306] Appellants were a number of civic associations that opposed the reclassification.[307] In the first application of the *PASH* requirements, the court held that in making its administrative findings, the LUC failed to "protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible."[308] The court set out the required findings related to Native Hawaiian traditional and customary rights, which structurally resemble the requirements of the National Environmental Policy Act.[309] While the required findings specified by *Ka Pa'akai O Ka 'Aina* may aid in protecting Native Hawaiian traditional and customary rights, applying this requirement to review by the LUC is problematic. A district boundary amendment does not give rise to a developmental impact. The findings requirement would be better suited to project specific permitting review at the county level. What is clear, however, is that *Ka Pa'akai O Ka 'Aina* is consistent with the Moon court's expansion of traditional and customary Native Hawaiian rights.

X. CONCLUSION

In sum, the Moon Court has made many useful contributions to the law of property in Hawai'i. It has taken care to preserve the rights of landowners to freely use property in the face of private restrictive covenants limiting that use if such covenants are the least bit vague or poorly defined. It has amplified and extended basic principles in the areas of coastal zone management,

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[305] 94 Haw. 31, 7 P.3d 1068 (2000).

[306] *Id.* at 34, 7 P.3d at 1071.

[307] *Id.*

[308] *Id.* at 53, 7 P.3d at 1090 (citing Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (*PASH*), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995)).

[309] *Id.* The requirements include

> (1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary [N]ative Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary [N]ative Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect [N]ative Hawaiian rights if they are found to exist.

Id.

condominium, easement, and leasehold law. Its record on preserving private property rights guaranteed by the U.S. Constitution's Fifth and Fourteenth Amendments in the face of regulatory challenges is, on the other hand, appalling, particularly given the increasing emphasis on preserving such rights in our nation's highest court. In case after case, the Moon Court has strained to apply general and often vague goals pursued by select interest groups and factions regardless of statutory law to the contrary. The result, coupled with Hawai'i's increasingly well-known penchant for lengthy, often decade-long land use permitting processes, is a climate that increasingly discourages both local and foreign investment in land development, because it is widely perceived as too risky for the private sector to undertake. In particular, the effect on the availability of housing that is affordable at any but the most astronomical levels has been great. In short, the Moon Court has made a considerable negative impression on the land development aspect of property law, virtually converting the use of land into a privilege rather than a constitutional right subject only to regulation for the health, safety and welfare of all. Whether that impression becomes indelible is a matter that the Recktenwald Court should address at the earliest opportunity.

Hawai'i's Right to Privacy

Jon M. Van Dyke* and Melissa Uhl**

I. INTRODUCTION

Hawai'i's constitution contains two privacy provisions: article I, section 6,[1] which was added in 1978 to give new protections to an individual's right to privacy, and article I, section 7,[2] which uses the more traditional formulation to provide protection from unreasonable searches, seizures, and invasions of privacy.[3] The 1950 Hawai'i Constitution provided protection for individuals from unreasonable searches and seizures in what was then numbered as article I, section 5 (and is now article I, section 7),[4] deriving its language from the Fourth Amendment to the United States Constitution.[5] Delegates to the 1968

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[1] "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. art. I, § 6.

[2]

> The right of people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Id. art. I, § 7.

[3] STANDING COMM. REP. No. 69, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 674 (1980).

[4] The 1950 version of article I, section 5 reads as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things seized.

HAW. CONST. art. I, § 5 (1950). To compare, the Fourth Amendment of the Federal Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[5] COMM. OF THE WHOLE REP. No. 5, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL

Constitutional Convention amended this provision to expand privacy protections, adding language to protect individuals from unreasonable "invasions of privacy" and to protect "communications sought to be intercepted."[6]

Delegates to the 1978 Constitutional Convention created what is now article I, section 6 to recognize privacy as a fundamental right, and retained article I, section 5, which was renumbered to become section 7.[7] The two provisions were intended to serve different purposes, and section 7 has been applied only to criminal cases.[8] Article I, section 6 guards a person's right to privacy in contexts other than criminal proceedings. It is designed to protect two types of interests: privacy in the "informational sense" and in the "personal autonomy"

CONVENTION OF HAWAII OF 1950, at 301 (1960). The drafters of the 1950 Constitution intended that the State benefit from federal decisions construing the Fourth Amendment. *Id.*

[6] The Committee on Bill of Rights, Suffrage and Elections explained the new language:

> Your Committee is of the opinion that inclusion of the term "invasions of privacy" will effectively protect the individual's wishes for privacy as a legitimate social interest. The proposed amendment is intended to include protection against indiscriminate wiretapping as well as undue government inquiry into and regulation of the areas of a person's life which are defined as necessary to insure "man's individuality and human dignity."

STANDING COMM. REP. NO. 55, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 233-34 (1973). The Committee of the Whole, in amending section 5, further stated:

> The protection against unreasonable invasions of privacy, as proposed by Committee Proposal No. 11, is intended to include protection against unreasonable interception of communications. Accordingly, your Committee has included the words "or the communications sought to be intercepted" at the end of Section 5, not only to indicate that the broad scope of the term "invasions of privacy" shall include protection of a person against unreasonable interception of communications, but also to avoid any interpretation, by the absence of such words, that warrants issuing need not be supported by particular description of the communications sought to be intercepted.

COMM. OF THE WHOLE REP. NO. 15, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 356 (1973).

[7] The Committee Report explained:

> In 1968 the Constitution was amended to include the prohibition against unreasonable invasions of privacy, but its inclusion within a section patterned after the Fourth Amendment right against unreasonable searches and seizures and the debate during the 1968 constitutional convention have engendered some confusion as to the extent and scope of the right . . . . Thus it may be unclear whether the present privacy provision [referring to article I, section 5 (now section 7)] extends beyond the criminal area. Therefore, your Committee believes that it would be appropriate to retain the privacy provision in article I, section 5 but limit its application to criminal cases, and create a new section as it relates to privacy in the informational and personal autonomy sense.

STANDING COMM. REP. NO. 69, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 674 (1980).

[8] *Id.*

sense.[9] As the materials below explain, most decisions by the Hawai'i Supreme Court have interpreted this privacy provision narrowly. This article focuses on the decisions addressing privacy claims in the context of sexual activities—especially prostitution—and marijuana use, as well as the court's approach to privacy claims in the same-sex-marriage litigation. This article then examines the decisions regarding privacy claims in the criminal context.

II. PROSTITUTION

Current Hawai'i statutes state that "[a] person commits the offense of prostitution if the person engages in, or agrees or offers to engage in, sexual conduct with another person for a fee."[10] Hawai'i Revised Statutes (H.R.S.) section 712-1200(2) defines "sexual conduct" as "sexual penetration," "deviate sexual intercourse," or "sexual contact,"[11] and H.R.S. section 707-700 further defines "sexual contact" as "any touching . . . of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts."[12]

The Hawai'i Supreme Court first addressed prostitution in *State v. Mueller*, where, in a 1983 opinion written by Justice Edward Nakamura—during Chief Justice Herman Lum's tenure—it ruled that a woman did not have a constitutionally protected privacy right to engage in unsolicited prostitution in her own home.[13] The court examined the legislative history of article I, section 6 and found that the 1978 Constitutional Convention sought to protect "certain highly personal and intimate matters, [where] the individual should be afforded freedom of choice, absent a compelling state interest."[14] The Constitutional Convention's committee report said that this right was "similar to the privacy right discussed in cases such as *Griswold v. Connecticut*,[15] *Eisenstadt v. Baird*,[16] *Roe v. Wade*,[17] etc."[18]

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[9] *Id.*

[10] HAW. REV. STAT. § 712-1200(1) (1993).

[11] *Id.* § 712-1200(2).

[12] *Id.* § 707-700 (1993 & Supp. 2010).

[13] 66 Haw. 616, 618, 671 P.2d 1351, 1353-54 (1983).

[14] *Id.* at 625, 671 P.2d at 1357 (quoting COMM. OF THE WHOLE REP. NO. 15, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1024 (1980)).

[15] 381 U.S. 479 (1965).

[16] 405 U.S. 438 (1972).

[17] 410 U.S. 113 (1973).

[18] *Mueller*, 66 Haw. at 625, 671 P.2d at 1357 (quoting COMM. OF THE WHOLE REP. NO. 15, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1024 (1980)) (internal citations omitted).

The *Mueller* court, held, however, that this privacy right did not protect an individual's decision to engage in unsolicited prostitution in the individual's own home.[19] The court found no federal decision that recognized this activity as a fundamental right.[20] Although the Constitutional Convention committee report could be read to support the view that article I, section 6 was intended to expand the federal right to privacy, the framers referred specifically to the three United States Supreme Court cases cited above.[21] The court refused, therefore, to infer "a talismanic effect" from the privacy provision.[22] The *Mueller* opinion acknowledged that no strong reasons have been identified for criminalizing prostitution,[23] but nonetheless refused to rule that the right to privacy affords any protection to this activity.[24] After declining to recognize the decision to engage in prostitution as a fundamental right, the court ruled that the prostitution statutes met the rational basis test based on society's interest in order and morality.[25]

Eleven years later, in *State v. Lindsey*, the Moon Court found that the crime of prostitution was not constitutionally serious enough to require a trial by jury.[26] The district court had found DeCarla Liana Lindsey guilty of three charges of prostitution.[27] Because H.R.S. section 712-1200 mandated incarceration for multiple violations, Lindsey argued that the severity of this outcome warranted a jury trial rather than a bench trial.[28] The Hawai'i Supreme Court disagreed, explaining that although it had recognized the right to a jury trial in "appropriate cases" even when the maximum sentence was less than six months, this was not one of them.[29] The court reviewed the legislative history of the prostitution statute and recognized that the decision to continue criminalizing prostitution was a "somewhat reluctant" one, and that

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[19] *Id.* at 623, 671 P.2d at 1356.

[20] *Id.*

[21] *See supra* notes 15-17.

[22] *Mueller*, 66 Haw. at 629, 671 P.2d at 1360.

[23] *Id.* at 626 n.6, 671 P.2d at 1358 n.6.

[24] *Id.* at 618, 671 P.2d at 1354.

[25] *Id.* at 628, 671 P.2d at 1359.

[26] 77 Haw. 162, 166, 883 P.2d 83, 87 (1994).

[27] *Id.* at 163, 883 P.2d at 84.

[28] *Id.*

[29] *Id.* at 164, 883 P.2d at 85.

> "The United States Supreme Court has interpreted the United States Constitution's sixth amendment right to a jury trial more narrowly than [the Hawai'i Supreme Court] has interpreted the Hawai'i Constitution's counterpart, article I, § 14," . . . and [the Hawai'i Supreme Court has] not adopted the rule that offenses for which the maximum period of incarceration is six months or less are presumptively petty.

Id. (quoting State v. Nakata, 76 Haw. 360, 365, 878 P.2d 699, 704 (1994)).

punishments of "mandatory fines and imprisonment[]" were due more to "the secondary effects of prostitution[.]"[30]

Then, in 1998, the court returned to this issue in *State v. Richie*, affirming the conviction of Carl Richie for promoting prostitution and holding that "prostitution" covered situations that did not involve sexual penetration.[31] The four women involved in the incident were also arrested, but their cases were later dismissed in return for their agreement to testify truthfully at Richie's trial.[32] In an opinion written by Justice Mario Ramil, the court found sufficient evidence of sexual contact and of an agreement to engage in sexual conduct with one of the women to affirm the lower court's conviction.[33] The court called Richie's attempts to characterize the prostitution statute as overbroad "absurd"[34] and did not address any constitutional privacy issues in its opinion.

In 2007, in *State v. Romano*,[35] the court again addressed whether private acts of prostitution should be protected by Hawai'i's fundamental right to privacy, revisiting this question in light of the United States Supreme Court's ruling in *Lawrence v. Texas*,[36] where the Court had found that individual decisions by married and unmarried persons "concerning the intimacies of their physical relationship . . . are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[37]

Pame Ann Mary Leilani Romano had been a licensed massage therapist for almost twenty years.[38] She advertised her services under the "Body, Mind and Spirit," "Massage," and "Health and Fitness" sections of the Pennysaver classifieds.[39] She did not advertise under the "Personal" or "Adult" sections.[40] When she was solicited for an out-call visit by undercover officer Jeffrey Tallion, he did not discuss sexual acts,[41] but after she arrived at Tallion's hotel

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[30] *Id.* at 166-67, 883 P.2d at 87-88.

[31] 88 Haw. 19, 30-31, 960 P.2d 1227, 1238-39 (1998).

[32] *Id.* at 39-40, 960 P.2d at 1247-48.

[33] *Id.* at 33, 960 P.2d at 1241 (quoting State v. Quitog, 85 Haw. 128, 145, 938 P.2d 559, 576 (1997)) (reiterating that "evidence adduced in the trial court must be considered in the strongest light for the prosecution . . . . The test on appeal is . . . whether there was substantial evidence to support the conclusion of the trier of fact.").

[34] *Id.* at 32, 960 P.2d at 1240 (rejecting Richie's argument that the prostitution statutes would cover "sitting on the lap of Santa Claus, or the Easter bunny" as "patently absurd" and "outrageous" because those situations do not involve the payment of a fee for sexual contact).

[35] 114 Haw. 1, 155 P.3d 1102 (2007).

[36] 539 U.S. 558 (2003).

[37] *Id.* at 578 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

[38] *Romano*, 114 Haw. at 4, 155 P.3d at 1105.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 3, 155 P.3d at 1104.

room, he asked if she did anything else. She responded with "Like what? Dance?" and he said that he "was referring to a blowjob."[42] She responded by saying, "No, hands only," and explaining that this additional service would cost twenty dollars.[43]

Romano argued that prostitution should be afforded constitutional protection, relying on *Lawrence v. Texas*,[44] which had ruled that the "intimate physical acts of consenting adults" were within the constitutionally protected zone of privacy.[45] The majority, however, in an opinion by Justice Simeon Acoba, declined to recognize the act of prostitution as falling within the same intimate terms that the United States Supreme Court applied to homosexual conduct in *Lawrence*,[46] citing (1) the explicit qualification in the *Lawrence* opinion excluding prostitution, (2) the public and commercial nature of the activity, and (3) the unrivaled reputation that prostitution holds in terms of public condemnation as the major reasons for denying it constitutional protection.[47]

Justice Steven Levinson issued a lengthy dissent arguing that the majority's holding was inconsistent with the logical extension of the protected right outlined in *Lawrence*.[48] "*Lawrence* . . . leads inexorably to the conclusion that the state may not exercise its police power to criminalize a private decision between two consenting adults to engage in sexual activity, whether for remuneration or not."[49] Justice Levinson maintained that because such individual intimate decisions by married and unmarried persons are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution under *Lawrence*, then by extension article I, section 6 of the Hawai'i State Constitution requires that such actions cannot be criminalized absent a compelling state interest.[50]

The dissent attempted to draw a distinction between public and private prostitution, arguing that private conduct is more likely to be protected constitutionally,[51] but the majority replied that the *Lawrence* opinion "did not draw the distinction between private solicited prostitutions and public solicited prostitutions[.]"[52] Furthermore, the *Romano* majority observed that in *Mueller*, the court had considered that "the activity in question took place in [defendant's] apartment, the participants were willing adults, and there were

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[42] *Id.*

[43] *Id.*

[44] 539 U.S. 558 (2003).

[45] *Id.* at 578 (citation omitted).

[46] *Romano*, 114 Haw. at 10, 155 P.3d at 1111.

[47] *Id.* at 9-13, 155 P.3d at 1110-14.

[48] *Id.* at 14-23, 155 P.3d at 1115-24 (Levinson, J., dissenting).

[49] *Id.* at 18, 155 P.3d at 1119 (citing *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting)).

[50] *Id.* at 16-17, 155 P.3d at 1117-18.

[51] *See, e.g.*, *id.* at 17, 155 P.3d at 1118.

[52] *Id.* at 9 n.11, 155 P.3d at 1110 n.11 (majority opinion).

'no signs of advertising . . . .'"[53] It follows then that because *Romano* involved newspaper ads and activity in a hotel, it could not be maintained that the activity was "wholly private."[54] The majority repeatedly framed the *Lawrence* holding in terms of "intimacy" between individuals,[55] drawing a distinction between intimate sexual conduct and prostitution: "such intimate practices or conduct are not at issue in the instant case."[56]

Justice Acoba's opinion for the majority recognized that the court had expanded the right to privacy pursuant to the language in Hawai'i's constitution[57] and acknowledged that evolving notions of acceptable behavior compel the expansion of protected privacy rights, but Justice Acoba refused to engage in any detailed discussion about whether prostitution should receive constitutional protection, explaining that "prostitution seems almost singularly unique in historical and social condemnation."[58] The court cited the drafters of the Hawai'i Penal Code and their justification for enactment of H.R.S. section

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[53] *Id.* at 11, 155 P.3d at 1112 (quoting State v. Mueller, 66 Haw. 616, 618-19, 671 P.2d 1351, 1354 (1983)).

[54] *Id.* (quoting *id.* at 22, 155 P.3d at 1123 (Levinson, J., dissenting)).

[55] *E.g.*, *id.* at 10, 155 P.3d at 1111.

[56] *Id.*

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> This court has also extended privacy rights under our own constitution. *See, e.g.*, *State v. Cuntapay*, 104 Hawai'i 109, 110, 85 P.3d 634, 635 (2004) (holding that "under Article I, section 7 of the Hawai'i Constitution, a guest of a homedweller is entitled to a right of privacy while in his or her host's home" (footnote omitted)); *State v. Detroy*, 102 Hawai'i 13, 20-22, 72 P.3d 485, 492-94 (2003) (holding that *Kyllo*[*v. United States*], 533 U.S. 27, 121 S. Ct. 2038 [2001], was dispositive of the defendant's federal constitutional claim and, additionally, that the use of a thermal imager to measure heat emanating from the interior of the defendant's apartment violated article I, section 7 of the Hawai'i Constitution because "[i]t has long been recognized in Hawai'i that generally, a person 'has an actual, subjective, expectation of privacy in his or her home'" (quoting *State v. Lopez*, 78 Hawai'i 433, 442, 896 P.2d 889, 898 (1995))); *State v. Bonnell*, 75 Haw. 124, 146, 856 P.2d 1265, 1277 (1993) (holding that "the defendants had an objectively 'reasonable privacy expectation that [they] would not be videotaped by government agents' in the employee break room" (quoting *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991))); [*State v.*]*Kam*, 69 Haw. [483,]496, 748 P.2d [372,]380 (declaring a statute that prohibited the promotion of pornographic adult magazines unconstitutional under article I, section 6 of the Hawai'i Constitution "as applied to the sale of pornographic materials to a person intending to use those items in the privacy of his or her home").

Id. at 12, 155 P.3d at 1113.

[58] *Id.*

712-1200 as "'the need for public order,'"[59] and relied upon the *Mueller* decision as binding precedent to maintain the prohibition on prostitution.[60]

An article that appeared in this law review shortly after the *Romano* decision[61] explained in some detail the arguments that can be made for the decriminalization of prostitution and for the conclusion that even commercial sexual activities should be protected under Hawai'i's right to privacy. Justice Levinson's dissent in *Romano* also develops those views in detail. But the court's majority during Chief Justice Moon's tenure has been reluctant to give the right to privacy an expansive interpretation, rejecting arguments that prostitution should be protected as a privacy right, and, as we also see in the next section, it has proceeded with similar caution when dealing with marijuana convictions.

III. MARIJUANA

The Hawai'i Supreme Court has issued three significant opinions regarding marijuana use. The first case, in 1972,[62] produced a divided court, in which three of the five justices (Kazuhisa Abe, Bernard Levinson, and Bert Kobayashi) wrote that the laws prohibiting personal marijuana use raised serious constitutional questions.[63] Nonetheless, the court affirmed the conviction because "the appellants have conceded both in the trial court and on appeal that the State may regulate the use of marijuana under its police power[,]" and hence the constitutional issue was not properly raised in the appeal.[64] This case preceded the addition of the explicit right to privacy to Hawai'i's constitution in 1978, but, ironically, the cases that followed this amendment took a much more negative view toward the idea that Hawai'i's constitution protected the right to the private use of marijuana.

In the second case, *State v. Mallan*, the court in 1998 upheld by a 4-1 vote the laws criminalizing marijuana possession in the context of an arrest of a person smoking marijuana in his parked car at the Waikiki Shell in Honolulu.[65] Justice Mario Ramil, joined by Chief Justice Ronald Moon, ruled that possession and use of marijuana cannot be viewed as "a 'fundamental' right

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[59] *Id.* at 13, 155 P.3d at 1114 (quoting State v. Mueller, 66 Haw. 616, 628-29, 671 P.2d 1351, 1359-60 (1983)).

[60] *Id.* at 14, 155 P.3d at 1115.

[61] Marissa H.I. Luning, *Prostitution: Protected in Paradise?*, 30 U. HAW. L. REV. 193 (2007).

[62] State v. Kantner, 53 Haw. 327, 493 P.2d 306 (1972).

[63] *See id.* at 336, 493 P.2d at 312 (Abe, J., concurring); *id.* at 339, 493 P.2d at 313 (Levinson, J., dissenting); *id.* at 347, 493 P.2d at 318 (Kobayashi, J., dissenting).

[64] *Id.* at 338, 493 P.2d at 313 (Abe, J., concurring).

[65] 86 Haw. 440, 950 P.2d 178 (1998).

that is 'implicit in the concept of ordered liberty' [or] a part of the 'traditions and collective conscience of our people.'"[66] Thus, the government must show only a rational basis to prohibit marijuana use, and the majority ruled that this test had been met because it had not been established that marijuana use is harmless.[67] Justice Robert Klein, joined by Justice Paula Nakayama, concurred in a short opinion stating that the framers of the right to privacy in the 1978 Constitutional Convention did not intend to "protect an individual from criminal prosecution for the possession and use of marijuana, or *any* contraband drug bought, sold, or used privately."[68] Justice Levinson dissented alone, as he did in *Romano*, arguing that the State lacked the power to prohibit activities that do not cause harm to others;[69] that Hawai'i's right to privacy "confers upon people 'the right to be left alone,' which gives to all individuals the right to personal autonomy, to dictate his or her own lifestyle, and to be oneself[]";[70] and that the government had failed to demonstrate that the prohibition on marijuana use "furthers a compelling state interest . . . or . . . employs the least restrictive means available[.]"[71]

The third case, in 2007,[72] addressed the additional argument that the prohibition on marijuana use violated the free exercise of religion, but the court rejected this argument. Joseph Sunderland submitted that he was a member of the Hawai'i Cannibis Ministry and that his use of marijuana was a central component of his religion, which believed that marijuana "has a unique way of elevating the consciousness[.]"[73] Justice Nakayama wrote the opinion of the court, ruling that generally applicable laws can be applied even if they burden religious practitioners and thus upholding the prohibition on marijuana because it "presents an across-the-board prohibition on specific conduct deemed to be socially harmful by the legislature."[74]

Justice Nakayama, joined by Justice James Duffy, concluded that Sunderland had not properly raised the right to privacy issue, and thus did not address it. Chief Justice Moon believed that the privacy issue had been properly raised and that *Mallan* had not resolved the question of marijuana use in one's home, but concluded nonetheless that the use of marijuana in the home is not a

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[66] *Id.* at 445, 950 P.2d at 183. Mallan's claim was also weakened because he was not in his home, but rather in a public parking lot. *Id.* at 447, 950 P.2d at 185.

[67] *Id.* at 446-47, 950 P.2d at 184-85.

[68] *Id.* at 510, 950 P.2d at 248 (Klein, J., concurring) (emphasis in original).

[69] *Id.* at 508-09, 950 P.2d at 246-47 (Levinson, J., dissenting).

[70] *Id.* at 509, 950 P.2d at 247.

[71] *Id.*

[72] State v. Sunderland, 115 Haw. 396, 168 P.3d 526 (2007).

[73] *Id.* at 398, 168 P.3d at 527.

[74] *Id.* at 404, 168 P.3d at 534.

fundamental right any more than the use of marijuana in a public parking lot.[75] Justice Acoba agreed with Chief Justice Moon's conclusions in a separate opinion.[76] Justice Levinson dissented, agreeing that the privacy issue had been properly raised, but disagreeing on the outcome: he would have, "based upon the analysis set forth in my dissenting opinion in *Mallan*, . . . reverse[d] the district court's judgment of conviction."[77]

The opinions of the justices in two marijuana cases decided during Chief Justice Moon's tenure thus show, with the exception of Justice Levinson, little appetite to consider the full implications of a right of personal privacy and a reluctance to give this right any broad interpretation.

IV. OTHER DECISIONS INVOLVING ARTICLE I, SECTION 6

The most important additional decision addressing Hawai'i's new (as of 1978) right to privacy was the 1993 decision involving same-sex marriage, *Baehr v. Lewin*.[78] The court ruled that the prohibition on same-sex marriages constituted sex-based discrimination under Hawai'i's constitution, which thus required the government to demonstrate a compelling interest for its prohibition, but at the same time it rejected the argument that the right to privacy in article I, section 6 encompassed the right to marry a person of one's own sex.[79] The plurality opinion, written by Justice Levinson and joined by Chief Justice Moon, said that the right to privacy as it has emerged in federal cases "presently contemplates unions between men and women"[80] and that Hawai'i's explicit privacy right "is similar to the federal right and that no 'purpose to lend talismanic effect' to abstract phrases such as 'intimate decision' or 'personal autonomy' can 'be inferred from article I, section 6, any more than . . . from the federal decisions.'"[81] Applying the federal approach to fundamental rights, Justice Levinson concluded that

> we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage

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[75] *Id.* at 407-08, 168 P.3d at 537-38 (Moon, C.J., concurring and dissenting).

[76] *See id.* at 411-13, 168 P.3d at 541-43 (Acoba, J., concurring and dissenting).

[77] *Id.* at 415-16, 168 P.3d at 545-46 (Levinson, J., dissenting).

[78] 74 Haw. 530, 852 P.2d 44 (1993).

[79] *Id.* at 550-57, 852 P.2d at 54-57.

[80] *Id.* at 555, 852 P.2d at 56.

[81] *Id.* at 555-56, 852 P.2d at 57 (quoting State v. Mueller, 66 Haw. 616, 630, 671 P.2d 1351, 1360 (1983)).

> is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.[82]

This conclusion has seemed odd to many commentators[83] because the Levinson opinion then went on to conclude that the prohibition on same-sex marriage constituted sex-based discrimination, a conclusion that, although technically logical, seems less intuitive and somewhat more convoluted. It seems that the court's preference for resting its holding on equal protection rather than the right to privacy stemmed from its reluctance to expand the right to privacy, out of a concern that such an expansion might be difficult to limit.

The court also rejected the claim of privacy in the 2005 case of *Janra Enterprises, Inc. v. City and County of Honolulu*,[84] ruling that individuals do not have the right to view erotic videos in private booths within a video store. In a unanimous opinion for the court written by Justice Acoba, the court upheld a city ordinance that required booths used for viewing pornographic videos to be visible from the booth's entranceway and "not be obscured by any curtain, door, wall or other enclosure at the entrance."[85] The Honolulu City Council had passed this ordinance because of concern about drug dealing and prostitution in such booths. The Waikīkī establishment that challenged the ordinance argued that because individuals have the right to purchase and view pornographic materials in the privacy of their homes,[86] a similar right should exist to view such materials in booths for those who may not have private homes or private areas in their homes. The court concluded "that the Hawai'i constitutional right to privacy under article I, section 6 does not encompass the right to view adult material in an enclosed booth within a commercial establishment," and that the ordinance was rationally related to the City's interest in curtailing crime.[87]

The Hawai'i appellate courts have also been reluctant to recognize a right to informational privacy, and that trend continued in the 1996 case of *State of Hawai'i Organization of Police Officers (SHOPO) v. Society of Professional Journalists—University of Hawai'i Chapter*,[88] where the court rejected the claim by SHOPO that records of police disciplinary actions should be shielded from public scrutiny. In a unanimous opinion written by Chief Justice Moon,

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[82] *Id.* at 556-57, 852 P.2d at 57.

[83] *See, e.g.*, Sherry Broder, *The Hawaii Supreme Court and Same-sex Marriage*, HAW. B.J., June 1993, at 4, 4.

[84] 107 Haw. 314, 113 P.3d 190 (2005). Co-author Van Dyke represented the City and County of Honolulu in this litigation.

[85] *Id.* at 322, 113 P.3d at 198 (quoting HONOLULU, HAW., REV. ORDINANCES § 41-39.8 (1990)).

[86] *See* State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988).

[87] *Janra Enterprises, Inc.*, 107 Haw. at 319-20, 113 P.3d at 195-96.

[88] 83 Haw. 378, 927 P.2d 386 (1996).

the court said that the informational privacy protected by article I, section 6 is information that is "highly personal and intimate[,]" and that misconduct records of government workers do not fall within that limited category.[89] In *State v. Bani*,[90] a sex offender claimed that the sex-offender-registration-and-notification law violated his right to privacy. The court did not address that issue directly, but did rule that the sex offender has a sufficient "liberty interest" in his reputation to trigger the due process clause of the Hawai'i Constitution.[91]

In these cases we continue to see a reluctance to give the right to privacy added to Hawai'i's constitution in 1978 as article I, section 6 an expansive interpretation, despite the strong language of this provision. In fact, during the tenure of Chief Justice Moon, not one claim to privacy under this constitutional provision proved to be successful.

V. PRIVACY IN THE CONTEXT OF CRIMINAL PROCEEDINGS

A. The Warrant Requirement

As explained in the introduction, privacy claims in the context of criminal proceedings are generally addressed under article I, section 7 of the Hawai'i Constitution, which was originally based on the Fourth Amendment, but was given additional language covering electronic surveillance in 1968.[92] Under U.S. and Hawai'i law, a warrantless search or seizure is presumptively unreasonable and is thus generally viewed as a constitutional violation.[93] If a person's legitimate expectation of privacy will be violated, the government needs either a valid search warrant or must establish that the search falls within a judicially recognized exception to the warrant requirement. These exceptions cover those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.[94]

The Hawai'i Supreme Court has adopted a two-prong test, taken from *Katz v. United States*,[95] to determine when a person has a legitimate privacy interest in

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[89] *Id.* at 406-08, 927 P.2d at 398-400.

[90] 97 Haw. 285, 36 P.3d 1255 (2001).

[91] *Id.* at 294, 36 P.3d at 1264.

[92] *See supra* Part I.

[93] *See* State v. Meyer, 78 Haw. 308, 312, 893 P.2d 159, 163 (1995) ("[I]f anything is settled in the law of search and seizure, it is that a search without a warrant issued upon probable cause is unreasonable per se[.]" (quoting State v. Fields, 67 Haw. 268, 281, 686 P.2d 1379, 1389 (1984))).

[94] *Id.*

[95] 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

the article I, section 7 context: first, the person must exhibit an actual, subjective expectation of privacy; and second, that expectation must be one that society would recognize as objectively reasonable.[96] The Moon Court consistently held that "[t]he right of the people to be free from unreasonable searches and seizures is *firmly* embedded in both the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution."[97]

Occasionally, the Moon Court interpreted section 7 to protect a broader range of privacy rights than those protected under the United States Constitution.[98] For example, in *State v. Quino*,[99] the court departed from the United States Supreme Court's holding in *California v. Hodari D.*[100] (requiring either physical force or submission to an assertion of authority) and afforded greater

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[96] State v. Bonnell, 75 Haw. 124, 139, 856 P.2d 1265, 1274 (1993) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). Furthermore, this right to privacy has been applied not as a "fundamental right but rather a test of whether the prohibition against unreasonable searches and seizures applies." State v. Wallace, 80 Haw. 382, 393, 910 P.2d 695, 706 (1996) (quoting COMM. OF THE WHOLE REP. NO. 15, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1024 (1980)).

[97] State v. Lopez, 78 Haw. 433, 441, 896 P.2d 889, 897 (1995) (citing State v. Pau'u, 72 Haw. 505, 509, 824 P.2d 833, 835 (1992)) (emphasis added).

[98] The *Lopez* court noted that "'[w]hen the United States Supreme Court's interpretation of a provision present in both the United States and Hawai'i Constitutions does not adequately preserve the rights and interests sought to be protected, we will not hesitate to recognize the appropriate protection as a matter of state constitutional law.'" *Id.* at 445, 896 P.2d at 901 (quoting State v. Bowe, 77 Haw. 51, 57, 881 P.2d 538, 544 (1994)). The court also noted that "[i]n the area of searches and seizures under article I, section 7, we have often exercised this freedom." *Id.* (citations omitted). *See also* State v. Quino, 74 Haw. 161, 177 n.2, 840 P.2d 358, 365 n.2 (1992) (Levinson, J., concurring).

> In *State v. Texeira*, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967), this court had the courage and foresight to forge the apparently revolutionary notion that "[a]s long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection." We have adhered steadfastly to this principle. *See, e.g.*, *State v. Grahovac*, 52 Haw. 527, 531, 533, 480 P.2d 148, 151-52 (1971); *State v. Santiago*, 53 Haw. 254, 265-66, 492 P.2d 657, 664 (1971); *State v. Kaluna*, 55 Haw. 361, 367-69, 372-75, 520 P.2d 51, 57-58, 60-62 (1974); *State v. Manzo*, 58 Haw. 440, 452, 573 P.2d 945, 953 (1977); *State v. Miyasaki*, 62 Haw. 269, 280-82, 614 P.2d 915, 921-23 (1980); *Huihui v. Shimoda*, 64 Haw. 527, 531, 644 P.2d 968, 971 (1982); *State v. Fields*, 67 Haw. 268, 282, 686 P.2d 1379, 1390 (1984); *State v. Wyatt*, 67 Haw. 293, 304 n.9, 687 P.2d 544, 552 n.9 (1984); *State v. Tanaka*, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985); *State v. Kim*, 68 Haw. 286, 289-90, 711 P.2d 1291, 1293-94 (1985); *State v. Kam*, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988).

Id.

[99] 74 Haw. 161, 840 P.2d 358.

[100] 499 U.S. 621 (1991).

protection to Hawai'i's citizens by utilizing the *United States v. Mendenhall*[101] standard (focusing on whether the person being questioned by a police officer feels free to disregard the questions and walk away) to determine whether a person has been "seized."[102] Similarly, in *State v. Lopez*, the court stated that the purpose of the evidentiary exclusionary rule under article I, section 7 is not only to deter government officials from circumventing constitutional protections,[103] which the U.S. Supreme Court has held is the rule's primary purpose under the Fourth Amendment, but also to protect the privacy rights of Hawai'i's citizens.[104]

B. Expectation of Privacy

As explained above, the court has used the two-pronged *Katz* test to determine whether a person is able to legally assert a constitutionally protected privacy interest in the context of section 7.[105] The first step determines whether the individual has a legitimate expectation of privacy, and the second examines whether this expectation is one society would recognize as objectively reasonable. The Moon Court has dealt with numerous scenarios where the boundaries of this expectation, both for the individual and society, have been tested. In assessing the subjective and objective reasonableness of an expectation of privacy, the court has considered the nature of the area involved, the precautions taken to insure privacy, and the type and character of the governmental invasion.[106]

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[101] 446 U.S. 544 (1980).

[102] Justice Klein, writing for the court, explained:

> In analyzing seizures under article I, section 7 of the Hawaii Constitution, this court has utilized the *Mendenhall* standard. In *State v. Tsukiyama*, 56 Haw. 8, 12, 525 P.2d 1099, 1102 (1974), we stated that "[i]n order to determine if the defendant's liberty was restrained and he was, therefore, seized, we must evaluate the totality of the circumstances and decide whether or not a reasonably prudent person would believe he was free to go."
>
> In *State v. Texeira*, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967), we acknowledged that "[a]s long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection." Thus, we decline to adopt the definition of seizure employed by the United States Supreme Court in *Hodari D.* and, instead, choose to afford greater protection to our citizens by maintaining the *Mendenhall* standard.

Quino, 74 Haw. at 170, 840 P.2d at 362.

[103] 78 Haw. 433, 446, 896 P.2d 889, 902 (1995) (citing State v. Furuyama, 64 Haw. 109, 122, 637 P.2d 1095, 1104 (1981)).

[104] *Id.*

[105] *See supra* notes 95-96 and accompanying text.

[106] State v. Augafa, 92 Haw. 454, 464, 992 P.2d 723, 733 (App. 1999) (quoting State v. Dias, 52 Haw. 100, 106-07, 470 P.2d 510, 514 (1970)).

In *State v. Diaz*, the court held that individuals have an objectively reasonable expectation of privacy behind an interior office door of a commercial establishment open for business to the public.[107] Justice Nakayama, writing for the court, said that Alicia Diaz exhibited an actual, subjective expectation of privacy by closing and locking the office door, analogizing Diaz's expectation to that of someone closing a bathroom stall door[108] or shutting venetian blinds and drawn curtains.[109] The court also found that society would recognize such an expectation of privacy in a closed, locked office door as objectively reasonable.[110]

The court has recognized that a legitimate expectation of privacy may exist if a person seeks to preserve something as private, even if it is in an area accessible to others or the public at large.[111] For example, in *State v. Bonnell*, the court affirmed that persons have a reasonable expectation of privacy in their workplace and have an objectively reasonable expectation not to be subjected to secret video surveillance in their break room.[112] Although the court declined to outline any general privacy interests that employees may have in the break room, it did maintain that persons may create "temporary zones of privacy" within which they may not reasonably be videotaped, even when this zone is in a place that they do not own or normally control, and where they may not be able to reasonably challenge a search at some other time.[113] The court found that the use of a video camera is an extraordinarily intrusive method of searching, and therefore that the government's showing of necessity must be very high to justify its use.[114] The court applied the approach taken under the Fourth Amendment, where judges consider the fact that searches vary in the degree to which they invade a person's privacy and thus require differing degrees of probable cause. The more intrusive the search is, the more critical it

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[107] 100 Haw. 210, 220, 58 P.3d 1257, 1267 (2002).

[108] *Id.* (citing State v. Biggar, 68 Haw. 404, 407, 716 P.2d 493, 495 (1986) (holding that a reasonable expectation of privacy was exhibited when the defendant closed the bathroom stall door)).

[109] *Id.* (citing State v. Kaaheena, 59 Haw. 23, 29, 575 P.2d 462, 467 (1978) (holding that a reasonable expectation of privacy was exhibited where gambling activity was shielded from a passerby's view by closed venetian blinds and drawn curtains)).

[110] *Id.*

[111] State v. Bonnell, 75 Haw. 124, 143, 856 P.2d 1265, 1275 (1993). What a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* (quoting Katz v. United States, 389 U.S. 347, 351-52 (1967)).

[112] *Id.* at 147, 856 P.2d at 1277 (quoting United States v. Taketa, 923 F.2d 665, 676 (9th Cir. 1991)).

[113] *Id.* at 147 n.9, 856 P.2d at 1277 n.9 (quoting *Taketa*, 923 F.2d at 677).

[114] *Id.* at 138 n.5, 856 P.2d at 1273 n.5 (citing United States v. Mesa-Rincon, 911 F.2d 1433, 1442-43 (10th Cir. 1990)).

becomes to obtain a warrant if at all feasible.[115] The court reasoned that because the warrantless and covert video surveillance of the employee break room was a search in the constitutional sense, the videotapes and any other evidence obtained as a result thereof were tainted and must be suppressed as "fruit[s] of the poisonous tree."[116]

In a 1996 decision, the court refused to extend privacy protection to a backpack containing clear plastic baggies when the police officer already had a valid search warrant for marijuana.[117] The backpack was a reasonable place for the officer to look for marijuana so the defendant had no basis for claiming a reasonable expectation that the *clear* plastic baggies in his backpack would be protected.[118] The court expressly reaffirmed the holding in *State v. Davenport*[119] that an officer was justified in searching in places that his experience told him might be reasonable repositories for marijuana.[120] The officer's notice of the contents of the baggies was not a further invasion of privacy, because the contents of the baggies were in "plain view."[121] The Fourth Amendment has been interpreted to provide protection to the owner of any container that "conceals its contents from plain view,"[122] and Hawai'i courts have applied and extended the law of closed containers in interpreting the parameters of article I, section 7.[123] Because the containers in this case were clear instead of opaque or solid, any expectation of privacy of their contents was lost.[124] The court went on to explain that it would have approved of the warrantless seizure of the backpack itself, based on probable cause that it contained evidence of criminal activity and the exigency of the situation created by the proximity of the vehicle's passengers, but that it would not condone the further searching of its interior contents.[125] To do so, the court noted, would

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[115] *Id.* (quoting United States v. Torres, 751 F.2d 875, 882 (7th Cir. 1984)).

[116] *Id.* (citing State v. Biggar, 68 Haw. 404, 409, 716 P.2d 493, 496 (1986)).

[117] State v. Wallace, 80 Haw. 382, 387, 910 P.2d 695, 700 (1996).

[118] *Id.* at 398-99, 910 P.2d at 712-13.

[119] 55 Haw. 90, 516 P.2d 65 (1973).

[120] *Wallace*, 80 Haw. at 405, 910 P.2d at 712 (quoting *Davenport*, 55 Haw. at 100, 516 P.2d at 72). The officer possessed "authority to search, in a reasonable manner, whatever spots within the described premises [his] experience indicated [might] be used as a cache, . . . and that the multicolored cloth bag was just such a "plausible repository for marijuana." *Id.* at 399, 910 P.2d at 712 (citations omitted).

[121] *Id.* at 399, 910 P.2d at 712.

[122] *Id.* at 400, 910 P.2d at 713 (quoting United States v. Ross, 456 U.S. 798, 822-23 (1982)) (emphasis removed and internal quotation marks omitted).

[123] *Id.*

[124] *Id.* at 400-05, 910 P.2d at 713-18.

[125] *Id.* at 404 n.18, 910 P.2d at 717 n.18.

create a new "probable cause exception" to the warrant requirement,[126] an exception that the court had "steadfastly refused" to allow in the past.[127]

The plain-view exception was also relevant in a 2000 decision where the court ruled that an officer's visual observation of the outside of a motorcycle parked on a public street did not violate any reasonable expectation of privacy under article I, section 7 because the defendant knowingly exposed the outward appearance and condition of the motorcycle to the public.[128] But in a 1991 decision, the court recognized a reasonable expectation of privacy in the contents of the wallet of a man held in custody for drunk driving,[129] and excluded the evidence obtained from the illegal search under the "fruit of the poisonous tree" doctrine.[130] The defendant was brought to the police station and then ordered to empty his pockets.[131] He produced a wallet that was searched to reveal a packet of cocaine.[132] The court held that although the police were justified in requiring him to empty out his pockets, they were not justified in the further intrusion into the wallet's different compartments once it was surrendered.[133] Because the police's purpose was to prevent "the entry of dangerous items and contraband into the jail,"[134] the court found that they could have used less intrusive means to achieve their goal.[135]

In *State v. Tau'a*, the court declined to adopt the "automatic standing" rule and instead ruled that in order for a person to suppress evidence, the person's own personal constitutional rights must have been violated by the challenged search or seizure instead of the rights of some third party.[136] The court reversed

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[126] *Id.* (citing *Ross*, 456 U.S. at 832 (Marshall, J., dissenting)).

[127] *Id.* (citing State v. Bonnell, 75 Haw. 124, 137-38, 856 P.2d 1265, 1273 (1993) ("No amount of probable cause can justify a warrantless search or seizure absent exigent circumstances or some other recognized exception to the warrant requirement.") (internal citations and quotations omitted)).

[128] State v. Ekenberg, No. 22499, 2000 Haw. LEXIS 283, at *4-5 (Aug. 31, 2000).

[129] State v. Perham, 72 Haw. 290, 291-92, 814 P.2d 914, 914-15 (1991).

[130] *Id.* at 294, 814 P.2d at 916; *see Bonnell*, 75 Haw. at 137-38, 856 P.2d at 1273 (explaining that evidence seized through an illegal search must be suppressed under the "fruits of the poisonous tree" doctrine).

[131] *Perham*, 72 Haw. at 291, 814 P.2d at 915.

[132] *Id.*

[133] *Id.* at 293, 814 P.2d at 915.

[134] *Id.*

[135] *Id.* at 294-95, 814 P.2d at 916.

[136] 98 Haw. 426, 438-39, 49 P.3d 1227, 1239-40 (2002). In *State v. Abordo*, 61 Haw. 117, 120-21, 596 P.2d 773, 775 (1979), the court adopted the United States Supreme Court's holding in *Rakas v. Illinois*, 439 U.S. 128 (1978), that the proponent of a motion to suppress must establish that his or her own constitutional rights, rather than the rights of a third party, were violated by the challenged search and/or seizure. *See also* State v. Edwards, 96 Haw. 224, 232, 30 P.3d 238, 246 (2001) ("The proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that his or

the suppression of evidence obtained after a narcotics search dog jumped into the vehicle and alerted, thereby provoking the police officer to obtain a search warrant for the vehicle.[137] It held that "a 'passenger qua passenger' does not have a legitimate expectation of privacy in the vehicle" the passenger is riding in, and thus cannot move to suppress evidence found during a search of the vehicle.[138] Furthermore, "a mere possessory interest in a seized item does not necessarily mean that the possessor's reasonable expectation of privacy has been infringed."[139] Because the search did not infringe the passenger's reasonable expectation of privacy, his subsequent statement to the police could not constitute excludable evidence or "tainted fruits of an initial unlawful search and seizure."[140] The court distinguished this case from its holding just one week earlier in *State v. Poaipuni*[141] where evidence and statements were suppressed because they were found to be illegally obtained through an illegal search of Peter Poaipuni's home, even though Poaipuni did not have a legitimate expectation of privacy in those specific items because he did not own or control them.[142]

Justice Ramil dissented in *Tau'a* and disagreed that *Poaipuni* and *Tau'a* were distinguishable.[143] He pointed out that Poaipuni admitted that he had no expectation of privacy in items he did not own or control, but he was nevertheless allowed to challenge the search of these items in his home, while Tau'a, who was present in the searched vehicle, somehow could not.[144] Justice Ramil emphasized his concern over the court issuing "two diametrically contradictory rules" within the span of one week.[145] Justice Acoba wrote a

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her own . . . rights were violated[.]") (internal citations omitted); State v. Araki, 82 Haw. 474, 483, 923 P.2d 891, 900 (1996) (same).

[137] *Tau'a*, 98 Haw. at 428-29, 49 P.3d at 1229-30.

[138] *Id.* at 434, 49 P.3d at 1235 (adopting the holding in *Rakas*).

[139] *Id.* at 438, 49 P.3d at 1239 (citing Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980)).

[140] *Id.* at 440 n.24, 49 P.3d at 1241 n.24.

[141] 98 Haw. 387, 49 P.3d 353 (2002).

[142] *Id.* at 388-89, 49 P.3d at 354-55.

[143] *Tau'a*, 98 Haw. at 440, 49 P.3d at 1241 (Ramil, J., dissenting).

[144] *Id.*

> Defendant Poaipuni denied ownership of and physically relinquished control over the firearms. Furthermore, Poaipuni testified that: (1) the weapons were not his; (2) he did not touch the weapons (they were allegedly carried and deposited into the toolshed by a third party); (3) he never possessed the weapons; and (4) he had no access to the weapons ("The whole purpose of putting 'em in [the toolshed] is because it's going to be locked and nobody can get in there except my Dad."). In comparing the two cases, it is incomprehensible that Tau'a, who was present in the vehicle, did not have an expectation of privacy, but Poaipuni, who essentially admitted that he had no expectation of privacy, somehow did.

Id. (alteration in original).

[145] *Id.*

separate dissenting opinion, arguing that the application of the legitimate expectation of privacy standard to possessory cases as a requirement of standing "contravenes the purposes of the exclusionary rule,"[146] which is meant to deter illegal police conduct and ensure that illegally obtained evidence is not used in court.[147] Without the narcotic dog's initial alert (which was deemed an illegal exploratory search because of the dog's status as an extension of its handler, who admittedly could not enter the vehicle legally), no probable cause existed for the officer to search the vehicle, the warrant based on the alert was thus invalid, and the fruits of the search should have been suppressed.[148] Justice Acoba argued that the entry of the search dog into the vehicle was itself an intrusion of privacy because there was neither probable cause nor exigent circumstances to justify this initial search, and mused that "no excited canine exception" existed to the probable cause or warrant requirements.[149]

Justice Acoba cautioned against the majority's adoption of the U.S. Supreme Court's opinion in *Rakas v. Illinois*, which he characterized as authorizing an "open season" for automobile searches.[150] Justice Acoba argued that because the rights involving a person's effects arise out of possession, possession in and of itself should suffice to give a party standing to raise that right.[151] Furthermore, Justice Acoba worried that absent an automatic-standing rule applicable to possessory crimes, a defendant may be placed in the intolerable position of choosing between asserting Fourth Amendment and Fifth Amendment rights against self-incrimination.[152]

In another vehicular search situation, Chief Justice Moon found that the defendant did not possess a reasonable expectation of privacy with regard to a handgun on the floor under his driver's seat.[153] Because the government agent was engaged in a lawful intrusion and inadvertently observed evidence of a crime, this observation was not considered an invasion of privacy.[154] Similarly, the court found no expectation of privacy for drugs and guns lying in plain view on the floor of another defendant's car.[155]

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[146] *Id.* at 454, 49 P.3d at 1255 (Acoba, J., dissenting).

[147] *Id.* (citing State v. Pattioay, 78 Haw. 455, 468, 896 P.2d 911, 924 (1995)).

[148] *Id.* at 458, 49 P.3d at 1259.

[149] *Id.* at 441, 49 P.3d at 1242.

[150] *Id.* at 453, 49 P.3d at 1254 (quoting Rakas v. Illinois, 439 U.S. 128, 156-57 (1978) (White, J., dissenting) (arguing that with the Court's opinion, no matter how unlawful stopping and searching a car may be, absent a possessory or ownership interest, no "mere" passenger may object, regardless of his [or her] relationship to the owner)).

[151] *Id.* at 449, 49 P.3d at 1250 (quoting Rawlings v. Kentucky, 448 U.S. 98, 117 (1980) (Marshall, J., dissenting)).

[152] *Id.* at 453, 49 P.3d at 1254.

[153] State v. Meyer, 78 Haw. 308, 893 P.2d 159 (1995).

[154] *Id.* at 317, 893 P.2d at 168.

[155] State v. Jenkins, 93 Haw. 87, 95-96, 997 P.2d 13, 21-22 (2000).

The court has recognized that the reasonable expectation of privacy in one's home, generally the quintessential private place,[156] can be invoked by a short-term guest who was staying over for a week.[157] The guest's subjective and reasonable expectation of privacy included the separately enclosed laundry room,[158] and thus his crystal methamphetamine found behind the washing machine in a warrantless search was properly suppressed.[159] In another case, the court similarly found that a person had a reasonable expectation of privacy in the mattress in his bedroom, and that a warrantless search was unreasonable even though the officers were aware that defendant used a gun in the bedroom to threaten his wife.[160] Thermal scans of a person's home have also been found to violate the reasonable expectation of privacy.[161]

On the other hand, the court in *State v. Anderson* found that a locked bedroom door did not in and of itself convert the bedroom into a separate dwelling establishing a reasonable expectation of privacy from an otherwise appropriate search of a house.[162] Absent objectively verifiable facts showing that the bedroom was a separate residential unit, the police officers were found to have acted reasonably in including the room of William David Anderson in their search warrant for drugs.[163] Although Anderson may have actually had a reasonable expectation of privacy in his bedroom, because the police were executing a valid search warrant at the time, their search could not be made illegal retroactively.[164]

In *State v. Dixon*, involving an issue of first impression, Chief Justice Moon held that the use of a ruse by the police to effect the voluntary opening of a door and the subsequent entry without force for the purpose of executing a lawful arrest warrant was reasonable under both the Hawai'i and U.S. Constitutions because the occupant had voluntarily surrendered his or her

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[156] State v. Lopez, 78 Haw. 433, 442, 896 P.2d 889, 898 (1995) ("There is no question that a person generally has an actual, subjective expectation of privacy in his or her home. Nor is there any question that the expectation of privacy in one's home is one that society recognizes as objectively reasonable.") *See* United States v. United States Dist. Court, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

[157] State v. Cuntapay, 104 Haw. 109, 85 P.3d 634 (2004).

[158] *Id.* at 116-17, 85 P.3d at 641-42.

[159] *Id.* at 118, 85 P.3d at 643.

[160] State v. Rodriguez, No. 22978, 2004 Haw. LEXIS 204, at *23-24 (Mar. 24, 2004).

[161] State v. Detroy, 102 Haw. 13, 23, 72 P.3d 485, 495 (2003).

[162] 84 Haw. 462, 469, 935 P.2d 1007, 1014 (1997) (citing United States v. Kyles, 40 F.3d 519, 524 (2d Cir. 1994)).

[163] *Id.* at 472-73, 935 P.2d at 1017-18.

[164] *Id.* at 470, 935 P.2d at 1015.

privacy by opening the door.[165] The court extended the *Dixon* rule in *State v. Eleneki* to include government entries to execute *search* warrants as well.[166]

C. Warrantless Search Exceptions

The court has recognized a few well-delineated exceptions to the warrant requirement involving exigent circumstances, but probable cause is still always required.[167] These exceptions arise when "the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence," outweigh the privacy concerns normally requiring warrants.[168]

One common exception to the warrant requirement is when the government official views evidence in either plain or open view. The court in *State v. Meyer*[169] declined to follow the U.S. Supreme Court and instead preserved the requirement that a plain-view sighting must come about inadvertently in order to prevent pretextual searches and seizures.[170] The *Meyer* court reiterated the distinction, first set forth in *State v. Kaaheena*,[171] between plain-view sightings and open-view sightings; although visually similar, these two situations are legally distinct.[172] In the *plain*-view situation, the sighting takes place after an intrusion into activities or areas where an individual has a reasonable expectation of privacy.[173] If the officer has already intruded, and if the intrusion is justified, the objects in plain view, sighted inadvertently, will be admissible.[174] In the *open*-view situation, however, "the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside [at] that which is knowingly exposed to the public."[175] In *State v. Bonnell*,[176] the court explained

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[165] 83 Haw. 13, 23, 924 P.2d 181, 191 (1996).

[166] 106 Haw. 177, 993 P.2d 1191 (2000).

[167] State v. Meyer, 78 Haw. 308, 312, 893 P.2d 159, 163 (1995) (citing State v. Fields, 67 Haw. 268, 281, 686 P.2d 1379, 1389 (1984)).

[168] *Id.* (quoting State v. Clark, 65 Haw. 488, 494, 654 P.2d 355, 360 (1982)).

[169] 78 Haw. 308, 893 P.2d 159.

[170] *Id. See* State v. Wallace, 80 Haw. 382, 398 n.14, 910 P.2d 695, 711 n.14 (1996) (citing *Meyer*, 78 Haw. at 314 n.6, 893 P.2d at 165 n.6). As the dissent by Justice Brennan (joined by Justice Marshall) in *Horton v. California* noted, "[t]he rationale behind the inadvertent discovery requirement is simply that we will not excuse officers from the general requirement of a warrant to seize if the officers know the location of evidence, have probable cause to seize it, intend to seize it, and yet do not bother to obtain a warrant particularly describing that evidence." 496 U.S. 128, 144-45 (1990) (Brennan, J., dissenting).

[171] 59 Haw. 23, 575 P.2d 462 (1978).

[172] *Meyer*, 78 Haw. at 313-17, 893 P.2d at 164-68. *See Kaaheena*, 59 Haw. at 28, 575 P.2d at 466.

[173] *Meyer*, 78 Haw. at 314, 893 P.2d at 165; *Kaaheena*, 59 Haw. at 28, 575 P.2d at 466.

[174] *Meyer*, 78 Haw. at 314, 893 P.2d at 165; *Kaaheena*, 59 Haw. at 28, 575 P.2d at 466.

[175] *Meyer*, 78 Haw. at 313, 893 P.2d at 164 (citing *Kaaheena*, 59 Haw. at 28-29, 575 P.2d at

that where the object observed by the police is in open view, it is not subject to any reasonable expectation of privacy and the observation does not constitute an impermissible search.[177]

The *Meyer* opinion went on to make it clear that mere visibility of contraband within constitutionally protected premises is not enough to justify entry and seizure without a warrant, because exigent circumstances are still required.[178] In *Meyer*, the officer's sighting of a handgun was a plain-view, instead of open-view, situation since the handgun was not knowingly exposed to the public.[179] A person passing by could not have spotted the gun by merely glancing in the window because it took the opening of the door to make it visible.[180] The court found that exigent circumstances justified the search, however, because of the risk of danger or destruction of evidence.[181]

Another exception to the general requirement for a warrant is where a person voluntarily consents to either a search or seizure. In *State v. Pau'u*,[182] the court sought to insure the survival of ample protection for citizens in these consent situations by making it clear that a waiver of one's constitutional rights or a confession, even if uncoerced and intelligently given, would be inadmissible if induced by a prior illegality.[183] The court maintained that the burden falls on the government to prove that the waiver was voluntary and uncoerced.[184] Furthermore, although the court has held that an officer has no affirmative duty to inform a person approached for questioning that he is free to leave the encounter at any time, failure to inform is a factor to be considered in evaluating whether consent has been freely and voluntarily given.[185] The court looks at the totality of the circumstances to determine whether persons truly provide consent voluntarily as opposed to giving consent because they mistakenly believed they had no other choice. In *State v. Quino*, the court held that once questioning by an airport police officer turned from general to inquisitive, a reasonable person in Quino's position would not have believed that he or she was free to ignore the officer's inquiries and walk away.[186]

466-67) (brackets in original).

[176] 75 Haw. 124, 856 P.2d 1265 (1993).

[177] *Id.* at 144, 856 P.2d at 1276 (citing State v. Kapoi, 64 Haw. 130, 140, 637 P.2d 1105, 1113 (1981) (quoting *Kaaheena*, 59 Haw. at 29, 575 P.2d at 467)).

[178] *Meyer*, 78 Haw. at 313, 893 P.2d at 164.

[179] *Id.* at 315, 893 P.2d at 166.

[180] *Id.*

[181] *Id.* at 317, 893 P.2d at 168.

[182] 72 Haw. 505, 824 P.2d 833 (1992).

[183] *Id.* at 512, 824 P.2d at 835-36 (citing State v. Knight, 63 Haw. 90, 94, 621 P.2d 370, 374 (1980)).

[184] *Id.* at 509, 824 P.2d at 835.

[185] State v. Quino, 74 Haw. 161, 174, 840 P.2d 358, 364 (1992).

[186] *Id.* at 172-75, 840 P.2d at 363-65.

Therefore, even though no force was used, the court found that an unreasonable seizure had taken place.[187]

In consent cases, the court has utilized a two-part test to determine whether evidence or statements may have been obtained by illegal means. In determining whether a statement is the fruit of an unlawful warrantless seizure, the court first decides at what point the individual was seized and then whether, prior to the seizure, the individual may have voluntarily and intelligently consented.[188] In *State v. Kauhi*, the court reasoned that even if Samson K. Kauhi was seized, such seizure was with his consent because the officer's questions were not "specifically designed to elicit responses that would either vindicate or implicate [Kauhi]."[189] The prior exchange had not escalated from an "ostensibly casual conversation to a focused and intrusive quest for evidence of criminal wrongdoing."[190] Conversely, in *State v. Trainor*, the court found that Trainor's cooperation in a "walk and talk situation" was involuntary because although the airport police officer had mentioned that Trainor was free to leave and was not under arrest, the officer's initial show of authority, pretextual questioning, and overall complete control of the situation meant that her subsequent pat down of Trainor was not the result of a voluntary consent.[191]

In *State v. Hanson*, the court explained that a search had to be conducted by a government official or someone acting as an arm of the government in order to invoke the protections of the Fourth Amendment and of article I, section 7.[192] It found in that case that the significant participation of the government in the development and implementation of the airport search program and compliance with the Federal Aviation Administration regulations converted routine airport screening searches into government searches.[193] The court found that an airport security search, where the passenger voluntarily consents by submitting to the screening process, is a special case scenario and need not be justified by any showing of probable cause or reasonable suspicion because of the magnitude and pervasive nature of the potential for public danger.[194] The court found that Hanson's consent was voluntary when an airport security guard asked him to

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[187] *Id.* at 172-73, 840 P.2d at 363-64.

[188] State v. Trainor, 83 Haw. 250, 256, 925 P.2d 818, 824 (1996) (citing State v. Kearns, 75 Haw. 558, 565, 867 P.2d 903, 907 (1994)).

[189] 86 Haw. 195, 204, 948 P.2d 1036, 1045 (1997) (quoting *Kearns*, 75 Haw. at 567, 867 P.2d at 908).

[190] *Id.* (quoting *Trainor*, 83 Haw. at 256, 925 P.2d at 824).

[191] *Trainor*, 83 Haw. at 262, 925 P.2d at 830.

[192] 97 Haw. 77, 80, 34 P.3d 7, 10 (2001).

[193] *Id.* at 80-81, 34 P.3d at 10-11.

[194] *Id.* at 83, 34 P.3d at 13.

open his tool box after it had initially been x-rayed, and Hanson complied and then allowed the guard to open the plastic bag that contained a weapon.[195]

In *State v. Lopez*, the court found that even if consent is given to police to enter a home and search after a robbery, a person's expectation of privacy is completely restored as soon as police leave and the occupants shut the door.[196] The court explained that in calling the police to report a robbery sometime around midnight on Friday, November 6, 1992, the Hauanios did not somehow voluntarily give Hawai'i law enforcement officials an implied license to enter their house, including their master bedroom, to take pictures and search for evidence relating to the criminal investigation (while the Hauanios were staying at a hotel).[197] The court rejected the concept of apparent authority and instead required actual authority to waive another's constitutional rights to privacy.[198] Adopting the inevitable-discovery rule, the court took further precaution by requiring a showing of clear and convincing evidence that the evidence obtained would inevitably have been discovered by lawful means.[199] Based on the circumstances, the court held that the evidence presented at trial would not have been inevitably discovered, and thus ruled that it was improper to admit into evidence.[200]

The court has been steadfast in requiring both probable cause and exigent circumstances before a lawful warrantless search is permitted. For example, the court in *State v. Monay* explained that the mere fact that drugs are involved in a situation is not an exigent circumstance, and it required proof by the government "that the occupants of the suspected locale were aware of the police presence and were taking steps which the police realistically feared may lead to the destruction of evidence."[201] In *State v. McCabe*, the court also held that the presence of two small seeds and two tablets in a backpack did not by itself establish probable cause to believe that the backpack owner was illegally

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[195] *Id.*

[196] 78 Haw. 433, 896 P.2d 889 (1995).

[197] *Id.* at 442, 896 P.2d at 898.

[198] *Id.* at 445, 896 P.2d at 901 (citing State v. Mahone, 67 Haw. 644, 647, 701 P.2d 171, 173-74 (1985) ("A third party cannot waive another's constitutional right to privacy unless authorized to do so. Thus, the consent of a third party cannot validate a warrantless search unless the third party possessed authority to consent."); State v. Matias, 51 Haw. 62, 67, 451 P.2d 257, 260 (1969) (holding that an individual's constitutional right to privacy cannot be waived by another unless he or she has authorized that other person to do so)).

[199] *Id.* at 451, 896 P.2d at 907.

[200] *Id.* at 455, 896 P.2d at 911.

[201] 85 Haw. 282, 284-85, 943 P.2d 908, 910-11 (1997) (quoting State v. Garcia, 77 Haw. 461, 470, 887 P.2d 671, 680 (1995)) (internal quotation marks and brackets omitted).

possessing Schedule III drugs.[202] The court has reviewed decisions regarding probable cause under the de novo standard.[203]

In an "incident-to-lawful-arrest" situation, probable cause is not required, but "the police must be able to point to specific and articulable facts from which it may be determined that the action they took was necessitated by the exigencies of the situation."[204] This language derives from the "stop and frisk" cases of *Terry v. Ohio*[205] and its progeny, and is generally known as the "reasonable suspicion" standard. In *State v. Bohannon*, the court upheld the long-standing adoption of the *Terry* stop standard and explained that the ultimate test in these situations must be whether, from the totality of the circumstances, measured by an objective standard, a government official of reasonable caution would be justified in believing that criminal activity was afoot and that the action taken was appropriate.[206] In this case, the court agreed that the screeching of Alicia Anne Bohannon's tires considered in concert with the reasonable inferences arising from the screeching tires warranted a reasonable suspicion that Bohannon had committed the offense of reckless driving and thus justified the officer's traffic stop.[207]

In *State v. Barros*, the court found that the officer's warrant check and subsequent "pat-down" were not unlawful because they occurred within the same time period that the officer would have issued a citation and because limited pat-downs are generally acceptable under the "search incident to a lawful arrest" exception.[208] But in *State v. Lopes*, the court found that the rights of Vanessa R. Lopes had been infringed when she was detained for a warrant search after coming to a police station to report an assault allegedly committed by a suspect waiting outside the station.[209] Because the police exceeded that degree of intrusion absolutely necessary under the circumstances of the case, that part of the detention related to the warrant-check procedure constituted an unreasonable seizure under article I, section 7.[210] Furthermore, seizure of a methamphetamine pipe following Lopes's arrest pursuant to the

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[202] No. 22979, 2001 Haw. LEXIS 286, at *30-31 (Aug. 9, 2001).

[203] State v. Navas, 81 Haw. 113, 123, 913 P.2d 39, 49 (1996).

[204] State v. Pulse, 83 Haw. 229, 245, 935 P.2d 797, 813 (1996) (quoting State v. Clark, 65 Haw. 488, 494, 654 P.2d 355, 360 (1982)).

[205] 392 U.S. 1 (1968); *see also* State v. Kim, 68 Haw. 286, 290, 711 P.2d 1291, 1294 (1985).

[206] 102 Haw. 228, 237, 74 P.3d 980, 989 (2003) (quoting State v. Barnes, 58 Haw. 333, 338, 568 P.2d 1207, 1211 (1977)); *see also* State v. Powell, 61 Haw. 316, 321-22, 603 P.2d 143, 147-48 (1979).

[207] *Bohannon*, 102 Haw. at 237-38, 74 P.3d at 989-90.

[208] 98 Haw. 337, 343, 48 P.3d 584, 590 (2002) (citing State v. Naeole, 80 Haw. 419, 423, 910 P.2d 732, 736 (1996); State v. Reed, 70 Haw. 107, 115, 762 P.2d 803, 808 (1988)).

[209] No. 24187, 2002 Haw. LEXIS 539, at *3, *6 (Sept. 6, 2002).

[210] *Id.* at *6.

newly discovered warrant was unlawful, and this evidence was suppressed at trial as fruits of the illegal detention.[211]

Addressing the reasonableness of a temporary investigative traffic stop in *State v. Spillner*, the court articulated the elements that go into creating probable cause and exigent circumstances.[212] The court included timing, the officer's knowledge of prior offenses, and the likelihood that current criminal activity is afoot as factors that contribute to validating a reasonable suspicion sufficient to warrant a temporary investigative stop.[213] The court explained that "articulated facts that indicate that an offense is ongoing in nature support reasonable suspicion that criminal activity continues to be afoot and therefore help justify a brief investigatory stop to confirm or dispel those suspicions."[214]

Ultimately, the court analyzed the reasonableness of the traffic stop by weighing the interests advanced by enforcing licensing, insurance, and other laws relating to highway safety against the nature and degree of the intrusion by law enforcement into motorists' private lives. "Where a brief investigatory stop, based on particularized information regarding a specific driver, advances the important state interest in highway safety, courts have determined that such stops are not unreasonable intrusions into the private sphere protected by the" Fourth Amendment and article I, section 7.[215]

Another important case involving traffic stops is *State v. Heapy*,[216] where the court found that the stop of Raymond J. Heapy's vehicle violated article I, section 7, because the sole reason for stopping Heapy was that he had turned off a street on which a sobriety checkpoint had been established, and the officer believed that this created a suspicion that he was inebriated or had something to hide.[217] The court held that a vehicular seizure or stop based on reasonable suspicion must be tied to some objective manifestation, observed prior to the stop, that the person is, or is about to be, engaged in criminal activity.[218] Because it was not objectively clear that Heapy was intoxicated or was purposefully avoiding the checkpoint, the officer's stop was unreasonable.[219]

On the other hand, the court found that an anonymous tip about erratic driving was enough to justify an investigatory stop because of the imminence of the danger and the reliability of the tip.[220] But searches must be linked

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[211] *Id.* at *6-7 (citations omitted).
[212] 116 Haw. 351, 173 P.3d 498 (2007).
[213] *Id.* at 360, 173 P.3d at 507.
[214] *Id.*
[215] *Id.* at 364, 173 P.3d at 511.
[216] 113 Haw. 283, 151 P.3d 764 (2007).
[217] *Id.* at 292, 151 P.3d at 773.
[218] *Id.* at 291-92, 151 P.3d at 772-73.
[219] *Id.* at 293, 151 P.3d at 774.
[220] State v. Prendergast, 103 Haw. 451, 460, 83 P.3d 714, 723 (2004).

somehow to the offense that was originally suspected.[221] In *State v. Estabillio*, the court held that because the police officer's investigation into possible drug activity was unrelated to the original basis of a traffic offense for stopping Estabillio, the evidence should have been suppressed at trial.[222]

In *State v. Silva*, the court explained that because temporary investigative stops involve an exception to the general rule requiring that searches and seizures be supported by probable cause, the scope of such detentions must consequently be quite narrow.[223] In *State v. Ketcham*, the court reiterated that a temporary stop may last for no longer than is absolutely necessary to confirm or dispel the officer's reasonable suspicion that criminal activity is afoot and must be no greater in intensity than necessary under the circumstances.[224] The court applied the *Terry* standard and subsequent determination of consent to a temporary stop in *State v. Kaleohano*.[225] The court found that although the officer told Kristin K. Kaleohano that she was free to go, the officer also told Kaleohano that if she refused to consent to the search, the standard procedure was to obtain a search warrant for her vehicle anyway.[226] The court found that no illegality preceded the officer's request for consent to search and that although Kaleohano was effectively seized when she agreed to the search of her vehicle, her lawful detention did not, as a per se matter, validate or invalidate her consent.[227] The officer did not exceed the scope of a temporary investigative stop, because the request to search Kaleohano's vehicle was based on the reasonable suspicion that she was impaired while driving.[228]

The court addressed the issue of "implied consent" in *State v. Entrekin* and found that it was something of a misnomer, inasmuch as a typical implied consent statute, including Hawai'i's, accords drivers the right to refuse a breath, blood, or urine test, rather than require them, as the term seems to suggest.[229] Thus, "implied consent statutes impose 'narrower guidelines for law

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[221] State v. Bolosan, 78 Haw. 86, 890 P.2d 673 (1995). "Offenses are related when the conduct that gave rise to the suspicion that was not objectively reasonable with respect to the articulated offense could, in the eyes of a similarly situated reasonable officer, also have given rise to an objectively reasonable suspicion with respect to the justifiable offense." *Id.* at 94, 890 P.2d at 681 (citation omitted).

[222] 121 Haw. 261, 273, 218 P.3d 749, 761 (2009).

[223] 91 Haw. 80, 81, 979 P.2d 1106, 1107 (1999) (citing Dunaway v. New York, 442 U.S. 200, 207-08 (1979)).

[224] 97 Haw. 107, 125, 34 P.3d 1006, 1024 (2001).

[225] 99 Haw. 370, 380, 56 P.3d 138, 148 (2002).

[226] *Id.* at 388, 56 P.3d at 156.

[227] *Id.* at 381, 56 P.3d at 149 (citing State v. Price, 55 Haw. 442, 444, 521 P.2d 376, 377 (1974) (stating that "the mere fact that a suspect is under arrest does not negate the possibility of a voluntary consent")).

[228] *Id.* at 383, 56 P.3d at 151.

[229] 98 Haw. 221, 226, 47 P.3d 336, 341 (2002).

enforcement authorities in the administration of sobriety tests upon suspected drunken drivers' than the United States Constitution would otherwise allow."[230] The court disagreed with Entrekin's argument that obtaining "a blood sample, absent either a valid arrest or actual—rather than implied—consent," was an unreasonable search and seizure.[231] The court held that "the nonconsensual extraction of a blood sample from Entrekin . . . violated neither the [F]ourth [A]mendment to the United States Constitution nor article I, section 7 of the Hawai'i Constitution, notwithstanding the fact that the police had not placed him under arrest prior to obtaining the blood sample."[232]

The court has resolutely maintained that "subsequent events can neither support nor invalidate the existence of probable cause at the time of a search or seizure."[233] In *State v. Kido*, the invalidation of a prior conviction and subsequent probation order did not change the circumstances so as to require the circuit court to allow Kido to withdraw his plea of no contest.[234] Likewise, the court has found anticipatory search warrants impermissible under Hawai'i statutory requirements where the contraband to be searched was known to be in the possession of the persons conducting the search at the time the warrants were issued.[235] The court found that a warrant based on the expectation that a parcel would be at the premises at the time of the future search was insufficient under the plain wording of the statutes because the parcel containing the contraband drugs was already in the possession of the police officers at the time the search warrant was issued, not with the person whose premises were to be searched.[236]

Shortly before Ronald Moon became chief justice, the court in *State v. Morris* addressed the level of privacy extended to probationers.[237] The court held that while "urinalysis drug testing is a search under the Hawaii Constitution[,]"[238] such searches are reasonable based upon the "diminished expectation of privacy with respect to the minimal intrusions of drug testing which are in furtherance of the State's reasonable interests[.]"[239] The court

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[230] *Id.* at 231 n.14, 47 P.3d at 346 n.14 (citing Rossell v. City & Cnty. of Honolulu, 59 Haw. 173, 180, 579 P.2d 663, 668 (1978)).

[231] *Id.* at 231, 47 P.3d at 346.

[232] *Id.* at 233, 47 P.3d at 348.

[233] State v. Kido, 109 Haw. 458, 462, 128 P.3d 340, 344 (2006) (citing State v. Phillips, 67 Haw. 535, 541, 696 P.2d 346, 351 (1985); House v. Ane, 56 Haw. 383, 391, 538 P.2d 320, 326 (1975)).

[234] *Id.* at 463, 128 P.3d at 345.

[235] State v. Scott, 87 Haw. 80, 81, 951 P.2d 1243, 1244 (1998).

[236] *Id.* at 84, 951 P.2d at 1247.

[237] 72 Haw. 67, 806 P.2d 407 (1991).

[238] *Id.* at 71, 806 P.2d at 410 (citing McCloskey v. Honolulu Police Dep't, 71 Haw. 568, 799 P.2d 953 (1990)).

[239] *Id.*

maintained that "[w]hile probationers [do] have a right to enjoy a significant degree of privacy and liberty," it is limited for those "who but for the grace of the sentencing court would be in prison."[240] The court found that the testing was not unduly intrusive and that it does not need to be prompted by reasonable suspicion.[241] In *State v. Propios*, the court also found that although a probation officer could lawfully search a defendant's residence based upon the results of a failed drug test, the police could not do so.[242] In this case, the probation officer's search was only a subterfuge for an improper search conducted by the police, and thus the evidence obtained by the police was properly suppressed at trial.[243]

Similarly, in *In re Jane Doe*,[244] the court explicitly adopted the standards set out in *New Jersey v. T.L.O.*[245] for searches of students by school officials. In an opinion written by Chief Justice Moon for a unanimous court, the court stated that although children in school have legitimate expectations of privacy, these expectations are diminished somewhat by the "substantial need of teachers and administrators . . . to maintain order."[246] The court held that because teachers and administrators act as representatives of the government, they must, therefore, comply with article I, section 7 of the Hawai'i Constitution.[247] Because of the unique nature of the school environment, school officials do not, however, need the usual probable cause or warrant to search or seize evidence from students under their authority.[248] The school officials must nonetheless have a reasonable suspicion that the search will produce relevant evidence, and the search and seizure must be reasonable under all the circumstances; thus, any search must be justified at its inception and reasonably related in scope to the circumstances that initially prompted the intrusion.[249] The court ultimately found that because it was reasonable for the school principal to suspect that the student had violated the law and that incriminating evidence would be found in her purse, the search was lawful under the circumstances.[250] In a subsequent school search case in 2004, the court concluded that an anonymous Crime Stoppers' tip did provide reasonable grounds to justify a search of a student for

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[240] *Id.* at 71-72, 806 P.2d at 410 (citing State v. Fields, 67 Haw. 268, 278, 686 P.2d 1379, 1388 (1984)).

[241] *Id.* at 72, 806 P.2d at 410-11.

[242] 76 Haw. 474, 879 P.2d 1057 (1994).

[243] *Id.*

[244] 77 Haw. 435, 887 P.2d 645 (1994).

[245] 469 U.S. 325 (1985).

[246] *In re Jane Doe*, 77 Haw. at 444, 887 P.2d at 654.

[247] *Id.* at 442, 887 P.2d at 652.

[248] *Id.*

[249] *Id.*

[250] *Id.* at 437, 887 P.2d at 647.

contraband.[251] The court applied the reasonableness standards set forth in *Terry v. Ohio*, which examine whether the search was justified at its inception and whether it was reasonably related in scope under the circumstances.[252]

D. Scope of Warrant

The Hawai'i and U.S. Constitutions protect individuals from unreasonable searches and seizures and generally require that searches be conducted pursuant to a warrant issued for probable cause supported by an oath or affirmation and describing the place to be searched and the persons or things to be seized.[253] Judicial determination of the constitutionality of a warrant requires analysis on a case-by-case basis because unique facts and circumstances often exist.[254] The language of the warrant itself, the executing officer's prior knowledge of the place, and the description of the location in the probable cause affidavit are all relevant factors in determining constitutionality.[255]

In *State v. Hauge*, the court found that once a sample of a person's blood or DNA is lawfully obtained from a person, the person has no remaining privacy interest in the sample.[256] Steven M. Hauge's blood had been previously drawn and tested for an unrelated robbery case, and he sought to suppress the use of his DNA in the present case because although he had consented to its use in the previous robbery case, he had not consented in the present case.[257] The court denied Hauge's motion but did draw some boundaries around the permissible use of DNA information.[258] It held that DNA evidence could be used only for identification purposes, but also concluded that since the lab's use of Hauge's blood sample in the present case was limited to the purposes of DNA comparison and identification as in the prior robbery case, it was proper.[259]

In *State v. Araki*, the court held that there was no seizure "when an object discovered in a private search is voluntarily relinquished to the government."[260]

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[251] *In re* John Doe, 104 Haw. 403, 408, 91 P.3d 485, 490 (2004) (citing New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)), *overruled on other grounds by In re* Jane Doe, 105 Haw. 505, 100 P.3d 75 (2004).

[252] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[253] State v. Anderson, 84 Haw. 462, 468, 935 P.2d 1007, 1012 (1997) (citing State v. Woolsey, 71 Haw. 638, 640, 802 P.2d 478, 479 (1990)); *see also* U.S. CONST. amend. IV; HAW. CONST. art. I, § 7.

[254] *Anderson*, 84 Haw. at 468, 935 P.2d at 1012 (citing State v. Kealoha, 62 Haw. 166, 170-71, 613 P.2d 645, 648 (1980)).

[255] *Id.* (citing State v. Matsunaga, 82 Haw. 162, 167, 920 P.2d 376, 381 (App. 1996)).

[256] 103 Haw. 38, 52, 79 P.3d 131, 145 (2003).

[257] *Id.* at 41, 79 P.3d at 134.

[258] *Id.*

[259] *Id.* at 53, 79 P.3d at 146.

[260] 82 Haw. 474, 481, 923 P.2d 891, 898 (1996) (quoting United States v. Coleman, 628

The State received a pornographic video voluntarily from the minor's mother, acting on her own volition, and so had not actually seized it from the store.[261] The court made clear that when private individuals "act as agents of the police in conducting a search or seizure," the regular constitutional provisions and curative measures must be followed.[262] In order to invoke constitutional protections, however, "the seizure in question must have been occasioned by the government[]" and not carried out independently by a civilian.[263] When an object discovered in a private search is voluntarily relinquished to the government, there is thus no seizure in the constitutional sense.[264] In contrast, in *State v. Kahoonei*, the court found an individual to be an instrumentality of the government when she conducted a search pursuant to their request.[265] The government involvement was significant and extensive enough to necessitate a warrant to qualify the search as lawful.[266] The court cautioned that to hold otherwise would create a loophole for circumventing one of the fundamental purpose of article I, section 7, which is to deter warrantless searches.[267]

E. Administering a Search Warrant

An individual's protection against unreasonable searches and seizures extends to situations where the government already has a proper warrant and requires that the search undertaken pursuant to the warrant meet the reasonableness standard. The U.S. Supreme Court, in a ruling followed by the Hawai'i Supreme Court,[268] held that the reasonableness of a search, an element of the overall reasonableness inquiry under the Fourth Amendment, depends on "whether law enforcement officers announce[] their presence and authority prior to entering."[269] This is called the knock-and-announce rule. In the Hawai'i case, *State v. Diaz*, where the police entered a video store already open for business and then proceeded to enter the interior office within, the court found that although the police officers need not announce their entry into the store, they must announce before entering the interior office.[270] The court

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F.2d 961, 966 (6th Cir. 1980)).

[261] *Id.* at 476, 923 P.2d at 893.

[262] *Id.* at 480, 923 P.2d at 897 (quoting State v. Boynton, 58 Haw. 530, 536, 574 P.2d 1330, 1334 (1978)) (internal quotations and brackets omitted).

[263] *Id.* (citing *Boynton*, 58 Haw. at 531, 534, 574 P.2d at 1331, 1333).

[264] *Id.* at 481, 923 P.2d at 898.

[265] 83 Haw. 124, 925 P.2d 294 (1996).

[266] *Id.* at 131, 925 P.2d at 301.

[267] *Id.*

[268] State v. Diaz, 100 Haw. 210, 220, 58 P.3d 1257, 1267 (2002).

[269] *Id.* (quoting Wilson v. Arkansas, 514 U.S. 927, 934 (1995)).

[270] *Id.* at 218-21, 58 P.3d at 1265-68 (citing United States v. Little, 753 F.2d 1420, 1435-36 (9th Cir. 1984)). The court agreed with the Ninth Circuit, holding that there is no duty to knock

looked at two factors: whether the police conduct was reasonable under the circumstances, and whether the purposes behind the knock-and-announce rule were furthered.[271] In *State v. Harada*, the court reiterated that the purposes of the knock-and-announce rule were "(1) to reduce violence to both occupants and police resulting from an unannounced entry, (2) to prevent unnecessary property damage, and (3) to protect an occupant's right to privacy."[272]

The *Diaz* court took notice that in *State v. Garcia*,[273] a ten-second delay between the announcement and the forcible entry into the outer door of a residence was unreasonable,[274] but that the U.S. Court of Appeals for the District of Columbia Circuit had found a fifteen-second delay to be reasonable.[275] The court reasoned that because a person in the office should be alert during business hours, a fifteen-second delay was a reasonable time to conclude that no response evinced a constructive refusal that authorized a forcible entry.[276] In a dissenting opinion, Justice Acoba stated that he would have included in the reasonableness requirement a rule obliging the police to also *demand* entry before forcing their way in.[277] His analysis is based on the Hawai'i knock-and-announce statute,[278] which Hawai'i courts have relied on (rather than on constitutional principles) in maintaining that a demand for entry is necessary.

Justice Acoba relied on the holding in *State v. Harada*, which maintained that where force is used to gain entry, in executing either a search or arrest warrant and even if accompanying a ruse, the law enforcement officer must

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and announce upon entering an open business or office for the purpose of executing a warrant, but also held, as a constitutional matter, that the police must give reasonable notice of their presence and authority before breaking an interior office door to a space that is manifestly not open to the public. *Id.*

[271] *Id.* at 220-21, 58 P.3d at 1267-68 (citing State v. Monay, 85 Haw. 282, 285, 943 P.2d 908, 911 (1997) (Ramil, J., concurring and dissenting)).

[272] 98 Haw. 18, 27, 41 P.3d 174, 183 (2002).

[273] 77 Haw. 461, 887 P.2d 671 (1995).

[274] *Diaz*, 100 Haw. at 221, 58 P.3d at 1268 (citing *Garcia*, 77 Haw. at 469, 887 P.2d at 679).

[275] *Id.* (citing United States v. Spriggs, 996 F.2d 320, 323 (D.C. Cir. 1993)).

[276] *Id.*

[277] *Id.* at 227, 58 P.3d at 1274 (Acoba, J., dissenting).

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> The officer charged with the warrant, if a house, store, or other building is designated as the place to be searched, may enter it without demanding permission if the officer finds it open. If the doors are shut the officer must declare the officer's office and the officer's business, and demand entrance. If the doors, gates, or other bars to the entrance are not immediately opened, the officer may break them. When entered, the officer may demand that any other part of the house, or any closet, or other closed place in which the officer has reason to believe the property is concealed, may be opened for the officer's inspection, and if refused the officer may break them.

HAW. REV. STAT. § 803-37 (1993).

comply with the knock-and-announce statute and explicitly demand entry.[279] In *Harada*, the officers were executing a search warrant and used a ruse to cause Harada to open his door briefly (after which he immediately tried to close it). The court held that when the officer then used force to prevent Harada from closing the door, the knock-and-announce requirement was implicated and the officers were required to declare their office, their business, and *demand* entrance.[280] Chief Justice Moon wrote that because the police officers failed explicitly to demand entry before they forced Harada's door open, they violated the knock-and-announce rule.[281] Chief Justice Moon relied on the previous holding in *Monay*,[282] where the court adopted the criteria in *Garcia*[283] and held that the plain and unambiguous language of the knock-and-announce rule required the police to demand entrance expressly before attempting forcible entry.[284] Chief Justice Moon explained that failure to demand entrance made the entry illegal and necessitated the suppression of all of the evidence seized.[285] Justice Acoba's dissent in *Diaz*, arguing that the police officer's failure to *demand* entry was a violation of the duty to comply with the knock-and-announce statute, appears to be more consistent (than the majority's ruling) with *Monay* and *Harada*, where the court explicitly stated that the failure to demand entry was a substantial violation of the knock-and-announce rule. Moreover, in *State v. Maldonado*, the court expressly rejected the doctrine of substantial compliance, and held that to require anything less than full compliance with the knock-and-announce statute would violate the plain language of the rule.[286]

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[279] 98 Haw. 18, 29, 41 P.3d 174, 185 (2002). In the previous case of *State v. Eleneki*, the court held that "the use of a ruse to gain entry is not prohibited in the execution of a search warrant." 92 Haw. 562, 563, 993 P.2d 1191, 1192 (2000). The purposes of the "knock-and-announce" rule are identical in both the arrest and search warrant contexts, and the use of a ruse is consistent with those purposes in the execution of a search warrant. *Id.* at 565, 993 P.2d at 1194. The court analogized *Eleneki* with the Ninth Circuit case of *United States v. Contreras-Ceballos*, where the officers were found to have complied with the knock-and-announce statute when they used a ruse to cause the defendant to open the door about twelve inches, after which he attempted to close the door, and then the officers pushed the door open further, announcing, "Police, search warrant, we demand entry." *Id.* at 567, 993 P.2d at 1196 (citing United States v. Contreras-Ceballos, 999 F.2d 432 (9th Cir. 1993)). *See also supra* notes 268-72 and accompanying text.

[280] *Harada*, 98 Haw. at 29, 41 P.3d at 185-86 (citing State v. Monay, 85 Haw. 282, 284, 943 P.2d 908, 910 (1997)).

[281] *Id.* at 24, 41 P.3d at 180.

[282] *Monay*, 85 Haw. 282, 943 P.2d 908.

[283] State v. Garcia, 77 Haw. 461, 887 P.2d 671 (1995).

[284] *Monay*, 85 Haw. at 284, 943 P.2d at 910.

[285] *Harada*, 98 Haw. at 30, 41 P.3d at 186.

[286] 108 Haw. 436, 444, 121 P.3d 901, 909 (2005).

VI. CONCLUSION

The Hawai'i Supreme Court has been innovative and independent in its approach to claims of privacy in the criminal procedure context and has crafted unique approaches to protect Hawai'i's citizens from overreaching tactics attempted by law enforcement bodies. But in other contexts, claims of privacy have been almost uniformly rejected, and, with the exception of the 1988 *State v. Kam* case (departing from federal precedents to find a privacy right to sell and purchase pornographic material for personal use in the privacy of one's home),[287] it is difficult to identify any case in which the right to privacy amendment now found in article I, section 6 has made a difference. The court seems reluctant to utilize this constitutional provision, perhaps fearing that it is so open-ended that it will be difficult to contain it within defined boundaries.

The innovative approaches that the Hawai'i Supreme Court has taken toward privacy claims in the criminal procedure context are exemplified by *State v. Heapy*,[288] where the plurality opinion pointed out that the court had stated repeatedly that article I, section 7 provides a broader protection to individual privacy than does the Fourth Amendment to the U.S. Constitution:

> Significantly, this court has declared that, compared to the Fourth Amendment, article I, section 7 of the Hawai'i Constitution guarantees persons in Hawai'i a "more extensive right of privacy[.]" *State v. Navas*, 81 Hawai'i 113, 123, 913 P.2d 39, 49 (1996); *see also State v. Dixon*, 83 Hawai'i 13, 23, 924 P.2d 181, 191 (1996) (noting that "article I, section 7 of the Hawai'i Constitution provides broader protection than the [F]ourth [A]mendment to the United States Constitution because it also protects against unreasonable invasions of privacy"); *State v. Tanaka*, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985) ("In our view, article I, § 7 of the Hawai'i Constitution recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights.").[289]

In the *Navas* case, the court explained that article I, section 7 of Hawai'i's constitution "was 'designed to protect the individual from arbitrary, oppressive, and harassing conduct on the part of government officials.'"[290] In the *Tanaka* case, the Hawai'i Supreme Court had held that police cannot search opaque, closed trash bags placed on the street or located in a trash bin without a search warrant, even though federal courts have interpreted the Fourth Amendment to allow such searches.[291] Also, in *State v. Rothman*, the court had found that

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[287] 69 Haw. 483, 748 P.2d 372 (1988).

[288] 113 Haw. 283, 151 P.3d 764 (2007); *see also supra* text accompanying notes 216-19.

[289] *Heapy*, 113 Haw. at 298, 151 P.3d at 779 (brackets in original).

[290] State v. Navas, 81 Haw. 113, 123, 913 P.2d 39, 49 (1996) (quoting Nakamoto v. Fasi, 64 Haw. 16, 23, 635 P.2d 946, 952 (1981); State v. Quino, 74 Haw. 161, 177-78, 840 P.2d 358, 365-66 (1992) (Levinson, J., concurring)).

[291] State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985).

persons using telephones have a reasonable expectation of privacy under the Hawai'i Constitution to the telephone numbers they call or receive on their private lines,[292] even though the U.S. Supreme Court had ruled previously in *Smith v. Maryland* that the Fourth Amendment did not require a warrant for the interception of such numbers.[293]

The *Heapy* case involved whether a police officer had the necessary "reasonable suspicion" to justify stopping a driver, based on the driver's decision to turn away from (and thus avoid) an alcohol checkpoint. The court's conclusion was that the driver's decision to turn away from the checkpoint did not provide evidence of operating the vehicle while intoxicated, and that therefore the police officer had no "objective basis—specific and articulable facts" to justify stopping and searching the driver,[294] even though courts in other jurisdictions had reached the opposite result.[295]

It is thus surprising that the Hawai'i Supreme Court has been so cautious in its interpretation of article I, section 6, which was proposed by the 1978 Constitutional Convention to protect each individual's "personal autonomy."[296] The language of this new provision emphasized that privacy interests can be limited only when the government has a "compelling" need to do so, and that legislative action is required to protect privacy concerns. The committee report supporting this right quoted from Justice Brandeis's opinion in *Olmstead v. United States*,[297] and emphasized that the right was designed to protect each individual's "right to personal autonomy, to dictate his lifestyle, to be oneself."[298]

Certainly the explicit right to privacy now found in article I, section 6 was added to Hawai'i's constitution for some purpose, and the delegates to the 1978 Constitutional Convention and the voters who supported it must have wanted to expand individual privacy. On Hawai'i's small and somewhat crowded islands, privacy concerns can loom large as a central element of autonomy and human dignity. It is to be hoped that this part of Hawai'i's constitution will be interpreted in that spirit and that Hawai'i's courts will in the future find claims of privacy that are protected by article I, section 6.

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[292] 70 Haw. 546, 779 P.2d 1 (1989).

[293] 442 U.S. 735 (1979).

[294] *Heapy*, 113 Haw. at 286, 151 P.3d at 767 (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)).

[295] *Id.* at 307-11, 151 P.3d at 788-92 (Moon, C.J., dissenting).

[296] *See supra* notes 7-9 and accompanying text.

[297] 277 U.S. 438 (1928).

[298] STANDING COMM. REP. No. 69, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 674-75 (1980).

Baehr v. Lewin and the Long Road to Marriage Equality

Michael D. Sant'Ambrogio* and Sylvia A. Law**

In 1993, the Hawai'i Supreme Court held in *Baehr v. Lewin* that excluding same-sex couples from marriage was presumptively invalid under the Hawai'i Constitution because it discriminated on the basis of sex.[1] Consequently, the exclusion could only be upheld if the State could demonstrate that it "further[ed] compelling state interests and [was] narrowly drawn to avoid unnecessary abridgments of constitutional rights."[2] This decision marked the first victory in the marriage equality movement in America.

Part I provides a rich description of the *Baehr v. Lewin* litigation, the decisions of the Hawai'i courts, and subsequent political developments in Hawai'i. Part II briefly describes national and international developments in relation to marriage equality since 1993. *Baehr* and its progeny have generated an important debate in legal and social science literature about whether "early" civil rights victories are incremental steps forward or precipitate a damaging backlash. Part III summarizes this debate. In Part IV, we seek to add something new to both the backlash debate and the conflict over same-sex marriage. We argue that, on balance, *Baehr* was an important step forward for lesbian, gay, bisexual, and transgender (LGBT) rights and gender equality. By asking the State to explain why same-sex couples could not be married, the Hawai'i Supreme Court opened a dialogue that continues to this day.

I. THE BATTLE OVER SAME-SEX MARRIAGE IN HAWAI'I

A. The Baehr v. Lewin *Litigation*

In 1990, in Hawai'i, as in all other states, same-sex couples were denied access to marriage. Unlike a handful of other jurisdictions, Hawai'i did not recognize domestic partnerships. Bill Woods, an organizer with the Gay

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[1] 74 Haw. 530, 597, 852 P.2d 44, 74 (1993).

[2] *Id.* at 582, 852 P.2d at 68.

Community Center in Honolulu, sought to challenge the exclusion of same-sex couples from marriage and found three couples who wanted to marry.[3]

The possibility of same-sex marriage seemed audacious and improbable in 1990. First, many gay people were deeply closeted. Most Americans reported that they did not personally know a homosexual person and condemned sex between gay couples, whatever the circumstances, while less than a third of Americans thought that heterosexual sex between unmarried people was always wrong.[4] Employers, including public employers, openly discriminated against gay persons.[5] There were almost no openly gay people on television, in Congress, or on the bench. Many gay people kept their identities and core loving relations secret from friends, family, and colleagues.[6] In Hawai'i, Professor Mari Matsuda of the University of Hawai'i William S. Richardson School of Law observed that the process of coming out of the closet is particularly intricate where extended families or 'ohana are complex and important.[7]

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[3] CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 151-57 (2010) (providing a rich version of the story of *Baehr v. Lewin*); *see also* David Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 281, 290-95 (John D'Emilio ed., 2000); WILLIAM ESKRIDGE, THE CASE FOR SAME SEX MARRIAGE 1-5 (1996).

[4] Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 235 n.34 (1988) (citing *Ferment in the Bedroom*, NEWSWEEK, Aug. 8, 1983, at 38, 38) [hereinafter Law, *Homosexuality*]. In 1983, only about one-fourth of adults surveyed in the United States reported having friends or acquaintances who were homosexual. Gregory M. Herek, *Beyond Homophobia: A Social Psychological Perspective on Attitudes Towards Lesbians and Gay Men*, *in* BASHERS, BAITERS AND BIGOTS: HOMOPHOBIA IN MODERN SOCIETY 1, 8 (J. De Cecco ed., 1984). In 1974, the most recent year for which quantitative, comparative data was available, seventy percent of Americans believed that sexual relations between members of the same sex were always wrong, even when the two people loved one another. Kenneth L. Nyberg & John P. Alston, *Analysis of Public Attitudes Toward Homosexual Behavior*, 2 J. HOMOSEXUALITY 99, 106 (1976). By contrast, less than one-third of Americans disapproved of sexual relations between unmarried adult men and women who loved each other. *Id.*

[5] *See, e.g.*, Singer v. U.S. Civil Serv. Comm'n, 530 F.2d 247 (9th Cir. 1976) (stating that public announcement of homosexual activities justifies the government's denial of employment), *vacated*, 429 U.S. 1033 (1977); Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986) (determining that there was no denial of due process in firing of gay CIA employee); Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (finding no civil rights violation when Georgia Attorney General Mike Bowers fired Robin Shahar, a female attorney in his office, when she publically announced a celebration of her commitment to another woman).

[6] *See generally* STEVEN SEIDMAN, BEYOND THE CLOSET: THE TRANSFORMATION OF GAY AND LESBIAN LIFE (2002).

[7] Mari Matsuda, *Love, Change*, 17 YALE J. L. & FEMINISM 185, 189-90 (2005).

Second, earlier challenges to the exclusion of same-sex couples from marriage in other states had been not only uniformly unsuccessful,[8] but were treated with dismissive contempt. In 1986, the Supreme Court held in *Bowers v. Hardwick* that, as applied to homosexual people, federal constitutional norms of privacy and liberty did not bar the state from imposing criminal punishment on adult consensual sexual conduct in the home.[9] *Bowers* was not overruled until 2003.[10]

Third, the national leadership of the LGBT legal community had made a nearly unanimous judgment that it was premature to pursue constitutional litigation challenging state laws that denied same-sex couples access to marriage.[11] In 1989, Tom Stoddard, then-executive director of Lambda Legal, and legal director Paula Ettelbrick debated whether the gay community should make marriage equality a priority issue.[12] Stoddard offered practical and moral arguments in support of an aggressive effort to promote marriage equality.[13] Ettelbrick responded by noting the patriarchal nature of marriage and the dangers of looking to the state to legitimate intimate relations.[14]

Apart from disagreement over whether marriage equality should be a priority, most national gay rights litigators believed that marriage equality was an unrealistic short-term goal, either in courts or in legislatures, and that it was more strategically sensible to seek recognition for same-sex couples in concrete, limited contexts.[15]

1. Plaintiffs and their counsel

On December 17, 1990, three same-sex couples sought marriage licenses from the Hawai'i Department of Health.[16] While they waited for the

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[8] *See generally* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. 1974); Jones v. Callahan, 501 S.W.2d 588 (Ky. App. 1973); Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); DeSanto v. Barnsley, 476 A.2d 952 (Pa. Super. 1984).

[9] 478 U.S. 186, 196 (1986).

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

[11] Chambers, *supra* note 3, at 289-90; BALL, *supra* note 3, at 164-65.

[12] Chambers, *supra* note 3, at 289.

[13] Tom Stoddard, *Why Gay People Should Seek the Right to Marry*, *in* SEXUALITY, GENDER, AND THE LAW 1099, 1099-1101 (William N. Eskridge, Jr. & Nan D. Hunter eds., 2d ed. 2004).

[14] Paula Ettelbrick, *Since When Is Marriage a Path to Liberation*, *in* SEXUALITY, GENDER, AND THE LAW, *supra* note 13, at 1098, 1098-99.

[15] BALL, *supra* note 3, at 164. This consensus included Nan Hunter and Matthew Coles of the American Civil Liberties Union (ACLU) and Lambda Legal, despite philosophical support from Stoddard and other leading LGBT lawyers, meeting at the Gay Rights Litigators' Roundtable. *Id.* Evan Wolfson, then a lawyer at Lambda Legal and now the founder and executive director of Freedom to Marry, dissented from this consensus. *Id.* at 157-60.

[16] BALL, *supra* note 3, at 156.

Department to decide whether to issue the licenses, Woods and the couples sought a lawyer to represent them, first approaching the local chapter of the American Civil Liberties Union (ACLU).[17] Carl Varady, ACLU of Hawai'i's Legal Director, following standard ACLU practice, referred the request to the litigation committee, and asked the national legal department for advice and assurance of help.[18] Bill Rubinstein and Nan Hunter of the national office informed Varady that the LGBT community was divided on the wisdom of challenging the denial of marriage equality and asked him to canvass the local LGBT community to learn its views.[19] Varady spoke informally with some thirty LGBT activists and civil libertarians and found that a slight majority favored a lawsuit challenging the denial of same-sex marriage.[20] Ultimately, the local and national ACLU participated in the case as amicus curiae and filed briefs in the trial court and the Hawai'i Supreme Court, emphasizing equal protection arguments.[21] Lambda Legal declined to represent the couples, despite the best efforts of Evan Wolfson, then a young staff attorney, to persuade it to do so.[22]

When the ACLU and Lambda Legal failed to accept the case, Woods and the couples sought help from Dan Foley, who was a leading Honolulu civil rights attorney in private practice.[23] After graduating from the University of San Francisco Law School in 1974, Foley served as counsel to various governmental bodies in Micronesia—then under U.S. control—in their quest for self-rule.[24] He developed a love for Pacific life and culture and settled in Hawai'i, serving as legal director of the Hawai'i ACLU from 1984 to 1987.[25] At the Hawai'i ACLU, he won a class action requiring the State to reform its prisons[26] and successfully represented many other civil liberties plaintiffs.[27] In

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[17] *Id.* at 165.

[18] E-mail from Carl Varady, Legal Dir., ACLU of Haw., to Sylvia A. Law (Jan. 15, 2011, 13:59:27 HST) (on file with authors).

[19] *Id.*

[20] *Id.*; *see also* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1638 (1997).

[21] E-mail from Carl Varady to Sylvia A. Law, *supra* note 18.

[22] BALL, *supra* note 3, at 165. Lambda ultimately filed an amicus brief when the case reached the Hawai'i Supreme Court and joined as co-counsel on the remand to the trial court. *See infra* Parts I.A.3, I.B.

[23] BALL, *supra* note 3, at 161.

[24] *Id.* at 160-61.

[25] *Id.* at 161.

[26] Spear v. Waihee, Civ. No. 84-1104 (D. Haw. 1984).

[27] *See* Daniel R. Foley Curriculum Vitae (on file with authors). Cases include advocating for children of undocumented aliens' right to general assistance, the Miss Gay Molokai Pageant's First Amendment rights, and native Hawaiian land and religious rights; bringing a whistle-blower case against the Office of the Sheriff, a First Amendment challenge to a government-sponsored cross, and privacy challenges to governmental drug testing programs;

1987, Foley left the Hawai'i ACLU for private general public interest practice.[28]

Foley agreed to represent the three couples. He believed they had plausible legal claims under the Hawai'i Constitution, even though he informed the couples that, realistically, their suit had little chance of success.[29] He knew that no other attorney was likely to take the case and believed that the couples were entitled to their day in court.[30] Foley is not gay and had not previously been a gay rights activist. He was, however, destined to spend the next decade as an advocate for marriage equality.[31]

2. *The initial* Baehr v. Lewin *litigation*

In May 1991, after the Department of Health denied their requests, the couples filed suit, presenting two straightforward claims under the Hawai'i Constitution. First, they argued that denying same-sex couples access to marriage licenses violated the plaintiffs' right to privacy as guaranteed by article I, section 6 of the Hawai'i Constitution.[32] Unlike the U.S. Constitution, Hawai'i's constitution explicitly recognizes a right of privacy. It provides that "the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."[33] The plaintiffs argued that the concept of privacy requires that the State respect the interests of all individuals to have intimate, committed relations with people of their choice.[34]

Second, the plaintiffs argued that the State denied them the equal protection of the law as protected by the Hawai'i Constitution.[35] Foley emphasized that the State's justifications for treating gay and straight couples differently did not

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placing an anti-nuclear referendum and access to the Libertarian Party on the ballot; and overturning a state law that placed limits on handicapped in housing. *Id.*

[28] *Id.*

[29] BALL, *supra* note 3, at 166.

[30] *Id.*

[31] Since 2000, Foley has served as an Associate Judge on the Hawai'i Intermediate Court of Appeals. Crystal Kua, *Foley Confirmed Despite Opposition*, HONOLULU STAR-BULLETIN, Aug. 4, 2000, *available at* http://archives.starbulletin.com/2000/08/04/news/story6.html. Foley's nomination to the bench was opposed by the Alliance for Traditional Marriage and Values, headed by Mike Gabbard. *Id.*

[32] HAW. CONST. art. I, § 6.

[33] *Id.*

[34] Baehr v. Lewin, 74 Haw. 530, 539, 852 P.2d 44, 50 (1993); BALL, *supra* note 3, at 169.

[35] HAW. CONST. art. I, § 5 ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.").

withstand scrutiny.[36] The State asserted that marriage was about procreation, but eight years earlier, the Hawai'i Legislature eliminated the requirement that marriage applicants demonstrate that they were capable of reproduction.[37] The State asserted that denying same-sex marriage was necessary to protect children and promote heterosexual parenting, but this assertion was found to be meritless when the case eventually went to trial.[38]

The claims were heard by Circuit Court Judge Robert G. Klein.[39] On October 1, 1991, the circuit court granted the defendant's motion for judgment on the pleadings.[40] The order contained a variety of findings of fact. As the Hawai'i Supreme Court subsequently noted:

> [T]he circuit court "found" that: (1) HRS § 572-1 "does not infringe upon a person's individuality or lifestyle decisions, *and none of the plaintiffs has provided testimony to the contrary*"; (2) HRS § 572-1 "does not . . . restrict [or] burden . . . the exercise of the right to engage in a homosexual lifestyle"; (3) Hawaii has exhibited a "history of tolerance for all peoples and their cultures"; (4) "*the plaintiffs have failed to show* that they have been ostracized or oppressed in Hawaii and have opted instead to rely on a general statement of historic problems encountered by homosexuals which may not be relevant to Hawaii"; (5) "homosexuals in Hawaii have not been relegated to a position of political powerlessness." . . . *[T]here is no evidence* that homosexuals and the homosexual legislative agenda have failed to gain legislative support in Hawaii"; . . . (8) HRS § 572-1 "is obviously designed to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation.[41]

In one sense, the circuit court's decision was a gift to the plaintiffs. In an effort to explain his reasons, Judge Klein offered contestable factual assertions that made judgment on the pleadings inappropriate and invited reversal.

The plaintiffs were also blessed by serendipitous changes in the Hawai'i Supreme Court's membership. Between the case filing in May 1991 and the Hawai'i Supreme Court's opinion in May 1993, "there was a marked

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[36] BALL, *supra* note 3, at 170.

[37] *See Baehr*, 74 Haw. at 539, 852 P.2d at 49.

[38] *See infra* text accompanying notes 89-94.

[39] Judge Klein, who is native Hawaiian, earned his law degree from the University of Oregon in 1972 and served as a law clerk to Hawai'i Supreme Court Chief Justice William S. Richardson. He was a Hawai'i state trial judge for fourteen years and a justice on the Hawai'i Supreme Court from 1992 to 2000. McCorriston Miller Mukai MacKinnon LLP, Attorney Biography for Robert G. Klein (Nov. 11, 2011), http://www.m4law.com/Attorneys/Robert-G-Klein.shtml. When *Baehr* reached the Hawai'i Supreme Court, he recused himself. Nancy Klingeman & Kenneth May, *For Better or for Worse, in Sickness and in Health, Until Death Do Us Part: A Look at Same-Sex Marriage in Hawaii*, 16 U. HAW. L. REV. 447, 491 n.160 (1994).

[40] *Baehr*, 74 Haw. at 543-44, 852 P.2d at 52.

[41] *Id.* at 547-48, 852 P.2d at 53-55 (emphases in original).

generational shift in the court's composition."[42] Governor John Waihe'e appointed Steven H. Levinson to the Hawai'i Supreme Court in 1992, and Ronald T.Y. Moon was elevated to Chief Justice in 1993.[43]

When Levinson was appointed, he "described himself as a child of the 1960s with a tendency to 'reach out and grab issues, rather than duck them.'"[44] Levinson was born in 1946 and moved to Hawai'i in 1971 after graduating from University of Michigan School of Law.[45] He served as a law clerk for his uncle, Hawai'i Supreme Court Associate Justice Bernard Levinson, and then spent seventeen years in private practice.[46] Governor John Waihe'e appointed Levinson in 1989 to the Hawai'i State Judiciary as a circuit court judge, where he served for three years before being elevated to the Hawai'i Supreme Court.[47]

Chief Justice Ronald T.Y. Moon was born in Hawai'i in 1940.[48] His grandparents were among the first Korean immigrants to Hawai'i.[49] He received his J.D. from University of Iowa College of Law before returning to Honolulu to clerk for United States District Court Judge Martin Pence.[50] After clerking, Moon served as a Honolulu deputy prosecutor until 1968, when he entered private practice.[51] In 1982, Governor George Ariyoshi appointed Moon to the Hawai'i State Judiciary as a circuit court judge.[52] Governor John Waihe'e elevated Moon to Associate Justice of the Hawai'i Supreme Court in 1990, where he served until he was elevated once again to Chief Justice.[53]

3. Baehr v. Lewin*: The Hawai'i Supreme Court decision*

On May 5, 1993, the Hawai'i Supreme Court issued its decision holding that excluding same-sex couples from marriage was presumptively invalid under the Hawai'i Constitution because it discriminated on the basis of sex. The law could only be upheld if the State demonstrated that it "further[ed] compelling state interests and [was] narrowly drawn to avoid unnecessary abridgments of

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[42] BALL, *supra* note 3, at 169.

[43] Lynda Arakawa, *Top Jurists Represent Diverse Backgrounds*, HONOLULU ADVERTISER, Nov. 23, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/Nov/23/ln/ln09a.html.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

constitutional rights."[54] Associate Justice Steven H. Levinson wrote a plurality opinion for himself and Acting Chief Justice Ronald T.Y. Moon. Intermediate Court of Appeals Chief Judge James Burns, sitting by designation, concurred; Intermediate Court of Appeals Judge Walter Heen, also sitting by designation, dissented.[55] This was the first time that any court, let alone the highest court of a state, held that a state must justify its reasons for denying marriage to same-sex couples. It was a watershed case.

As a preliminary matter, Justice Levinson framed the issue as one of same-sex marriage rather than homosexual marriage. "'Homosexual' and 'same-sex' marriages are not synonymous."[56] Homosexual and heterosexual describe sexual attractions or behaviors. "Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals."[57] This framing is accurate. Marriage licensing authorities do not ask applicants about sexual attraction or behavior, and state laws do not require or authorize them to do so. This framing led the plurality to see the claim as one of discrimination on the basis of gender, rather than discrimination against homosexual people.[58]

Justice Levinson rejected the plaintiffs' main argument that denying same-sex couples the right to marry violated the Hawai'i Constitution's explicit protection of the right to privacy.[59] Although the Hawai'i Supreme Court had adopted an expansive interpretation of the privacy guarantee of the 1978 Hawai'i Constitution only five years earlier in *State v. Kam*,[60] Justice Levinson narrowly framed the question in *Baehr* as whether to recognize a new fundamental right to same-sex marriage.[61]

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[54] Baehr v. Lewin, 74 Haw. 530, 583, 852 P.2d 44, 68 (1993).

[55] *Id.* at 584, 852 P.2d at 68 (Burns, J., concurring); *id.* at 587, 852 P.2d at 70 (Heen, J., dissenting).

[56] *Id.* at 543 n.11, 852 P.2d at 51 n.11 (plurality opinion).

[57] *Id.*

[58] *Id.* at 564, 852 P.2d at 60.

[59] *Id.* at 550-57, 852 P.2d at 55-57.

[60] 69 Haw. 483, 748 P.2d 372 (1988). Kam, a clerk at the Lido Bookstore in Honolulu, was convicted of selling a pornographic magazine to an undercover police officer. *Id.* at 486, 748 P.2d at 374. In *United States v. 12 200-FT Reels of Super 8mm Film*, the U.S. Supreme Court held that while the Federal Constitution protects individuals' constitutional right to possess and view obscene material in the privacy of their homes, "the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others." 413 U.S. 123, 128 (1973). But in *Kam*, the Hawai'i Supreme Court held that banning commercial distribution violated the state constitution, explaining, "It is obvious that an adult person cannot read or view pornographic material in the privacy of his or her own home if the government prosecutes the sellers of pornography . . . and consequently bans any commercial distribution." *Kam*, 69 Haw. at 495, 748 P.2d at 379. Dan Foley represented the defendant in *Kam*.

[61] *Baehr*, 74 Haw. at 555, 852 P.2d at 57.

The *Baehr* court refused to affirm that same-sex couples could be denied the right to marry without violating those "fundamental principles of liberty and justice that lie at the base of all our civil and political institutions."[62]

Justice Levinson's equal protection analysis began with the observation that marriage is a state-controlled legal status that gives rise to many rights and benefits.[63] Additionally, the equal protection clause of the Hawai'i Constitution is "more elaborate" than its federal counterpart.[64] The clause specifically prohibits discrimination on the basis of sex.[65] The Hawai'i marriage statute, by its plain language, "restricts the marital relation to a male and a female."[66] Once Justice Levinson defined the dispute as one of gender discrimination, the resolution was relatively easy. The Hawai'i Constitution creates a strong presumption against the validity of laws that discriminate on the basis of sex. Relying upon the court's 1978 decision in *Holdman v. Olim*,[67] the plurality reasoned:

> First, we clearly and unequivocally established, for purposes of equal protection analysis under the Hawaii Constitution, that sex-based classifications are subject, as a *per se* matter, to some form of "heightened" scrutiny . . . . Second, we assumed, *arguendo*, that such sex-based classifications were subject to "strict scrutiny." Third, we reaffirmed the longstanding principle that this court is free to accord greater protections to Hawaii's citizens . . . than are recognized under the United States Constitution.[68]

Accordingly, the *Baehr* plurality held that the marriage statute created a sex-based classification and was "presumed to be unconstitutional" unless the defendant could show "that (a) the statute's sex-based classification is justified

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[62] *Id.* at 556-57, 852 P.2d at 57. Justice Levinson later wrote an extensive dissenting opinion affirming a broad reading of the Hawai'i Constitution's privacy clause in a case challenging the constitutionality of Hawai'i's ban on the possession of marijuana. *See* State v. Mallan, 86 Haw. 440, 454-509, 950 P.2d 178, 192-247 (1998) (Levinson, J., dissenting). Justice Levinson distinguished *Baehr* from *Mallan*. *Id.* at 466, 950 P.2d at 204.

[63] *Baehr*, 74 Haw. at 558-59, 852 P.2d at 58. Hawai'i has not recognized common law marriages since the 1920s. *Id.*

[64] *Id.* at 562, 852 P.2d at 60.

[65] "No person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. I, § 5.

[66] *Baehr*, 74 Haw. at 563, 852 P.2d at 60.

[67] 59 Haw. 346, 581 P.2d 1164 (1978).

[68] *Baehr*, 74 Haw. at 576-77, 852 P.2d at 65-66. Despite the demanding dicta, the *Holdman* court rejected the claim of a woman prison visitor who was refused entry because she was not wearing a brassiere. *Holdman*, 59 Haw. at 347, 581 P.2d at 1165-66. The court held that the policy did not constitute a sex-based classification, and, if it did, "the compelling state interest test would be satisfied in this case if it were to be held applicable." *Id.* at 352, 581 P.2d at 1168.

by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights."[69]

The State argued that "the fact that homosexual . . . partners cannot form a state-licensed marriage [was] not the product of impermissible discrimination implicating equal protection considerations, but rather a function of their biologic inability as a couple to satisfy the definition of the status to which they aspire[d]."[70] In other words, marriage is, by definition, a relationship between a man and a woman. But when the marriage statute is seen as discriminating on the basis of gender, rather than sexual orientation, the argument becomes "circular and unpersuasive."[71] In addition, when prohibiting same-sex marriage is seen as a form of discrimination on the basis of sex, the analogy to *Loving v. Virginia*[72] is powerful. In *Loving*, the U.S. Supreme Court held that Virginia's law limiting marriage to people of the same race violated the Equal Protection Clause of the Fourteenth Amendment.[73] In *Baehr*, the State defended its denial of marriage to same-sex couples, saying that the bar was equally applicable to men and women.[74] Similarly, in *Loving*, Virginia contended that "because its miscegenation statutes punish[ed] equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, d[id] not constitute an invidious discrimination based upon race."[75] The U.S. Supreme Court rejected that logic and held:

> There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races . . . . At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the "most rigid scrutiny" . . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.[76]

The gender discrimination theory adopted by the *Baehr* court was not the central focus of the plaintiffs' constitutional challenge.[77] Professor Carlos Ball reported that at oral argument, "one of the judges asked Assistant General Faust

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[69] *Baehr*, 74 Haw. at 580, 852 P.2d at 67.

[70] *Id.* at 564-65, 852 P.2d at 61 (internal quotation marks omitted).

[71] *Id.* at 565, 852 P.2d at 61.

[72] 388 U.S. 1 (1967).

[73] *Id.* at 12.

[74] *Baehr*, 74 Haw. at 580-82, 852 P.2d at 67-68.

[75] *Loving*, 388 U.S. at 8.

[76] *Id.* at 11-12.

[77] The plaintiffs' key arguments were that denying same-sex couples access to marriage denied them a fundamental liberty protected by the strong privacy protection of the Hawai'i Constitution and violated equal protection by creating an irrational classification between heterosexual and homosexual couples. *See supra* text accompanying notes 32-35.

whether it did not in fact constitute discrimination to deny "a male and a male" a marriage license when it is provided to a "male and a female?"[78] Retired Justice Levinson reported that Judge Burns asked this question.[79] The notion that denying same-sex couples access to marriage unconstitutionally discriminates on the basis of sex had been explored in law review literature prior to 1992,[80] but the *Baehr* court did not rely upon or refer to these articles.

Somewhat ironically, Judge Burns did not sign on to the sex discrimination argument, but concurred with a caveat. He asked: "As used in the Hawaii Constitution, to what does the word 'sex' refer? In my view, the Hawaii Constitution's reference to 'sex' includes all aspects of each person's 'sex' that are 'biologically fated.'"[81] Judge Burns was correct that one factor that traditionally makes race a paradigmatic suspect classification is that it is biologically determined, or "immutable."[82] Further, the question of whether sexual orientation is biologically determined or chosen has long been controversial in the LGBT community.[83] Justice Levinson, for the plurality, found that the question of whether sexual orientation is chosen or fated was irrelevant to the fact that the marriage law discriminates on the basis of sex.[84]

Intermediate Court of Appeals Judge Walter Heen, sitting by designation, dissented, relying on the reasoning of other state courts that marriage, by definition, is a relationship between a man and a woman.[85] Judge Heen reasoned that the Hawai'i marriage law "treat[ed] everyone alike and applies equally to both sexes."[86] The "legislative purpose of fostering and protecting

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[78] BALL, *supra* note 3, at 170. The Attorney General responded that the distinction was "permissible discrimination." *Id.*

[79] Interview with Steven Levinson, Assoc. Justice (ret.), Haw. Sup. Ct., in Honolulu, Haw. (Jan. 28, 2011).

[80] Law, *Homosexuality*, *supra* note 4; Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

[81] Baehr v. Lewin, 74 Haw. 530, 585, 852 P.2d. 44, 69 (1993) (Burns, J., concurring).

[82] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 360-61 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (noting the relevance of immutability to suspect classifications); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (concluding that sex-based classifications are suspect based in part on the immutability of sex). *But see* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (explaining that the mentally retarded are "different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one") (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 150 (1990)).

[83] WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 501-652 (2003).

[84] *Baehr*, 74 Haw. at 547 n.14, 852 P.2d at 53 n.14.

[85] *Id.* at 590, 852 P.2d at 71 (Heen, J., dissenting).

[86] *Id.*

the propagation of the human race through heterosexual marriages" justified denying plaintiffs a license to marry.[87]

By relying on equal protection, rather than the due process clause (a fundamental rights analysis), the Hawai'i Supreme Court followed a long judicial and scholarly tradition. A fundamental right, or privacy, approach identifies particular individual interests (in this case, marriage), as especially important and demands that the State provide strong reasons to justify the denial of the fundamental right. An equal protection holding demands that the State explain the reasons for treating allegedly similar couples differently. "[T]he Due Process Clause has often been interpreted so as to protect traditionally recognized rights . . . [while] [t]he Equal Protection Clause is emphatically not an effort to protect traditionally held values. . . . The function of the Equal Protection Clause is to protect disadvantaged groups."[88]

B. Baehr v. Lewin*: The aftermath in Hawai'i*

In May 1993, the Hawai'i Supreme Court remanded *Baehr v. Lewin* to the trial court to give the State the opportunity to demonstrate its reasons for denying marriage licenses to same-sex couples.[89] The State delayed the trial until the fall of 1996.[90] It sought to demonstrate that same-sex couples were inferior parents, while the plaintiffs presented experts who testified as to the growing evidence that virtually no differences existed in development, self-esteem, and gender role behavior between the children of LGBT parents and those of heterosexual parents.[91] On cross-examination, the State's experts conceded that gay parents performed in a fully satisfactory manner.[92] At trial on December 3, 1996, Judge Kevin Chang found that same-sex couples are just as qualified to be parents as heterosexual couples and that, far from harming children, recognizing same-sex marriage would help children of LGBT couples by offering them the legal benefits of two parents who are married to each

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[87] *Id.* at 596-97, 852 P.2d at 74.

[88] Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1169-74 (1988).

[89] *Baehr*, 74 Haw. at 582, 852 P.2d at 68.

[90] Chambers, *supra* note 3, at 292. Three clergy members of the Church of Jesus Christ of Latter-Day Saints and the church itself sought to intervene, arguing that if same-sex marriage were legal, they, as people authorized to solemnize marriages under Hawai'i law, would be required to do so in violation of their religious beliefs. *Id.* The trial court denied the motion to intervene and the Hawai'i Supreme Court affirmed. *Id.* Both courts allowed the trial to be delayed while the proposed intervenors appealed. *Id.*; Baehr v. Miike, 80 Haw. 341, 910 P.2d 112 (1996).

[91] Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *5 (Haw. 1st Cir. Dec. 3, 1996); BALL, *supra* note 3, at 175-78; Chambers, *supra* note 3, at 292-93.

[92] Chambers, *supra* note 3, at 292; BALL, *supra* note 3, at 175-78.

other.[93] Judge Chang found that "children of gay and lesbian parents and same-sex couples tend to adjust and develop in a normal fashion" and that "in Hawaii, and elsewhere, same-sex couples can, and do, have successful, loving, and committed relationships."[94] Opponents of same-sex marriage criticized the State for focusing on child rearing, urging the State to defend its marriage statute by demonstrating that same-sex marriage destabilized traditional heterosexual marriage.[95] On appeal from the trial court's decision, the State hired a private, conservative lawyer who made those arguments.[96]

During the years between the Hawai'i Supreme Court's decision in 1993 and the trial court's finding in 1996 that no rational, much less compelling, reason supported excluding same-sex couples from marriage, the issue of same-sex marriage was debated politically in Hawai'i. Reacting quickly to the Supreme Court's 1993 decision, the Legislature established a Commission on Sexual Orientation and the Law to make recommendations regarding the rights and benefits of same-sex couples.[97] The Legislature required that the commission include members representing the Mormon and Roman Catholic Churches.[98] When the Hawai'i state courts invalidated the provision regarding church representatives as unconstitutional, the Legislature created a smaller commission with the same mission.[99] In December 1995, the commission recommended that the Legislature legalize same-sex marriage or, in the alternative, adopt a domestic partnership law according same-sex couples the same rights as married couples.[100] Opponents of same-sex marriage grew in political strength, particularly through an organization called Hawai'i's Future Today, which had the backing of the Catholic and Mormon churches, as well as support from conservative groups from the Mainland.[101]

In 1997, the Legislature adopted a Reciprocal Beneficiaries Law, the first in the nation, which permitted any two individuals who could not otherwise marry to receive some of the rights and benefits that accompany marriage, such as hospital visitation rights, inheritance rights, joint ownership of property, and the opportunity to sue for wrongful death.[102] At the same time, the Legislature approved a constitutional amendment that, if accepted by voters in November 1998, would give the Legislature the authority to limit marriage to one man and

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[93] BALL, *supra* note 3, at 181.
[94] Chambers, *supra* note 3, at 292-93.
[95] *Id.* at 293.
[96] BALL, *supra* note 3, at 182.
[97] Chambers, *supra* note 3, at 292.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] BALL, *supra* note 3, at 180.
[102] HAW. REV. STAT. §§ 572C-1 to -7 (1997).

one woman.[103] On November 3, 1998, Hawai'i voters adopted the marriage amendment by a margin of sixty-nine percent to twenty-nine percent.[104] Dan Foley, the *Baehr* plaintiffs' attorney, sought to persuade the Hawai'i Supreme Court to read the constitutional amendment to require formal legislative action before the constitutional holding requiring marriage equality was reversed.[105] The Hawai'i Supreme Court, in an unsigned opinion, rejected Foley's argument.[106]

C. The Prospects for Same-Sex Marriage and Civil Unions in Hawai'i Today

Marriage equality was not seriously debated in Hawai'i from 1998 until 2009. Although the 1998 constitutional amendment seemed to allow the Legislature to authorize same-sex marriage, marriage equality advocates did not press for that. In 2002, Hawai'i, a traditionally Democratic state, elected Republican Linda Lingle as Governor, and she served until December 2010.[107] The conservative coalition that mobilized to oppose same-sex marriage was an important part of Lingle's political base.

There was no robust organized effort to press for greater recognition of same-sex relationships until 2007, when Equality Hawai'i began to build a broad-based coalition in support of civil unions.[108]

In 2010, the Hawai'i Legislature voted for civil unions—18-7 in the Senate and 31-20 in the House.[109] On July 6, 2010, Governor Lingle vetoed the bill.[110] Lingle said:

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[103] Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *5 (Dec. 9, 1999) (citing 1997 Haw. Sess. L. H.B. 117 § 2, at 1247.) The bill proposed adding the following language to article I of the Hawai'i Constitution: "Section 23. The legislature shall have the power to reserve marriage to opposite-sex couples." *Id.*

[104] BALL, *supra* note 3, at 184.

[105] *Id.*

[106] *Baehr*, 1999 Haw. LEXIS 391, at *5.

[107] Derrick DePledge, *The Lingle Years*, HONOLULU STAR-ADVERTISER, Dec. 5, 2010, *available at* http://www.staradvertiser.com/news/20101205_The_Lingle_Years.html.

[108] *See* Equality Hawai'i, http://www.equalityhawaii.org (last visited Mar. 20, 2011); Hawai'i Family Portraits, Husbands Without Borders, http://www.hawaiifamilyportraits.org/alan.html (last visited Mar. 20, 2011).

[109] *Lingle Vetoes Civil Unions Bill*, HONOLULU STAR-ADVERTISER, July 6, 2010, *available at* http://www.staradvertiser.com/news/Lingle_vetoes_civil_unions_bill.html.

[110] Posting of Jonathan Capehart to PostPartisan, Washington Post Blog, *Override Hawaii Gov. Lingle's Veto of Civil Unions*, http://voices.washingtonpost.com/postpartisan/2010/07/override_hawaii_gov_lingles_ve.html (July 8, 2010, 15:52 EST).

> It would be a mistake to allow a decision of this magnitude to be made by one individual or a small group of elected officials. And while ours is a system of representative government it also is one that recognizes that, from time to time, there are issues that require the reflection, collective wisdom and consent of the people and reserves to them the right to directly decide those matters. This is one such issue.[111]

Lingle's veto message is difficult to defend. It was not "one individual or a small group of elected officials"[112] who decided to authorize civil unions, but a large majority of the democratically elected Legislature. The Hawai'i Constitution, which presumably reflects the "collective wisdom and consent of the people,"[113] gave the Legislature the power to decide whether to allow same-sex marriage.[114] In response to Lingle's veto, Lambda Legal and the ACLU filed suit in state court seeking equal rights for same-sex couples, without claiming a right to marry.[115]

In the 2010 Democratic primary election for Governor to replace Linda Lingle, Neil Abercrombie, long-time Hawai'i Congressperson, defeated Honolulu Mayor Mufi Hannemann by a surprising landslide margin of twenty-two points.[116] The *Honolulu Star-Advertiser* noted that "their most substantive difference was over civil unions."[117] Abercrombie went on to defeat Republican Lieutenant Governor James "Duke" Aiona by a landslide margin of seventeen points.[118] Again, one of the major issues dividing the candidates was same-sex unions.[119]

In 2011, the Hawai'i Legislature acted quickly to authorize civil unions, and Governor Abercrombie signed it into law on February 23, effective on January 1, 2012.[120] The Act provides that partners to a civil union "shall have all the

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[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *See supra* notes 103-04 and accompanying text.

[115] *Gay Couples Sue Hawaii*, ADVOCATE.COM, July 29, 2010, http://www.advocate.com/printArticle.aspx?id=131299.

[116] Derrick DePledge, *Blowout: Abercrombie to Face Aiona After Trouncing Hannemann*, HONOLULU STAR-ADVERTISER, Sept. 18, 2010, *available at* http://www.staradvertiser.com/news/20100918_Abercombie_takes_early_lead_in_governors_race.html; Eugene Tanner, *Abercrombie Wins Dem. Primary for Governor in Hawaii*, USA TODAY, Sept. 20, 2010, *available at* http://www.usatoday.com/news/politics/2010-09-18-hawaii-election_N.htm.

[117] DePledge, *supra* note 116.

[118] Herbert A. Sample, *Aiona's Margin of Defeat Surprises*, HONOLULU STAR-ADVERTISER, Nov. 8, 2010, *available at* http://www.staradvertiser.com/news/hawaiinews/20101108_Aionas_margin_of_defeat_surprises.html.

[119] Tanner, *supra* note 116.

[120] Act of Feb. 23, 2011, No. 1, 2011 Haw. Sess. Laws 1; B.J. Reyes, *"Today is an Amazing Day": Civil Union Supporters Rejoice, Opponents Lament the New Law*, HONOLULU STAR-

same rights, benefits, protections, and responsibilities under law" as are granted to married couples.[121] "The family court of each circuit shall have jurisdiction over all proceedings relating to the annulment, divorce, and separation of civil unions entered into in this State in the same manner as marriages."[122] The requirements for eligibility to enter into a civil union are the same as the requirements for marriage, except that the Act provides that a civil union partner may not be "a partner in another civil union, a spouse in a marriage, or a party to a reciprocal beneficiary relationship."[123] The Act provides that "[a]ll unions entered into in other jurisdictions between two individuals not recognized under section 572-3 [the marriage statute] shall be recognized as civil unions."[124]

II. THE NATIONAL SAME-SEX MARRIAGE MOVEMENT AFTER *BAEHR V. LEWIN*

In 1993, few people could imagine same-sex marriage. In 2012, same-sex marriage is a vibrant, concrete reality. In the United States, same-sex couples currently can marry in six states—Connecticut,[125] Iowa,[126] Massachusetts,[127] New Hampshire,[128] New York,[129] and Vermont[130]— and the District of Columbia.[131] Moreover, as this article went to print, Maryland and Washington passed laws that will bring the total number of jurisdictions allowing same-sex marriage to at least nine by 2013, unless the laws are first repealed by referendum.[132] In addition, the attorneys general of Maryland[133] and Rhode

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ADVERTISER, Feb. 24, 2011, *available at* http://www.staradvertiser.com/news/20110224_Today_is_an_amazing_day.html; Vicki Viotti, *Civil Unions: The Road Ahead*, HONOLULU STAR-ADVERTISER, Mar. 6, 2011, *available at* http://www.staradvertiser.com/editorials/20110306_Civil_unions_The_road_ahead.html.

[121] Act of Feb. 23, 2011, No. 1, 2011 Haw. Sess. Laws 1.

[122] *Id.*

[123] *Id.* Thus it seems that a Hawai'i couple who had entered into a reciprocal beneficiary relationship would need to terminate that relation prior to entering into a civil union. *Id.*

[124] *Id.* This issue has been controversial in other states. *See infra* text accompanying note 135.

[125] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

[126] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

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

[128] N.H. REV. STAT. ANN. § 457:1-a (2010).

[129] In June 2011, New York became the third and largest state to enact marriage equality legislatively. Nicholas Confessore and Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

[130] VT. STAT. ANN. tit.15, § 8 (2009).

[131] D.C. CODE § 46-406 (2010).

[132] Same-sex couples will be able to marry in Maryland beginning January 1, 2013 unless the issue is placed on the November 2012 ballot by referendum and the law is rejected by the

Island[134] have issued advisory opinions that the state may recognize same-sex marriages performed in other jurisdictions, although the Rhode Island Supreme Court has cast some doubt on whether the courts will follow the attorney general's opinion in that state.[135] Furthermore, seven states—California, Hawai'i, Illinois, Nevada, New Jersey, Oregon, and Washington—offer civil unions or domestic partnerships granting all of the state-level rights and responsibilities of marriage.[136] Finally, an additional three states—Colorado, Maine, and Wisconsin—offer civil unions or domestic partnerships granting some of the state-level rights and responsibilities of marriage.[137]

Despite these successes, the campaign for marriage equality has also suffered serious setbacks. Opponents of same-sex marriage have been remarkably successful at enacting legislation and amending state constitutions to preserve marriage as a heterosexual institution and preclude recognition of same-sex relationships. Two waves of such laws swept the nation over the past eighteen years, clustered around the presidential elections of 1996 and 2004. This Part reviews the successes and setbacks of the national same-sex marriage movement since *Baehr v. Lewin*.

A. DOMA and Mini-DOMAs

The judicial victories in Hawai'i were followed by a wave of legislative setbacks for same-sex marriage. The most significant was the Defense of

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voters. Annie Linskey, *O'Malley to Sign Same-Sex Marriage Bill Today*, THE BALTIMORE SUN, Mar. 1, 2012, *available at* http://www.baltimoresun.com/news/maryland/politics/blog/bal-omalley-to-sign-samesex-marriage-bill-today-20120229,0,1317765.story. The Washington law takes effect on June 7, 2012 unless opponents gather enough signatures to submit the law to the voters by referendum in the November 2012 elections, in which case the law will be put on hold until the voters approve or reject it. Lornet Turnbull, *Gregoire Signs Gay Marriage Into Law*, THE SEATTLE TIMES, Feb. 13, 2012, *available at* http://seattletimes.nwsource.com/html/localnews/2017497028_gaymarriage14m.html.

[133] 95 Md. Op. Att'y Gen. 3 (Feb. 23, 2010).

[134] Letter from Patrick C. Lynch, R.I. Att'y Gen., to Jack R. Warner, R.I. Comm'r of Higher Educ. (Feb. 20, 2007) (on file with authors).

[135] In *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007), the Rhode Island Supreme Court held that the state family court could not entertain a petition for divorce from a same-sex couple married in Massachusetts.

[136] *See* Human Rights Campaign, Marriage Equality & Other Relationship Recognition Laws (Map), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (last visited July 18, 2011) [hereinafter Human Rights Campaign]; *see also, e.g.*, CAL. FAM. CODE § 297-297.5 (1999); ME. P.L. 2003, c. 672 (2004); NEV. REV. STAT. § 122A.200 (2009); Monica Davey, *Illinois Governor Signs Civil Union Law*, N.Y. TIMES, Jan. 31, 2011, *available at* http://thecaucus.blogs.nytimes.com/2011/01/31/illinois-governor-signs-civil-union-law/.

[137] *See* Human Rights Campaign, *supra* note 136.

Marriage Act (DOMA), which the United States Congress passed in 1996.[138] The federal legislation (1) declared that no state is required to recognize any public acts concerning same-sex marriages recognized by another state; and (2) defined "marriage" for purposes of federal law as "a legal union between one man and one woman as husband and wife."[139]

Although the House report on DOMA recites that it was adopted in response to the decision in *Baehr*,[140] closer examination of the legislative and political history suggests that DOMA was promoted as a wedge issue in anticipation of the 1996 presidential election. Anti-gay rights activists asserted that the U.S. Constitution would obligate other states to recognize marriages performed in Hawai'i.[141] Professor Jane Schacter observed:

> Same-sex marriage has proven to be something of a perfect storm for the Religious Right. The controversy combines in a single issue several of that movement's foundational commitments—commitments to normative heterosexuality, to traditional gender roles, to combating perceived judicial activism on cultural issues, and to the idea that marriage is an institution under widespread social siege and in need of defense.[142]

Same-sex marriage became a major issue in the 1996 campaign, when eight conservative religious groups organized a rally three days before the Iowa caucuses and asked candidates to sign a pledge, the Marriage Protection Resolution, opposing same-sex marriage.[143] Then-President William Clinton's effort to end the ban on gay people in the military had backfired. The "don't ask, don't tell compromise" pleased no one and caused him political damage.[144] DOMA was introduced in May and was passed with both Republican and Democratic support in September 1996.[145] President Clinton quickly, and without protest, signed the act into law.[146]

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[138] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. 1996) and 28 U.S.C. § 1738C (Supp. 1996)).

[139] *Id.*

[140] H.R. Rep. No. 104-664, at 2-3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07.

[141] Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1203 (2009).

[142] *Id.* at 1214.

[143] Craig A. Rimmerman, *The Presidency, Congress, and Same-Sex Marriage*, *in* THE POLITICS OF SAME-SEX MARRIAGE 273, 276 (Craig A. Rimmerman & Clyde Wilcox eds., 2007).

[144] See Schacter, *supra* note 141, at 1218-19.

[145] The House approved the bill 342 to 67; the Senate 85 to 14. DOMA watch, Federal Defense of Marriage Act (DOMA), http://www.domawatch.org/about/federaldoma.html (last visited Mar. 20, 2011).

[146] This was before the trial court in *Baehr* ruled that the State had failed to demonstrate any rational basis for the ban on same-sex marriage. Baehr v. Miike, No. 91-1394, 1996 WL694235, at *5 (Haw. 1st Cir. Dec. 3, 1996).

Section two of DOMA provides that no state shall be required to recognize same-sex marriages entered into in other states.[147] Because states have traditionally had the authority to determine which out-of-state marriages they recognize,[148] most scholars see the provision as a symbolic statement of federal opposition to same-sex marriage that does not materially change the legal landscape.[149] Section three of DOMA provides that marriage is "a legal union between one man and one woman" for the purposes of federal law.[150] As a practical matter, this means that same-sex couples do not qualify for federal benefits available to heterosexual married couples, including tax and Social Security benefits.

Legal and political support for DOMA has eroded in recent years. In 2010, the Massachusetts U.S. District Court held in *Gill v. Office of Personnel Management* that denying federal benefits based on marriage to same-sex couples legally married in Massachusetts violated the federal guarantee of equal protection because there was no rational justification for the distinction.[151] In a companion case, the same court held that DOMA violated the Tenth Amendment by intruding on areas of exclusive state authority by forcing the Commonwealth to engage in invidious discrimination against its own citizens

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[147] 28 U.S.C. § 1738C (2006).

[148] The general rule, embodied in section 283 of the Second Restatement of Conflicts of Law, provides that a "marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283(2) (1971). Some states affirm the value of recognizing marriages that were valid where performed and are reluctant to find public policy reasons to deny the validity of marriages. For example, in *In re Estate of May*, the New York Court of Appeals recognized a Rhode Island marriage between an uncle and a niece that would have been void if performed in New York. *In re* Estate of May, 114 N.E.2d 4, 5-7 (N.Y. 1953). Other states more willingly insist that marriage partners comply with state rules. For example, in *Catalano v. Catalano*, the Connecticut Supreme Court refused to recognize a marriage between an uncle and a niece, even though their marriage was legal in Italy, where they had married, and they had lived together as man and wife for many years. 170 A.2d 726 (Conn. 1961).

[149] Most scholars support the Restatement regime under which states decide which marriage rules violate "the strong public policy of the state." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283(2) (1971). This approach respects federalism and the fact that different states have different values. *See, e.g.*, Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005) [hereinafter Koppelman, *Interstate Recognition*]; Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2208-13 (2005). *But see* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (arguing that the Full Faith and Credit clause of the U.S. Constitution requires that states respect marriages recognized in other states).

[150] 1 U.S.C. § 7 (2006).

[151] 699 F. Supp. 2d 374, 397 (D. Mass. 2010).

in order to receive and retain federal funds.[152] Two similar challenges to DOMA were filed in the U.S. District Courts of Connecticut and the Southern District of New York on November 9, 2010.[153]

Upon taking office, President Obama found himself caught between his constituents' opposition to DOMA and a sense of obligation to defend a validly enacted law of Congress.[154] After initially defending DOMA in the courts, on February 23, 2011, the Obama Administration reversed course. Attorney General Eric H. Holder, Jr. informed Congress that the Department of Justice (DOJ) had determined that section three of DOMA was unconstitutional and, therefore, the DOJ would no longer defend the law.[155] Attorney General Holder explained that the new lawsuits filed in Connecticut and New York required the DOJ to reconsider whether gays and lesbians constitute a suspect class under the Equal Protection Clause, triggering the application of heightened scrutiny to DOMA's sexual orientation-based classifications.[156] The Attorney General concluded that other courts are likely to hold that gays and lesbians do constitute a suspect class because of, among other factors, the history of discrimination against gays and lesbians.[157]

Consequently, the DOJ could no longer defend DOMA using hypothetical rationales, but had to defend Congress' actual motivations for the law as "substantially related to an important government objective."[158] This, Attorney General Holder concluded, the DOJ could not do. He cited the numerous expressions of moral disapproval of gays and lesbians and their intimate relationships in the congressional record and explained that this was "precisely

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[152] Massachusetts v. Sebelius, 698 F. Supp. 2d 234, 253 (D. Mass. 2010). As this article went to print, the First Circuit affirmed the judgment of the district court in both cases. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012).

[153] *See* Pedersen v. OPM, No. 310 CV 1750 (VLB) (D. Conn. Nov. 9, 2010) (same-sex couples from Connecticut, Vermont, and New Hampshire filed suit in federal court in Connecticut challenging the denial of federal benefits based on marriage); Windsor v. United States, No. 10 CV 8435 (direct) (S.D.N.Y. Nov. 9, 2010). Edith Windsor married Thea Spyer in Canada in 2007 and lived in New York, where their marriage was not recognized. *Id.* When Spyer died in 2009, Windsor had to pay $350,000 in federal estate taxes, which she would not have had to pay if the federal government recognized their marriage. *Id.*

[154] *Editorial: A Bad Call on Gay Rights*, N.Y. TIMES, June 15, 2009, *available at* http://www.nytimes.com/2009/06/16/opinion/16tue1.html; *see also* Charlie Savage, *Suits on Same-Sex Marriage May Force Administration to Take a Stand*, N.Y. TIMES, Jan. 28, 2011, *available at* http://www.nytimes.com/2011/01/29/us/politics/29marriage.html. The Department of Justice generally, but not always, defends the validly enacted laws of Congress. *See* Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001).

[155] Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to John A. Boehner, U.S. Rep. (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

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

[157] *Id.* at 2-4.

[158] *Id.* at 4 (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).

the kind of stereotype-based thinking and animus that the Equal Protection Clause was designed to guard against."[159] The Attorney General's change of policy, and particularly his endorsement of strict scrutiny for distinctions based on sexual orientation, is a significant victory in the campaign for marriage equality. Still, the House of Representatives quickly stepped in to defend DOMA,[160] and the Obama Administration will continue to enforce the law until it is repealed or enjoined by a court of law.[161]

In addition to the federal DOMA, the 1990s witnessed the construction of a second line of statutory defense against same-sex marriage at the state level. Beginning with Hawai'i in 1994,[162] thirty-eight states passed so-called "mini-DOMAs," defining marriage as heterosexual and, in most but not all cases, also precluding the recognition of same-sex marriages performed in other states.[163]

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[159] *Id.* at 5 (citation omitted).

[160] Jennifer Steinhauer, *House Republicans Move to Uphold Marriage Act*, N.Y. TIMES, Mar. 5, 2011, at A16.

[161] Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to John A. Boehner, U.S. Rep., *supra* note 155, at 5.

[162] Act of June 22, 1994, No. 217, 1994 Haw. Sess. Laws 526 (codified as HAW. REV. STAT. § 572-1 (2006)). The Hawai'i law was purely symbolic given that the Hawai'i Supreme Court in *Baehr* had held that the State must show a compelling reason to limit marriage to between a man and a woman and the voters of Hawai'i had not yet amended the state constitution to authorize the Legislature to define marriage notwithstanding the constitution's equal protection clause. *See supra* notes 101-06 and accompanying text.

[163] 1998 Ala. Acts 500 (codified as ALA. CODE § 30-1-19 (2010)); 1996 Alaska Sess. Laws 21 (codified as ALASKA STAT. § 25.05.011 (2010)); 1996 Ariz. Sess. Laws 348 (codified as ARIZ. REV. STAT. ANN. § 25-101 (2011)); 1997 Ark. Acts 146 (codified as ARK. CODE ANN. § 9-11-208 (2010)); Prop. 22, § 2, approved March 7, 2000 (codified as CAL. FAM. CODE § 308.5 (West 2010)), *invalidated by In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); 2000 Colo. Sess. Laws ch. 233, § 1 (codified as COLO. REV. STAT. § 14-2-104(1)(b) (2010)); 2005 Conn. Pub. Act. 10 (codified as CONN. GEN. STAT. ANN. § 46b-38nn), repealed by 2009 Conn. Pub. Act. 13; 1996 Del. Laws 375 (codified as DEL. CODE ANN. tit. 13, § 101 (2011)); 1997 Fla. Laws 268 (codified as FLA. STAT. ANN. § 741.212 (West 2010)); 1996 Ga. Laws 1025 (codified as GA. CODE ANN. § 19-3-3.1 (2011)); 1996 Idaho Sess. Laws 331 (codified as IDAHO CODE ANN. § 32-209 (2011)); 1996 Ill. Laws 89-459 (codified as 750 ILL. COMP. STAT. §§ 5/212, 213.1 (2011)); 1997 Ind. Acts 1 (codified as IND. CODE ANN. § 31-11-1-1 (West 2010)); 1998 Iowa Acts 1099 (codified as IOWA CODE ANN. § 595.2(1) (West 2009)), *invalidated by* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); 1996 Kan. Sess. Laws 142 (codified as KAN. STAT. ANN. § 23-101 (2011)); KY. REV. STAT. ANN. § 402.005 (LexisNexis 2010); 1999 La. Acts 890 (codified as LA. CIV. CODE ANN. art. 3520 (2010)); 1997 Me. Laws 65 (codified as ME. REV. STAT. ANN. tit. 19-A, § 701 (2010)); 1996 Mich. Pub. Acts 324 (codified as MICH. COMP. LAWS ANN. § 551.1 (West 2011)); 1997 Minn. Laws 203, art. 10 (codified as MINN. STAT. ANN. § 517.03 (West 2010)); 1997 Miss. Laws 301 (codified as MISS. CODE ANN. § 93-1-1(2) (2010)); 1996 Mo. Legis. Serv. S.B. 768 (codified as MO. ANN. STAT. § 451.022 (West 2010)); 1997 Mont. Laws 424 (codified as MONT. CODE ANN. § 40-1-401(1)(d) (2009)); 2004 N.H. Laws 100:1 (codified as N.H. REV. STAT. ANN. § 457:3 (2004)), amended by 2009 N.H. Laws 59:1; 1996 N.C. Sess. Laws 588 (codified as N.C. GEN. STAT. ANN. § 51-1.2 (West 2010)); 1997 N.D. Laws 145

Twenty-five mini-DOMAs were passed in 1996 and 1997 alone.[164] By the time the *Baehr v. Lewin* litigation came to an end in 1998, thirty-one states had enacted laws to prevent the recognition of same-sex marriages.[165]

After 1998, seven more states added such laws, but their rate of enactment fell off precipitously, with the last mini-DOMA enacted in 2005.[166] Moreover, the California,[167] Connecticut,[168] and Iowa[169] state supreme courts struck down their state's heterosexual marriage laws in 2008 and 2009, New Hampshire reversed its policy to allow same-sex marriage in 2009,[170] and New York became the third and largest state to pass marriage equality legislatively in 2011.[171] Nevertheless, a total of thirty-four states currently have statutes on the books proscribing same-sex marriage.

B. The Best of Times: Baker, Lawrence, Goodridge, *and the Mayors*

The wave of bans on same-sex marriage laws that swept much of the nation in the 1990s was followed by two important judicial victories for marriage equality in New England. In July 1997, before the *Baehr* litigation concluded, three same-sex couples in Vermont, represented by Gay & Lesbian Advocates & Defenders (GLAD), filed a lawsuit challenging the State's refusal to issue them marriage licenses.[172] In December 1999, the Vermont Supreme Court

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(codified as N.D. CENT. CODE § 14-03-01 (2009)); 2004 Ohio Laws 61 (codified as OHIO REV. CODE ANN. § 3101.01(c)(1) (West 2011)); 1996 Okla. Sess. Laws 131 (codified as OKLA. STAT. ANN. tit. 43, § 3.1 (West 2010)); 1996 Pa. Laws 124 (codified as 23 PA. STAT. ANN. § 1704 (West 2010)); 1996 S.C. Acts 327 (codified as S.C. CODE ANN. § 20-1-15 (2010)); 1996 S.D. Laws 161 (codified as S.D. CODIFIED LAWS § 25-1-1 (2010)); 1996 Tenn. Pub. Acts 1031 (codified as TENN. CODE ANN. § 36-3-113 (2010)); 1997 Tex. Sess. Law Serv. 7 (West) (codified as TEX. FAM. CODE ANN. § 2.001(b) (West 2009)); 1999 Utah Laws 15 (codified as UTAH CODE ANN. §§ 30-1-2, -1-4 (2010)); 1997 Va. Acts 354, 365 (codified as VA. CODE ANN. § 20-45.2 (2010)); 1998 Wash. Sess. Laws 1 (codified as WASH. REV. CODE ANN. §§ 26.04.010, 26.04.020 (West 2010)); 2001 W. Va. Acts 91 (codified as W. VA. CODE ANN. § 48-2-603 (West 2010)).

[164] *See supra* note 163.

[165] *See supra* note 163.

[166] *See supra* note 163.

[167] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). The California Supreme Court was itself subsequently overruled by two ballot initiatives. *See* Strauss v. Horton, 207 P.3d 48, 68 (Cal. 2009).

[168] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

[169] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

[170] 2009 N.H. Laws 59:1 (codified as N.H. REV. STAT. ANN. § 457:1-a (2010)); *see also* Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 3, 2009, at A19, *available at* http://www.nytimes.com/2009/06/04/us/04marriage.html.

[171] *See* Confessore and Barbaro, *supra* note 129.

[172] Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 23 (2005).

held in *Baker v. State* that under the common benefits clause of the Vermont Constitution, "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[173] The court left it to the State Legislature to decide whether this would take the form of "marriage" or an equivalent domestic partnership or civil unions system.[174] The Legislature ultimately chose to institute civil unions, enacting them into law in 2000.[175]

The next year, GLAD filed a marriage equality lawsuit in Massachusetts.[176] In November 2003, the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health* held that the State did not have a rational basis to deny same-sex couples marriage; therefore, refusing to issue same-sex couples marriage licenses violated both the due process and the equal protection clauses of the Massachusetts Constitution.[177] The court gave the Legislature 180 days to remedy the constitutional violation.[178]

Baehr v. Lewin had a direct influence on the Vermont and Massachusetts supreme courts that recognized same-sex unions. In *Baker v. State*, Associate Justice Denise R. Johnson rested her concurring opinion on the sex discrimination analysis first articulated in *Baehr*.[179] Justice Johnson would have gone further than the majority and enjoined "the State from denying marriage licenses to plaintiffs based on sex or sexual orientation."[180] Similarly, in *Goodridge v. Department of Public Health*, Associate Justice John M. Greaney, who provided the critical fourth vote necessary to allow same-sex couples to marry, adopted the Hawai'i Supreme Court's sex discrimination analysis in his concurring opinion:[181]

> That the classification is sex based is self-evident. The marriage statutes prohibit some applicants, such as the plaintiffs, from obtaining a marriage license, and that prohibition is based solely on the applicants' gender. . . . Stated in particular terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he

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[173] 744 A.2d 864, 867 (Vt. 1999).

[174] *Id.* at 886.

[175] *See* 2000 Vt. Adv. Legis. Serv. 91 (LexisNexis); VT. STAT. ANN. tit. 15, § 1204 (2010).

[176] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

[177] *Id.* at 961.

[178] *Id.* at 970.

[179] 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part) (citing Baehr v. Lewin, 74 Haw. 530, 572, 852 P.2d 44, 64 (1993)).

[180] *Id.* at 898.

[181] 798 N.E.2d at 970-71 (Greene, J., concurring) (citing sex-based discrimination analysis in *Baehr*, 74 Haw. at 564, 852 P.2d at 60, and *Baker*, 744 A.2d at 905 (Johnson, J., concurring in part and dissenting in part)).

(Gary) is a man. Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law.[182]

It was the best of times for LGBT rights advocates. In June 2003, the U.S. Supreme Court in *Lawrence v. Texas*[183] struck down a Texas law criminalizing consensual same-sex sodomy and overruled *Bowers v. Hardwick*,[184] a seventeen-year-old opinion in which the Court had upheld Georgia's sodomy law. The majority opinion in *Lawrence*, written by Justice Kennedy, held that the criminalization of intimate, adult consensual conduct violated the substantive component of the Fourteenth Amendment's Due Process Clause.[185] The Court explained that the State cannot demean the existence of homosexuals or control their destiny by making their private sexual conduct a crime: "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[186] Accordingly, the Court declared: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[187]

Justice O'Connor concurred in the judgment, but would have struck down the law under the Equal Protection Clause of the Fourteenth Amendment, rather than the Due Process Clause, for singling out homosexual sodomy.[188] She explained that "[w]hen a law exhibits such a desire to harm a politically unpopular group," the Court applies a "more searching form of rational basis review" under the Equal Protection Clause.[189] The Texas law could not survive heightened rational basis review because mere moral disapproval does not constitute a legitimate government interest.[190]

Both Justice Kennedy and Justice O'Connor expressly limited the sweep of their opinions, disavowing their application to same-sex marriage. The majority explained that " [t]he present case does not involve . . . whether the

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[182] *Id.* at 971.

[183] 539 U.S. 558 (2003).

[184] 478 U.S. 186 (1986).

[185] 539 U.S. at 578.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 579 (O'Connor, J., concurring in the judgment). Justice O'Connor joined the majority in *Bowers*, 478 U.S. 186, and declined to join the majority in overruling it. *Lawrence*, 539 U.S. at 582. She construed the question in *Bowers* as "whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy." *Id.* (citing *Bowers*, 478 U.S. at 188 n.2). But in *Lawrence* the question was whether "moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy." *Id.*

[189] *Lawrence*, 539 U.S. at 580.

[190] *Id.* at 582 (citing Romer v. Evans, 517 U.S. 620, 633 (1996)).

government must give formal recognition to any relationship that homosexual persons seek to enter."[191] Justice O'Connor went further:

> Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.[192]

The Court's decision in *Lawrence* provoked a fiery dissent from Justice Scalia, who recognized its implications for same-sex marriage:[193]

> Justice O'Connor seeks to preserve [state laws limiting marriage to opposite-sex couples] by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest . . . . But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples . . . . In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).[194]

For Justice Scalia, moral disapproval of homosexuality constituted a perfectly legitimate government interest.[195]

Although Justice Scalia's opinion is deeply disturbing to those committed to LGBT equality, he is certainly right that the equal protection principles articulated by Justice O'Connor are equally applicable to laws banning same-sex marriage. Indeed, they are the same equal protection principles applied by the Hawai'i courts in *Baehr v. Lewin*, albeit to sex rather than sexual orientation.

In the wake of *Lawrence v. Texas* and *Goodridge v. Department of Public Health*, the same-sex marriage movement moved out of the courts and into several LGBT-friendly city halls. In 2004, Mayor Gavin Newsom of San Francisco declared California's marriage law unconstitutional and ordered his City Clerk to begin issuing same-sex marriage licenses.[196] The City Clerk issued roughly 4000 marriage licenses to same-sex couples before a state court stopped the process and, ultimately, invalidated the marriages.[197] During March 2004, local officials also issued marriage licenses to same-sex couples in Multnomah County, Oregon, Asbury Park, New Jersey, Sandoval County, New

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[191] *Id.* at 578.

[192] *Id.* at 585.

[193] *Id.* at 602 (Scalia, J., dissenting).

[194] *Id.* at 601-02 (emphasis in original) (citation omitted).

[195] *Id.* at 602.

[196] *See* Lockyer v. City & Cnty. of San Francisco, 95 P.3d 459, 464-65 (Cal. 2004).

[197] *Id.* at 465-66.

Mexico, and New Paltz, New York before being similarly enjoined by court orders.[198]

Finally, on May 17, 2004, same-sex marriages began in Massachusetts—the first same-sex marriages in the United States that were not invalidated by a court order.[199]

C. The Worst of Times: Constitutional Amendments and the 2004 Election

Beginning in 1998, a third and more serious line of defense was erected against the recognition of same-sex marriages across the nation: twenty-nine states amended their state constitutions to prohibit the recognition of same-sex marriages.[200] First, voters in Alaska amended their state constitution to recognize only marriages between "one man and one woman" after a state trial court held that the denial of marriage to same-sex couples was subject to strict scrutiny under the Alaska Constitution.[201] Next, in 2000, Nebraska and Nevada followed suit.[202] These states represented the first "pre-emptive" marriage amendments; at that time, there was no same-sex marriage litigation in those states. They were also the first to expressly proscribe any recognition of same-sex marriages from other states, which became a common feature of these amendments.[203]

Then, following the advent of same-sex marriage in Massachusetts, and on the eve of the 2004 election, Republicans in Congress proposed a Federal Marriage Amendment (FMA), mandating a federal definition of marriage as

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[198] *See* Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1, 3-27 (2007) [hereinafter Law, *Who Gets to Interpret the Constitution?*].

[199] Pam Belluck, *Massachusetts Gay Marriage to Remain Legal*, N.Y. TIMES, June 15, 2007, *available at* http://www.nytimes.com/2007/06/15/us/15gay.html.

[200] ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. 30, § 1; ARK. CONST. of 1868, amend. 83; CAL. CONST. art. 1, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. 1, § 27; GA. CONST. art. I, § IV; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OKLA. CONST. art. II, § 35; OHIO CONST. art. XV, § 11; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. 11, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. 1, § 15-A; WIS. CONST. art. 13, § 13.

[201] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI., 1998 WL 88743, at *6 (Alaska Super. Feb. 27, 1998). In Hawai'i, by contrast, the voters merely gave the legislature the power to limit marriage to heterosexual couples. BALL, *supra* note 3, at 184.

[202] In Nevada, voters had to approve the amendment again in the next general election. *See* NEV. CONST. art. 19, § 2(4).

[203] William C. Duncan, *Revisiting State Marriage Recognition Provisions*, 38 CREIGHTON L. REV. 233, 261-62 (2005).

limited to a man and a woman.[204] In July 2004, a 48-50 procedural vote thwarted Republican hopes to bring the proposed amendment before the Senate.[205] The House waited until September 30 to bring the amendment to the floor; it attained a 227-186 majority, but fell short of the constitutionally required two-thirds vote.[206]

Failure to adopt a marriage amendment at the federal level helped to inspire action in several states.[207] In 2004, thirteen states amended their constitutions to recognize only heterosexual marriages.[208] Some claimed that the measures "acted like magnets for thousands of socially conservative voters in rural and suburban communities who might not otherwise have voted."[209] All of the initiatives passed by wide margins. In only two states—Michigan and Oregon—the amendments were passed with less than sixty percent of the vote.[210] In 2005 and 2006, another ten states amended their constitutions to proscribe same-sex marriage,[211] bringing the total to twenty-six.

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[204] Proposing an amendment to the Constitution of the United States relating to marriage, H.R.J. Res. 106, 108th Cong. (2004), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-108hjres106ih/pdf/BILLS-108hjres106ih.pdf. A slightly different version of the FMA was first introduced in Congress in 2002, but never made it out of committee. Proposing an amendment to the Constitution of the United States relating to marriage, H.R.J. Res. 93, 107th Cong. (2002), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-107hjres93ih/pdf/BILLS-107hjres93ih.pdf.

[205] Laurie Kellman, *Gay Marriage Ban Falls Short of Majority*, WASH. POST, June 7, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700929.html; Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 15, 2004, *available at* http://www.nytimes.com/2004/07/15/us/senators-block-initiative-to-ban-same-sex-unions.html.

[206] Final Vote Results for Roll Call 484, U.S. House of Representatives Office of the Clerk (Sept. 30, 2004), http://clerk.house.gov/evs/2004/roll484.xml.

[207] JAMES W. CEASER & ANDREW E. BUSCH, RED OVER BLUE: THE 2004 ELECTIONS AND AMERICAN POLITICS 149-50 (2005).

[208] *Id. at* 161-62. The thirteen states were Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Ohio, Oregon, and Utah. In all but Louisiana and Missouri, which voted on the measures in September and August, respectively, the amendment was put to the voters on the Presidential Election Day in November. Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643, 659 & nn.112-18 (2009) [hereinafter Rosenberg, *Saul Alinsky*].

[209] James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at A4.

[210] CEASER & BUSCH, *supra* note 207, at 161-62; Rosenberg, *Saul Alinsky*, *supra* note 208, at 659 & n.118.

[211] The ten states were Kansas and Texas in 2005, and Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin in 2006. *See* Rosenberg, *Saul Alinsky*, *supra* note 208, at 660 & nn.122-24.

The spate of constitutional amendments declined dramatically after 2006, but did not completely abate. In 2008, three more states, including California, amended their constitutions, and in 2012 North Carolina did as well.[212] Still, as the wave of marriage amendments subsided after 2006, the pace of marriage equality victories picked up. Between 2008 and 2012, the Connecticut Supreme Court, the Iowa Supreme Court, the state legislatures of Vermont, New Hampshire, New York, Washington, and Maryland, and the Council of the District of Columbia acted to require the recognition of same-sex marriages in their jurisdictions.[213]

D. California

In California, the struggle over same-sex marriage has been complex and controversial. In 2011, many of the issues presented by the debate over same-sex marriage, and the "backlash" debate (discussed below in Part III), are in a lively state of play. In 2000, California voters approved Proposition 22, a legislative act proposed by citizen initiative, making clear that marriage is limited to a man and a woman.[214] Even though the California Constitution provides strong protection for liberty and equality,[215] LGBT litigators decided not to litigate same-sex marriage there because it is notoriously easy to amend the California Constitution through citizen initiatives.[216]

In September 2005, the California Legislature became the first in the nation to pass equal marriage rights legislation for same-sex couples.[217] However, Governor Schwarzenegger vetoed the bill because it conflicted with Proposition 22 and California law does not allow the legislature to overrule statutes passed

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[212] Rosenberg, *Saul Alinsky*, *supra* note 208, at 6 & n.118. The other two states were Arizona and Florida. *Id.*; *see also* Campbell Robertson, *Ban on Gay Marriage Passes in North Carolina*, N.Y. TIMES, May 9, 2012, at A15.

[213] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); VT. STAT. ANN. tit.15, § 8 (2009); N.H. REV. STAT. ANN. § 457:1-a (2010); 2011 N.Y. Sess. Laws Ch. 95 (A8354) (McKinney); 2012 Wash. Legis. Serv. Ch. 3 (S.S.B. 6239) (West); Linskey, *supra* note 132; D.C. CODE § 46-406 (2010).

[214] Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1260-61 (2010).

[215] California was the first state to hold that the state law banning inter-racial marriage violated the California Constitution's equal protection clause, nineteen years before the U.S. Supreme Court reached that conclusion in *Loving v. Virginia*, 388 U.S. 1 (1967). Perez v. Sharp, 198 P.2d 17 (Cal. 1948). California held that gender classifications are constitutionally suspect in 1971 before the U.S. Supreme Court subjected them to heightened scrutiny. Sail'er Inn, Inc. v. Kirby, 485 P.2d 529 (Cal. 1971).

[216] Cummings & NeJaime, *supra* note 214, at 1255.

[217] Dean E. Murphy, *Same Sex Marriage Wins Vote in California*, N.Y. TIMES, Sept. 7, 2005, *available at* http://www.nytimes.com/2005/09/07/national/07california.html.

through citizen initiatives.[218] On May 15, 2008, the California Supreme Court held that limiting marriage to a man and a woman violated state due process and equal protection guarantees because the right to marry is fundamental, sexual orientation constitutes a suspect classification, and no compelling state interest supports the restriction.[219] But on November 4, 2008, California voters passed Proposition 8 by a fifty-two to forty-eight margin,[220] amending the California Constitution to provide that "only marriage between a man and a woman is valid or recognized in California."[221] Eighteen thousand same-sex couples got married in California between May 15 and November 4, 2008.[222] On May 26, 2009, the California Supreme Court rejected arguments that Proposition 8 was an improper attempt to revise, rather than amend, the California Constitution and upheld the referenda.[223] The court also, however, held that the marriages already entered into were valid.[224]

On May 22, 2009, a few days before the decision upholding Proposition 8, Ted Olson and David Boies filed suit in federal court on behalf of same-sex couples, challenging Proposition 8 under the U.S. Constitution.[225] Olson represented George W. Bush in the 2000 election recount and then served as his solicitor general.[226] David Boies is a prominent trial lawyer who represented Al Gore in the recount.[227] For the most part, both California and national LGBT legal leadership were acutely aware of the rightward drift of the federal courts and were not eager to press a glitzy federal claim challenging Proposition 8.[228] But, like when the *Baehr v. Lewin* plaintiffs filed suit in Hawai'i in 1991, or when Gavin Newsom began marrying same-sex couples in 2004, civil rights litigators who thought the initiative unwise were pressed to join a struggle that they did not choose.

Perry v. Schwarzenegger was assigned to Judge Vaughn R. Walker of the Northern District of California.[229] The plaintiffs were two same-sex couples.[230] Dozens of LGBT organizations, churches, civil rights organizations, bar associations, law professors, and others participated as amici in support of the

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[218] Law, *Who Gets to Interpret the Constitution?*, *supra* note 198, at 13.

[219] *In re* Marriage Cases, 183 P.3d 384, 400-04 (Cal. 2008).

[220] *See* Strauss v. Horton, 207 P.3d 48, 68 (Cal. 2009).

[221] *See id.* at 65 (quoting CAL. CONST. art. I, § 7.5). In other words, Proposition 8 did by constitutional amendment essentially what Proposition 22 had attempted to do by legislative act.

[222] *Id.* at 59.

[223] *Id.* at 122.

[224] *Id.*

[225] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

[226] Cummings & NeJaime, *supra* note 214, at 1299.

[227] *Id.*

[228] *See id.* at 1299-1300.

[229] *Perry*, 704 F. Supp. 2d 921.

[230] *Id.* at 927.

plaintiffs.[231] The defendants were California's Governor, Attorney General, several public health officials, and County Clerk-Recorders.[232] All of the governmental defendants refused to defend Proposition 8, with the exception of the Attorney General, who conceded that it was unconstitutional.[233] Judge Walker allowed the official proponents of Proposition 8 to intervene and defend the initiative.[234]

From January 11, 2010 to January 27, 2010, Judge Walker conducted a trial, inviting the parties to present and cross-examine both lay and expert witnesses to explore whether any evidence supported California's refusal to recognize marriage between two people because of their sex.[235] The plaintiffs presented eight lay witnesses, including the four plaintiffs, who offered moving testimony on the reasons marriage was important to them.[236] In addition, nine highly-qualified experts[237] on the history of marriage, the sociology and psychology of various forms of child rearing, and the economic effects of same-sex marriage testified as to the benefits of same-sex marriage and the lack of justification for excluding same-sex couples from marriage.[238]

The proponents of Proposition 8 "vigorously defended the constitutionality of Proposition 8" but "eschew[ed] all but a rather limited factual presentation."[239] The proponents presented only one witness, David Blankenhorn, to address the government's interest in denying marriage to same-sex couples.[240] Blankenhorn, founder and president of the Institute for American Values, was presented as an expert on marriage, fatherhood and family structure.[241] Blankenhorn did not have a doctorate, and while he had published, he had never published in a peer-reviewed journal.[242] Eventually, Judge Walker rejected Blankenhorn's testimony, not simply because he lacked

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[231] *See, e.g.*, Brief for American Civil Liberties Union, Lambda Legal Defense and Education Fund., Inc., and National Center for Lesbian Rights as Amici Curiae Supporting Plaintiffs, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292), 2010 WL 391010.

[232] *Perry*, 704 F. Supp. 2d 921.

[233] *Id.* at 928.

[234] *Id.*

[235] *Id.* at 929.

[236] *Id.* at 932.

[237] *Id.* at 938-45 (describing the plaintiffs' expert witnesses' credentials).

[238] *Id.* at 933-38. The court made extensive findings as to the credibility and competence of the plaintiffs' experts. *Id.*

[239] *Id.* at 931.

[240] *Id.* at 932.

[241] *Id.* at 945.

[242] *Id.* at 945-46. Prior to becoming an expert on marriage, fatherhood and family structure, Blankenhorn had been a community organizer. *Id.* While President Obama has made it respectable to have been a community organizer, it probably does not bear on whether he is an expert.

personal expert qualification, but rather because "Blankenhorn's opinions [were] not supported by reliable evidence or methodology and Blankenhorn failed to consider evidence contrary to his view in presenting his testimony. The court therefore [found] the opinions of Blankenhorn to be unreliable and entitled to essentially no weight."[243]

The trial was the most extensive ever conducted on the question of whether there is any rational reason for the state to deny same-sex couples the right to marry.[244] Judge Walker, having conducted a serious factual trial, cast most of his conclusions as findings of fact. Because they are findings of fact rather than conclusions of law, appellate courts have limited authority to reverse Judge Walker's decision.[245]

On the basis of the testimony presented to him, Judge Walker found that "[m]arriage in the United States has always been a civil matter."[246] Indeed, Judge Walker's opinion included a lengthy discussion of the history of the institution of marriage, including its traditional organization "based on presumptions of a division of labor along gender lines."[247] It noted that "[m]en were seen as suited for certain types of work and women for others. Women were suited to raise children and men were seen as suited to provide for the family."[248] Judge Walker found, however, that "California has eliminated

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[243] *Id.* at 950. Blankenhorn's general theory is that "there are three universal rules that govern marriage: (1) the rule of opposites (the 'man/woman' rule); (2) the rule of two; and (3) the rule of sex." *Id.* at 946. On cross-examination, he conceded that the rule of two is often violated in the case of both serial monogamy and polygamy, and that the rule of sex is violated when one spouse is in a prison, without a system of conjugal visits. *Id.* at 948. In addition to this general theory, he asserted that "children raised by married, biological parents do better on average than children raised in other environments." *Id.* The court found that the evidence presented by Blankenhorn and the plaintiffs' experts "may well [have] support[ed] a conclusion that parents' marital status may affect child outcomes"; the studies did "not, however, support a conclusion that the biological connection between a parent and his or her child is a significant variable for child outcomes." *Id.*

[244] The trial process and factual findings of *Baehr* in 1996, Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. 1st Cir. Dec. 3, 1996), and the court in *Perry* are stunningly similar. In *Baehr*, on remand the state trial court found, after a full hearing in which each side presented expert testimony subject to cross examination, that the government had wholly failed to establish that same-sex couples were less competent to raise children than heterosexual couples. BALL, *supra* note 3, at 175-78, 181. It remains to be seen whether the same-sex marriage dispute will be resolved on the basis of facts.

[245] FED. R. CIV. P. 52(a)(6); *see also* Anderson v. City of Bessemer City, 470 U.S. 564 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

[246] *Perry*, 704 F. Supp. 2d at 946. Judge Walker also made the factual finding that "a person may not marry unless he or she has the legal capacity to consent to marriage," and that neither California nor any other state "has ever required that individuals entering a marriage be willing or able to procreate." *Id.*

[247] *Id.* at 958.

[248] *Id.*

marital obligations based on the gender of the spouse. Regardless of their sex or gender, marital partners share the same obligations to one another and to their dependants."[249] Furthermore, he made extensive factual findings about contemporary understandings of the benefits of marriage—familial, emotional, psychological, and material—which are no longer gendered.[250]

Turning to the question of sexual orientation, informed by expert opinion, Judge Walker found that sexual orientation "is fundamental to a person's identity"[251] and that "California has no interest in asking gays and lesbians to change their sexual orientation . . . . Same-sex couples are *identical* to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions."[252] In addition, rejecting Proposition 8 proponents' claims that allowing same-sex marriage would undermine heterosexual marriage, Judge Walker found: "Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry. . . ."[253]

In a key factual finding, Judge Walker also found that "[t]he children of same-sex couples benefit when their parents can marry."[254] He made extensive findings that whether a child is well-adjusted does not depend on the gender or sexual orientation of the parents.[255]

Still sticking to the facts as shown by the expert evidence, Judge Walker found that Proposition 8 reminds LGBT couples in "committed long-term relationships that their relationships are not as highly valued as opposite-sex relationships."[256] Judge Walker found that "[d]omestic partnerships lack the social meaning associated with marriage, and marriage is widely regarded as the definitive expression of love and commitment in the United States."[257] Furthermore, Judge Walker found that "[p]ublic and private discrimination against gays and lesbians occurs in California and in the United States."[258] Addressing the Proposition 8 campaign, Judge Walker found, as a matter of fact, that the "campaign relied on [negative] stereotypes to show that same-sex relationships are inferior to opposite-sex relationships."[259]

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[249] *Id.* at 960.

[250] *Id.* at 960-64.

[251] *Id.* at 964, 966.

[252] *Id.* at 967 (emphasis added).

[253] *Id.* at 972.

[254] *Id.* at 973.

[255] *Id.* at 981-82.

[256] *Id.* at 979.

[257] *Id.* at 970. Judge Walker relied on the fact that the proponents of Proposition 8 conceded that marriage is uniquely valuable and that domestic partnership, civil unions or other protections for families are culturally inferior. *Id.*

[258] *Id.* at 981.

[259] *Id.* at 990.

Turning from facts to law, Judge Walker noted that "[t]he parties [did] not dispute that the right to marry is fundamental."[260] The question presented was "whether plaintiffs seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new right."[261] Judge Walker held that "[p]laintiffs do not seek recognition of a new right . . . . Rather, plaintiffs ask California to recognize their relationships for what they are: marriages."[262] Therefore, Judge Walker held that Proposition 8 is subject to strict scrutiny under the plaintiffs' due process claim.[263] "Under strict scrutiny, the state bears the burden of producing evidence to show that Proposition 8 is narrowly tailored to a compelling government interest . . . . Proposition 8 cannot withstand rational basis review. Still less can Proposition 8 survive the strict scrutiny[.]"[264]

Turning to the plaintiffs' equal protection claims, Judge Walker found that "Proposition 8 discriminates both on the basis of sex and on the basis of sexual orientation."[265] Although the court did not cite *Baehr v. Lewin*, Judge Walker agreed with the sex discrimination analysis articulated by the Hawai'i Supreme Court. He reasoned: "Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."[266] But Judge Walker concluded that the law also discriminated on the basis of sexual orientation: "sex and sexual orientation are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation. . . . Sexual orientation discrimination is thus a phenomenon distinct from, but related to, sex discrimination."[267]

This was an important move. Reviewing the marriage law under the heightened scrutiny applicable to sex discrimination would have made Judge Walker's decision more vulnerable on appeal because it is far from clear whether the Ninth Circuit or the Supreme Court would agree that the law should be subject to heightened scrutiny. But all laws must at a minimum satisfy rational basis review.[268]

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[260] *Id.* at 992.
[261] *Id.*
[262] *Id.* at 993.
[263] *Id.* at 994.
[264] *Id.* at 995.
[265] *Id.* at 996.
[266] *Id.*
[267] *Id.*
[268] Romer v. Evans, 517 U.S. 620, 632 (1996); Heller v. Doe, 509 U.S. 312, 320-21 (1993).

After scrutinizing the justifications offered for Proposition 8, the court held that it failed to satisfy even rational basis review:[269]

> Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus toward gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate. . . . 'The Constitution cannot control private biases, but neither can it tolerate them' . . . . California's obligation is to treat its citizens equally, not to 'mandate [its] own moral code.' '[M]oral disapproval, without any other asserted state interest,' has never been a rational basis for legislation.[270]

On August 4, 2010, based on the foregoing findings of fact and conclusions of law, the district court held that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[271] Accordingly, Judge Walker enjoined the application and enforcement of Proposition 8.[272] The same day, the proponents of the initiative filed a notice of appeal, and the Ninth Circuit subsequently stayed the district court's order pending appeal.[273]

On February 7, 2012, a three-judge panel of the Ninth Circuit affirmed the district court's judgment in a 2-1 decision authored by Judge Stephen Reinhardt.[274] Judge Reinhardt's opinion held Proposition 8 unconstitutional on narrower grounds than Judge Walker's. The court declined to decide "[w]hether under the Constitution same-sex couples may *ever* be denied the right to marry[.]"[275] Rather, relying heavily on the Supreme Court's opinion in *Romer v. Evans*, the court held that "[b]y using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection

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[269] *Perry*, 704 F. Supp. 2d at 997. Although he held that Proposition 8 failed to satisfy even rational basis review, Judge Walker concluded that laws targeting gays and lesbians should be subject to strict scrutiny because the group has "experienced a 'history of purposeful unequal treatment' [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Id.* (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976)).

[270] *Id.* at 1002 (citing *Romer*, 517 U.S. at 633; Moreno v. Dep't of Agric., 413 U.S. 528, 534 (1973); Palmore v. Sidoti, 466 U.S. 429, 433 (1984); Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring in the judgment)).

[271] *Id.* at 1003-04. Judge Walker held that the equal protection claim was "based on sexual orientation, but this claim [was] equivalent to a claim of discrimination based on sex." *Id.* at 996.

[272] *Id.* at 1003-04.

[273] Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010).

[274] Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

[275] *Id.* at 1064 (emphasis in original).

Clause."[276] Because California is the only state where the right to same-sex marriage was repealed by referendum after such marriages had already legally taken place, the opinion does not mandate same-sex marriage beyond California.

On June 5, 2012, as this article went to print, the Ninth Circuit denied Proposition 8 supporters' petition for en banc review by eleven of the Ninth Circuit's judges.[277] The narrow holding of Judge Reinhardt's opinion, specific to the unique history of same-sex marriage in California, provides the Supreme Court with a ready-made rationale to deny cert if the Court is reluctant to settle the question of marriage equality.[278]

Like the Hawai'i Supreme Court in *Baehr*, the court in *Perry* gave the defendants an opportunity to present justifications for the alleged discrimination or deprivation of liberty. The Hawai'i Supreme Court did this by remanding the case to the trial court, while Judge Walker insisted on a trial on the merits, even though neither the plaintiffs nor the defendants wanted a trial.[279] Insisting on a factual trial is not only fair to the State, but it is very useful politically. Part of the power of both *Baehr* and *Perry* is that the defendants, given the opportunity to show a basis for denying same-sex couples the right to marry, came up so short.

E. Beyond U.S. Politics and Law

The movement toward recognizing same-sex marriage has also made dramatic gains outside the United States, particularly in Europe, but in Latin America and South Africa as well. In 1989, Denmark became the first country to grant legal status to same-sex unions.[280] Since 2001, ten additional nations have made marriage available to same-sex couples.[281] Additionally, nineteen nations have authorized civil unions for same-sex couples.[282]

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[276] *Id.* at 1096.

[277] Perry v. Brown, 681 F.3d 1065 (9th Cir. 2012).

[278] For an excellent commentary on same-sex marriage, see Georgetown University School of Law Professor Nan Hunter's blog, Hunter of Justice: A Blog About Sexuality, Gender, Law and Culture, http://hunterforjustice.typepad.com/ (last visited Mar. 25, 2011).

[279] *See* Cummings & NeJaime, *supra* note 214, at 1300-01.

[280] The Danish Registered Partnership Act, No. 372, June 1, 1989, *available at* http://www.ilga-europe.org/content/download/10993/65145/file/Denmark%20registered%20partnership%20(english).pdf.

[281] *See* Marriage Law Foundation, INTERNATIONAL SURVEY OF LEGAL RECOGNITION OF SAME-SEX COUPLES (2011), http://marriagelawfoundation.org/publications/International.pdf. The following are listed in the order they were adopted: Netherlands, 2001; Belgium, 2003; Canada, 2005; Spain, 2005; South Africa, 2006, Norway, 2008; Sweden, 2009; Argentina, 2010; Iceland, 2010; Portugal, 2010. *Id.*

[282] Scott T. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications*

F. Public Attitudes to Same-Sex Marriage

Public attitudes toward LGBT people and same-sex marriage have changed significantly since *Baehr v. Lewin* in 1993. According to a Gallup poll, between 1996—when DOMA was passed—and 2010, the proportion of Americans who supported same-sex marriage increased from twenty-seven percent to forty-four percent.[283] The Pew Research Center reported that in 2010, for the first time in polling history, fewer than half of those polled opposed same-sex marriage (forty-eight percent opposed and forty-two percent supported).[284] People born after 1980 favor allowing gays and lesbians to marry legally by a fifty-three percent to thirty-nine percent margin, while those born before 1945 continue to oppose same-sex marriage, fifty-nine percent to twenty-nine percent.[285]

An analysis of a 2010 CNN poll found that a narrow majority of Americans support same-sex marriage; this is the first poll to find majority support.[286] According to research by political science professors Andrew Gelman, Jeffrey Lax, and Justin Phillips of the Columbia University Department of Political Science, same-sex marriage did not have majority support in any state as recently as 2004.[287] By 2008, the majority in three states supported marriage equality, and by 2011, seventeen states had crossed the fifty percent line.[288]

The results of the two ballot measures in California defining marriage as heterosexual are instructive. In 2000, California voters approved Proposition 22, which statutorily defined marriage as between a man and a woman, by a sixty-one percent to thirty-nine percent margin.[289] In 2008, California voters approved Proposition 8, the constitutional ban on same-sex marriage, by only a fifty-two percent to forty-eight percent margin.[290] When Proposition 8 was

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for Same-Sex Spouses in a World Without DOMA, 16 WM. & MARY J. WOMEN'S L. 536, 607 n.329 (2010).

[283] Jeffrey M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, GALLUP, May 24, 2010, http://www.gallup.com/poll/128291/americans-opposition-gay-marriage-eases-slightly.aspx.

[284] *Support for Same-Sex Marriage Edges Upward*, THE PEW RESEARCH CENTER FOR PEOPLE & THE PRESS, Oct. 6, 2010, http://people-press.org/report/662/same-sex-marriage.

[285] *Id.*

[286] *Americans Split Evenly on Gay Marriage*, politicalticker (CNN) (Aug. 11, 2010, 00:34 EST), http://politicalticker.blogs.cnn.com/2010/08/11/americans-split-evenly-on-gay-marriage/.

[287] *Id.*

[288] *Id.* (discussing CNN, OPINION RESEARCH POLL (2010), http://i2.cdn.turner.com/cnn/2010/images/08/11/rel11a1a.pdf).

[289] DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF ELECTION RESULTS (2010), *available at* http://www.sos.ca.gov/elections/sov/2010-general/07-for-against.pdf.

[290] Local Ballot Measures (CNN) (Jan. 12, 2009, 00:00 EST), http://www.cnn.com/ELECTION/2008/results/ballot.measures/.

approved, a majority of people opposed same-sex marriage, while in 2011 a majority supported it.[291] A similar shift occurred in Maine, where same-sex marriage legislation was repealed by referenda in 2009.[292]

Of course, public opinion does not necessarily translate into a change in public policy. If a minority feels strongly and is willing to vote on a single issue basis, it is able to exercise political power disproportionate to its popular support. These issues are explored further in Part IV.

III. THE BACKLASH DEBATE

The successes and setbacks of the marriage equality movement since *Baehr v. Lewin* have provoked debate among lawyers, activists, and scholars about whether litigation has been an effective tool for achieving the movement's goals while the majority of the public does not support same-sex marriage. On one side are those we call the "Backlash Theorists," who reject the capacity of the courts to effect social change and are skeptical of the possibility of achieving marriage equality through litigation. They contend that the handful of judicial victories have produced a backlash with far greater costs than can be justified by their benefits. On the other side are those we call the "Backlash Skeptics." While acknowledging that the marriage equality movement has suffered serious setbacks at the ballot box, these scholars and activists argue that the benefits of litigation have, on balance, outweighed its costs.

We will explore the arguments made by each side in this backlash debate in greater detail before turning to our own assessment of the achievements of the marriage-equality litigation and the part that can be reasonably attributed to *Baehr*.

A. The Backlash Theorists

The Backlash Theorists generally support marriage equality; they simply take issue with how the movement has pursued that goal. John D'Emilio, an eminent historian of sexuality, gender, and social movements, has called the marriage campaign nothing less than a "disaster".[293] "Despite all the cheering for the gains we have made, the attempt to achieve marriage through the courts

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[291] Andrew Gelman, Jeffrey Lax & Justin Phillips, *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 21, 2010, at WK3, *available at* http://www.nytimes.com/2010/08/22/weekinreview/22gay.html.

[292] *Id.*

[293] John D'Emilio, *Will the Courts Set us Free? Reflections on the Campaign for Same Sex Marriage*, *in* THE POLITICS OF SAME-SEX MARRIAGE 39, 45 (Craig A. Rimmerman & Clyde Wilcox eds., 2007). D'Emilio first presented his views at a lecture in February 2004, before the 2004 Presidential election. *Id.* at 61.

has provoked a series of defeats that constitute *the greatest calamity in the history of the gay and lesbian movement in the United States*."[294] Gerald N. Rosenberg, a professor of political science and lecturer in law at the University of Chicago, contends that "[t]he battle for same-sex marriage would have been better served if [LGBT activists] had never brought litigation, or had lost their cases."[295] In his opinion, the same-sex marriage litigation has "set back [the] goal of marriage equality for at least a generation."[296] Michael J. Klarman, a professor of constitutional law and history at Harvard Law School, contends that, "[b]y outpacing public opinion on issues of social reform,"[297] judicial rulings such as *Baehr* "mobilize opponents, undercut moderates, and retard the cause they purport to advance."[298]

Rosenberg and Klarman are best known for challenging liberal assumptions about the impact of the U.S. Supreme Court's historic opinion in *Brown v. Board of Education*.[299] They argue that the opinion provoked massive resistance to desegregation by Southern Whites, reversed gains in the struggle for racial equality that had been made since World War II, and unleashed a wave of violence against African Americans.[300] Notwithstanding the Court's order in *Brown*, Rosenberg and Klarman contend that desegregation did not make any significant progress, other than in the border states, until the 1960s, when Congress and the President committed themselves to ending Jim Crow.[301]

Rosenberg argues that courts are poor catalysts of social change due to a variety of institutional constraints. First, the limited nature of constitutional rights forces advocates to argue for the extension or recognition of new rights, which courts are reluctant to do given the importance of precedent to judicial decision-making.[302] Second, the Supreme Court cannot risk getting too far ahead of the political branches given the judiciary's dependence on and

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[294] *Id.* at 45 (emphasis added).

[295] Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 813 (2006).

[296] Rosenberg, *Saul Alinsky*, *supra* note 208, at 656.

[297] Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 482 (2005) [hereinafter Klarman, *Brown and Lawrence*].

[298] *Id. But see* Michael J. Klarman, *Marriage Equality: Are Lawsuits the Best Way?*, HARV. L. BULL., Summer 2009, at 7, 9, *available at* http://www.law.harvard.edu/news/bulletin/2009/summer/ask.php (qualifying the backlash claim concerning *Goodridge*).

[299] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Benjamin I. Page ed., 2d ed. 2008) [hereinafter ROSENBERG, THE HOLLOW HOPE]; Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994) [hereinafter Klarman, *How Brown Changed Race Relations*]; Klarman, *Brown and Lawrence*, *supra* note 297.

[300] Klarman, *Brown and Lawrence*, *supra* note 297, at 453-58.

[301] *Id.*

[302] ROSENBERG, THE HOLLOW HOPE, *supra* note 299, at 10-13.

vulnerability to Congress and the President.[303] Third, even if these institutional constraints can be overcome, the judiciary is decentralized and lacks the resources and expertise to implement comprehensive social reforms.[304] Put differently, courts ultimately depend on other institutional actors to carry out their orders.

Accordingly, Rosenberg argues that courts can produce social change only when these constraints are overcome through: (1) sufficient legal precedent for change; (2) sufficient support in Congress and the executive branch for change; *and* (3) either sufficient support or low levels of opposition among the citizenry.[305] In addition, there must be: (a) positive or negative inducements for compliance with the court's order; (b) the ability for the court's order to be implemented through the market; *or* (c) some other incentive to comply for those responsible for implementation.[306]

Rosenberg first published his ideas in *The Hollow Hope* in 1991.[307] But he began work on a second edition of the book in response to the *Baehr* litigation.[308] By 2008, when the second edition of *The Hollow Hope* was finally published, Rosenberg was confident that the marriage equality movement was the most recent progressive movement to fall prey to the lure of litigation and provoke a political backlash that undermined its goals.[309]

Like Rosenberg, Klarman also comes to same-sex marriage by way of *Brown v. Board of Education*. He first published his backlash thesis concerning *Brown* in 1994,[310] but after *Goodridge v. Department of Public Health* he believed that he had found another example to support his thesis. He argues that court rulings such as *Brown* and *Goodridge* produce a political backlash because they (1) raise the salience of the social issue and force people to take sides; (2) incite anger over "outside interference" or "judicial activism"; and (3) alter the order in which social change would otherwise occur by skipping incremental steps with greater public support (e.g., desegregation of transportation rather than education in the case of *Brown*, and civil unions rather than marriage in the case of *Goodridge*).[311] Moreover, Klarman argues that the Supreme Court is rarely willing to lead public opinion.[312]

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[303] *Id.* at 13-15.

[304] *Id.* at 15-21.

[305] *Id.* at 32-36.

[306] *Id.*

[307] ROSENBERG, THE HOLLOW HOPE, *supra* note 299.

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

[309] *Id.* at 419.

[310] Klarman, *How Brown Changed Race Relations*, *supra* note 299.

[311] Klarman, *Brown and Lawrence*, *supra* note 297, at 473-82. Klarman believes that *Brown* indirectly led to the success of the civil rights movement in the 1960s because the wave of violence that swept the South in its wake ultimately contributed to Northern whites' demands for political intervention by Congress and the President. Klarman, *How Brown Changed Race*

John D'Emilio agrees with Klarman's general assessment of the Supreme Court's political inclinations.[313] Neither *Brown* nor *Roe v. Wade*[314] placed the Supreme Court in the "vanguard of social change."[315] Instead, he suggests, "both decisions built on strong foundations in American society, culture, and law. They attempted to place a constitutional imprimatur on trends already well under way."[316] In addition, citing Gayle S. Rubin, D'Emilio contends that "[s]ex laws are notoriously easy to pass[,]" but "[o]nce they are on the books, they are extremely difficult to dislodge."[317] In other words, without relief from the United States Supreme Court, the marriage equality movement will have to contend with the hard slog of repealing scores of heterosexual marriage laws and constitutional provisions put in place since *Baehr*.

In sum, the Backlash Theorists argue that the marriage equality movement has been "one step forward, two steps backwards."[318] Nowhere has full marriage equality been achieved.[319] While same-sex marriage is available in a handful of states and the District of Columbia, none of these marriages are recognized at the federal level, or in the vast majority of other states. The judicial victories have motivated opponents more than supporters, and the movement has provoked a backlash erecting multiple barriers to further progress in the rest of the country and at the federal level. Moreover, the Backlash Theorists suggest that same-sex marriage litigation has diverted valuable resources from other more effective strategies and causes.[320] More could have been achieved if LGBT advocates had focused on non-litigation strategies and less politically contentious issues, such as civil unions and employment discrimination.

B. The Backlash Skeptics

A group of activists and academics have challenged the Backlash Theorists' description of the marriage-equality movement as well as their conclusions about its success. Rather than seeing one step forward and two steps backward,

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Relations, *supra* note 299, at 111-16. But because the anti-LGBT backlash has not included similarly organized violence, he does not see the same indirect benefits for marriage equality. Klarman, *Brown and Lawrence*, *supra* note 297, at 482.

312 Klarman, *Brown and Lawrence*, *supra* note 297, at 482.

313 D'Emilio, *supra* note 293, at 44-45.

314 403 U.S. 113 (1973).

315 D'Emilio, *supra* note 293, at 56-57.

316 *Id.*

317 *Id.* at 60.

318 ROSENBERG, THE HOLLOW HOPE, *supra* note 299, at 368.

319 *Id.* at 352.

320 *Id.* at 423.

these Backlash Skeptics look at the past nineteen years and see two steps forward and one step backward.

The Backlash Skeptics reject three major descriptive premises of the Backlash Theorists: (1) that the marriage equality movement has wholly, or even primarily, chosen litigation as a means to achieve their goals; (2) that LGBT legislative victories are immune to political backlash; and (3) that movement lawyers have controlled the agenda.

Laura Beth Nielsen argues that the marriage equality movement has combined impact litigation with a host of other non-litigation strategies including direct action, community organizing, political strategies, education, and public demonstrations.[321] Moreover, the Backlash Skeptics do not believe a campaign focused purely on legislation would have fared any better: LGBT legislative victories have also been overturned by citizen lawmaking mechanisms.[322]

National movement attorneys have picked their battles carefully and litigated only where they have public support, in states such as Vermont and Massachusetts.[323] But the movement advocates do not control the world. Same-sex couples might find a lawyer to represent them and a court to listen to their claims, as in Hawai'i.[324] Mayors might decide that their oath to support the constitution prohibits them from denying marriage licenses to same-sex couples, as in San Francisco and New Paltz.[325] Flashy, competent, well-funded lawyers might decide to launch a federal constitutional claim.[326]

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[321] Laura Beth Nielsen, *Social Movements, Social Process: A Response to Gerald Rosenberg*, 42 J. MARSHALL L. REV. 671, 673 (2009).

[322] *See, e.g.*, Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 179-81 (2009); Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 878-81 (2006); Bonauto, *supra* note 172, at 64. In 1977, after the Dade County Metropolitan Commission in Florida enacted an antidiscrimination ordinance, a campaign led by Anita Bryant successfully placed a referendum on Dade County's ballot repealing the ordinance. CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 127-28 (Shane Phelan ed., 2002); Keck, *Beyond Backlash*, *supra*, at 179. The voters approved the referendum by a margin of more than two to one. RIMMERMAN, *supra*, at 127-28. Similarly, a series of LGBT-friendly local ordinances enacted in Colorado in the 1980s and 1990s prompted a 1992 citizen's initiative that amended the Colorado Constitution to ban any laws offering legal protections on the basis of sexual orientation. Keck, *supra*, at 179-80. Until the U.S. Supreme Court struck down the Colorado amendment in *Romer v. Evans*, laws precluding LGBT protections were placed on state-wide ballots in Idaho, Maine, and Oregon, and local jurisdiction ballots in Florida, Ohio, and Oregon. *Id.* at 180.

[323] *See* Baker v. State, 744 A.2d 864, 867 (Vt. 1999); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

[324] *See supra* notes 17-31 and accompanying text.

[325] *See supra* notes 196-98 and accompanying text.

[326] *See supra* notes 225-29 and accompanying text (discussing the plaintiffs' lawyers in

More fundamentally, the Backlash Skeptics challenge the Backlash Theorists' appraisal of the net effect of the marriage equality movement since *Baehr*.[327] For the Backlash Skeptics such as Thomas M. Keck and Carlos A. Ball, the availability of same-sex marriage in six states[328] and the District of Columbia, and the recognition of such marriages in at least one other state,[329] is no small achievement, notwithstanding their lack of federal recognition.[330]

In addition, the Backlash Skeptics contend that the real world impact of the backlash has not been as significant as it seems at first blush. Keck points out that no state recognized same-sex marriage before *Baehr* and that therefore the statutory bans, while psychologically demoralizing, have not effected a change in policy.[331] Moreover, while the state constitutional bans are worse because they preclude the legislature and the courts as future agents of change, Keck argues that in the vast majority of these states, neither the courts nor the legislature are likely to change marriage policy anytime soon.[332] Change will come in most of these places only, if at all, through federal court intervention.[333]

The Backlash Skeptics also contend that the marriage equality movement has had collateral benefits ignored by the Backlash Theorists. The focus on marriage, and the resistance to marriage, has increased public support for civil unions, which have emerged as a compromise position.[334] In the 2004 presidential race, both George W. Bush and John Kerry supported civil unions for same-sex couples.[335] In the 2008 presidential race, all the major Democratic

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Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010)).

[327] Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1494 (2006) [hereinafter Ball, *The Backlash Thesis*].

[328] Connecticut (2008), District of Columbia (2010), Iowa (2009), Massachusetts (2004), New Hampshire (2010), New York (2011), and Vermont (2009). Human Rights Campaign, *supra* note 136. As noted above, *see supra* note 132 and accompanying text, Washington and Maryland may soon be added to this list.

[329] Maryland recognizes same-sex marriages where contracted. 95 Md. Op. Att'y Gen. 3 (Feb. 23, 2010); *see supra* text accompanying note 132.

[330] Ball, *The Backlash Thesis*, *supra* note 327, at 1525; Keck, *supra* note 322, at 164, 168-69. Indeed, the Backlash Skeptics' view of the importance of these achievements seems to prove their related point that the successes of litigation inspired supporters as well as opponents, contrary to Rosenberg and Klarman's view of judicial decisions in advance of public opinion. *Id.*

[331] Keck, *supra* note 322, at 158, 168.

[332] *Id.* at 168.

[333] *Id.*

[334] Ball, *The Backlash Thesis*, *supra* note 327, at 1530.

[335] Sheryl Gay Stolberg, *Democratic Candidates Are Split on the Issue of Gay Marriages*, N.Y. TIMES, July 16, 2003, *available at* http://query.nytimes.com/gst/fullpage.html?res=9F05EFDB153CF935A25754C0A9659C8B63

candidates supported civil unions.[336] Today, in 2011, sixty-six percent of Americans support same-sex marriage or civil unions.[337] Thus, the debate has shifted from whether to recognize same-sex relationships to how to recognize them, which represents a significant step forward.[338]

Indeed, in addition to the states recognizing same-sex marriages, seven states provide all of the state-level spousal benefits to same-sex couples in domestic partnerships or civil unions,[339] and three states provide some state-level spousal benefits.[340] In many cases, these expansions of partnership rights took place against the background of same-sex marriage litigation. "Beginning with Hawai'i, every state in which a court has ruled in favor of expanded partnership rights for same-sex couples [has] indeed subsequently seen an expansion of such rights."[341] In California, Connecticut, New Jersey, and New York, lawmakers expanded the rights granted same-sex couples while litigation was pending; in Oregon, Washington, and again in New York, legislators acted after litigation *failed* to achieve same-sex marriage.[342]

Moreover, the Backlash Skeptics argue that it is reasonable to attribute other LGBT successes, such as the repeal of sodomy laws, the enactment of laws prohibiting discrimination and penalizing hate crimes based on sexual orientation, and greater acceptance of adoptions by LGBT couples, to the marriage equality campaign.[343] By increasing LGBT visibility and humanizing same-sex relationships, the marriage equality movement has forced politicians

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(despite the title of the article, it reports that Kerry, Howard Dean, Joseph Leiberman and Richard Gephardt all opposed same-sex marriage, but supported civil unions); Elisabeth Bumiller, *Bush Says His Party is Wrong to Oppose Gay Civil Unions*, N.Y. TIMES, Oct. 24, 2004, *available at* http://www.nytimes.com/2004/10/26/politics/campaign/26gay.html.

[336] Andrew Jacobs, *For Gay Democrats, a Primary Where Rights Are Not an Issue, This Time*, N.Y. TIMES, Jan. 28, 2008, *available at* http://www.nytimes.com/2008/01/28/us/politics/28gay.html; Katharine Q. Seelye et al., *On the Issues: Social Issues*, N.Y. TIMES, 2008, http://elections.nytimes.com/2008/president/issues/abortion.html.

[337] Posting of Joel Connelly to Seattle PI, *Poll: Big Majority for Same-Sex Marriage/Civil Unions*, SEATTLE PI (Feb. 8, 2011, 13:00 PST), http://blog.seattlepi.com/seattlepolitics/2011/02/08/poll-big-majority-for-same-sex-marriage-civil-unions/.

[338] Ball, *The Backlash Thesis*, *supra* note 327, at 1532.

[339] Human Rights Campaign, *supra* note 136. The states are California (domestic partnerships in 1999 and expanded rights in 2005), Hawai'i (civil unions in 2011), Illinois (2010), Nevada (domestic partnerships in 2009), New Jersey (civil unions in 2007), Oregon (domestic partnerships in 2008) and Washington (domestic partnerships in 2007 and 2009). *Id.*

[340] *Id.* The states are Colorado (designated beneficiaries, 2009), Maine (2004), and Wisconsin (domestic partnerships, 2009). *Id.*

[341] Keck, *supra* note 322, at 169.

[342] *Id.* at 170.

[343] Ball, *The Backlash Thesis*, *supra* note 327, at 1533-34; Keck, *supra* note 322, at 171-75 & tbls.5, 6.

and voters to think about their LGBT neighbors and how far they are willing to extend the promise of equality. Since *Baehr v. Lewin*, we have witnessed the end of the criminalization of consensual sodomy, twenty-one states have passed laws targeting hate crimes based on sexual orientation, twelve states have passed laws prohibiting employment discrimination on the basis of sexual orientation, and eleven states have passed laws prohibiting employment discrimination on the basis of gender identity.[344]

IV. AN EVALUATION OF *BAEHR V. LEWIN* AND THE BACKLASH DEBATE

D'Emilio, Rosenberg, and Klarman argue that the movement for LGBT liberty, equality, and respect would be better if Dan Foley had never agreed to represent the plaintiffs in *Baehr v. Lewin*, or if Justices Moon and Levinson had ruled against marriage equality. We disagree, largely for the reasons articulated by the Backlash Skeptics. In this part we offer additional thoughts about this debate.

In the late 1980s, there were several components to the same-sex marriage debate in the LGBT community.[345] Is the fight for same-sex marriage a desirable goal? Is it a strategically wise priority for the LGBT movement? Is litigation the best way to pursue the goal? The Backlash Theorists focus primarily on the wisdom of constitutional litigation.

Powerful reasons supported the LGBT movement's determination in the 1980s that it was unwise to seek same-sex marriage through litigation. Courts had summarily dismissed all of the claims brought up to that point.[346] Society and the courts have always had more difficulty eradicating historic prejudice in the home than in the public sphere. For example, both the NAACP and the ACLU opposed constitutional challenges to anti-miscegenation laws long after the U.S. Supreme Court decided *Brown v. Board of Education* in 1954.[347] The Court did not decide *Loving v. Virginia*[348] until 1967, thirteen years after *Brown v. Board of Education* and nineteen years after the California Supreme Court struck down the anti-miscegenation law in *Perez v. Sharp*.[349] But while it makes sense for civil rights leadership to seek to set an agenda, both the Backlash Theorists and the LGBT leadership overestimate the ability of the organized movement to control the world.[350] The LGBT leadership had little choice but to join the marriage equality litigation once it began.

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[344] Keck, *supra* note 322, at 175 tbl.6.

[345] *See supra* text accompanying notes 8-15.

[346] *See supra* note 8.

[347] Schacter, *supra* note 141, at 1161-62.

[348] 388 U.S. 1 (1967).

[349] 198 P.2d 17 (Cal. 1948).

[350] *See supra* notes 324-326 and accompanying text.

The same-sex marriage litigation of the past twenty years has produced three important benefits. First, judicial decisions like *Baehr*—from *Perry v. Schwarzenegger*[351] to *Gill v. Office of Personnel Management*[352]—reveal that when asked to present reasons for denying same-sex couples access to marriage, those who oppose same-sex marriage are unable to articulate and defend reasons other than tradition, a particular version of morality, and irrational prejudice. Even when the constitutional claims have been rejected by the courts, as in New York,[353] powerful dissents demonstrate the irrationality of the discrimination that can hinder political change.[354] Irrational prejudice is good enough in the context of legislation or popular politics, but not in a judicial context that asks for a rational relationship between ends and means, backed by evidence subject to cross-examination. This is an important advantage of litigation over legal reform via the legislature or ballot initiatives. The same-sex marriage debate is a powerful argument for the rule of law.

Second, sometimes, as in Massachusetts, Vermont, California, Connecticut, and Iowa,[355] the litigation is successful and same-sex couples get married. While the Backlash Theorists are right that the U.S. Supreme Court is generally loathe to advance far ahead of the national mood, it is a big country, and same-sex marriage litigation has found a receptive audience in several state supreme courts. And it is fair to assume that these judicial decisions support legislative action in other states. The availability of same-sex marriage in six states and the District of Columbia and the recognition of such marriages by at least two other states is a significant achievement. These marriages afford same-sex couples with all of the benefits conferred by the state on opposite-sex couples, including inheritance rights, hospital visitation rights, emergency medical decision-making powers, access to health and pension benefits, reciprocal support obligations, and division of marital property.[356]

Apart from the material benefits to families headed by same-sex couples, the implementation of same-sex marriage in several states demonstrates that the sky will not fall and provides examples that LGBT activists can point to as they attempt to expand the number of states that recognize these unions. The best way to influence public opinion on gay marriage is to implement it.[357] In

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[351] 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[352] 699 F. Supp. 2d 374 (D. Mass. 2010).

[353] Hernandez v. Robles, 855 N.E.2d 1, 5 (N.Y. 2006).

[354] *See, e.g., id.* at 22 (Kaye, C.J., dissenting). *See also* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (suggesting ways in which litigation losses can benefit movements for social change).

[355] *See supra* Part II.B.

[356] NAT'L CONFERENCE OF STATE LEGISLATURES, CIVIL UNIONS & DOMESTIC PARTNERSHIP STATUTES (2010), http://www.ncsl.org/Default.aspx?TabId=16444.

[357] Barney Frank, U.S. Rep., Keynote Address at the Charles R. Williams Project on Sexual Orientation on the Law and Public Policy at UCLA, 4th Annual Update on Sexual Orientation

Vermont, initial reaction to the Vermont Supreme Court's decision that civil unions were constitutionally required was extremely hostile.[358] The same occurred in Massachusetts.[359] As Congressman Barney Frank noted, if the Massachusetts Constitution could have been amended the day after *Goodridge v. Department of Public Health*, it would have been.[360] But, as time has passed and same-sex couples have gotten married, it has, in Frank's words, "become boring" and thereby acceptable with the new question being: "What do you get your lesbian neighbors from Crate and Barrel?"

Third, same-sex marriage litigation has had spillover effects. First and foremost, the struggle for marriage equality has made civil unions a compromise position supported by the majority of Americans and now available in some form in ten states.[361] Moreover, it is reasonable to attribute other LGBT successes—the repeal of sodomy laws, the enactment of laws prohibiting discrimination and penalizing hate crimes based on sexual orientation, and greater acceptance of adoptions by LGBT couples—to the marriage equality campaign, which has increased LGBT visibility and humanized LGBT relationships.[362] The years since *Baehr* have seen major changes in the law to protect LGBT people from discrimination.[363] "Some of the biggest successes [in] the gay rights movement came in the 1990s through changes in corporate policies that covered thousands of employees."[364] It is, of course, impossible to rigorously demonstrate a cause and effect relationship between same-sex marriage and these spillover effects. But it is clear that state supreme court decisions like *Baehr v. Lewin*—including *Baker v. State*,[365] *Goodridge v. Department of Public Health*,[366] and *In re Marriage Cases*[367]—provoked a public debate about the value of same-sex relationships that has forced politicians and voters to think about how far they are willing to extend the promise of equality.

The Backlash Theorists vastly overstate the difficulty in implementing same-sex marriage. Constitutional challenges to policies denying marriage licenses to same-sex couples are fundamentally different than challenges to segregated

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Law and Public Policy (Feb. 25, 2005).

[358] *Id.*

[359] *Id.*

[360] *Id.*

[361] *See* Human Rights Campaign, *supra* note 136.

[362] Ball, *The Backlash Thesis*, *supra* note 327, at 1533-34; Keck, *supra* note 322, at 171-75 & tbls.5, 6.

[363] *See supra* Parts I-II.

[364] URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 10 (1996).

[365] 744 A.2d 864, 867 (Vt. 1999).

[366] 798 N.E.2d 941, 949 (Mass. 2003).

[367] 183 P.3d 384 (Cal. 2008).

schools, oppressive prisons, or a vast range of public policies that discriminate, in effect, on the basis of race, class, gender, or disability. These classic civil rights claims demand huge resources to gather and present facts to demonstrate discrimination and to prove lack of justification. Implementing a court order to end segregation, or de facto discrimination in schools or the workplace, or to reform prisons or mental institutions is a complex process that typically demands decades of judicial oversight, special masters, and fact-finding.[368] By contrast, an order striking down an official state policy that denies marriage licenses to otherwise qualified couples simply because they are of the same sex is simple to implement. The court must merely tell the county clerk to start issuing licenses. Thus, the challenges identified by Rosenberg in implementing court-ordered social reform[369] do not seem to exist in the case of same-sex marriage, which has been implemented successfully wherever it has been ordered.

The Backlash Theorists are certainly correct that the federal and state DOMAs make it more difficult to achieve marriage equality; however, the cause and effect relation between the same-sex marriage litigation and these laws is less than clear. As noted earlier, the possibility of same-sex marriages presents a perfect political storm for the religious right.[370] Moreover, we largely agree with Keck that the two waves of state anti-same-sex marriage statutes and constitutional amendments have, for the most part, not changed policy.[371] Although in Hawai'i and Alaska, ballot initiatives preempted the implementation of a policy change by the courts, and more recently a ballot initiative in Maine preempted a same-sex marriage statute, only in California did a ballot initiative actually reverse an implemented same-sex marriage policy.[372] In the rest of the states with constitutional amendments it will be more difficult to gain marriage equality, but we agree with the Backlash Skeptics that it is unlikely that courts or legislatures in many of these states will be receptive to marriage equality arguments in the near future. Thus, these states will require very hard political work in any event, whether working through the state legislatures or voter initiatives, in the absence of federal court intervention.

Will it be, as D'Emilio suggests,[373] harder to remove these laws than it was to put them on the books in the first place? In the thirty states with

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[368] *See* JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S BROWN DECISION INTO A REVOLUTION FOR EQUALITY (1981).

[369] ROSENBERG, THE HOLLOW HOPE, *supra* note 299, at 15-21.

[370] *See supra* text accompanying note 142.

[371] Keck, *supra* note 322, at 158, 168.

[372] *See supra* text accompanying notes 201 (Alaska), 219-23 (California), 103-06 (Hawai'i).

[373] D'Emilio, *supra* note 293, at 60.

constitutional amendments, it will certainly require changing the views of the voters in the absence of federal court intervention along the lines of *Perry v. Schwarzenegger*.[374] How difficult this will be and how long it will take depend on the state. The odds of California reversing its course in the next couple of years are good; the odds of Utah reversing its course are not.

The more concerning setbacks are the nineteen constitutional amendments that could be interpreted to preclude civil unions and other types of legal recognition of same-sex relationships. A majority of Americans now support some type of legal recognition of same-sex relationships,[375] and while civil unions may not enjoy majority support in each of these individual states, there is certainly greater support for civil unions than for same-sex marriage. Civil unions can provide many of the same tangible benefits offered by states. This is a very real cost of the backlash and the movement should focus on trying to salvage what it can from these amendments.

Finally, the most important setback in the marriage equality movement has been DOMA, and more specifically its withholding of federal recognition of same-sex marriages. The fact that these marriages are not recognized by the federal government is of enormous practical consequence and likely discourages same-sex couples from marriage in states where it is allowed. To be sure, it is not the federal recognition of same-sex marriage as much as the idea of same-sex marriage itself that rankles social conservatives and many voters who have not thought much about the issue.[376] Whether rational or not, both sides in this debate attach great importance merely to the word "marriage."[377] But without DOMA, the same-sex marriages recognized at the

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[374] 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[375] The Pew Forum on Religion & Public Life, MAJORITY CONTINUES TO SUPPORT CIVIL UNIONS (2009), http://pewforum.org/Gay-Marriage-and-Homosexuality/Majority-Continues-To-Support-Civil-Unions.aspx.

[376] *See, e.g.*, Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 387 (1999) ("The fight is mostly about a word, not an act. Couples are not arrested for participating in a ceremony of same-sex union."); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 450 (1996) ("Whatever the context of the debate, most speakers are transfixed by the symbolism of legal recognition.").

[377] In *Perry v. Schwarzenegger*, Judge Walker found that "marriage" has a unique symbolic meaning in our culture and that even the proponents of Proposition 8 "admit that there is a significant symbolic disparity between domestic partnership and marriage." 704 F. Supp. 2d at 970. *Compare* Human Rights Campaign Marriage & Relationship Recognition, http://www.hrc.org/issues/marriage/marriage_introduction.asp (last visited Mar. 21, 2011) ("Only marriage can provide families with true equality."), *with* Family Research Council, Human Sexuality: Homosexuality, http://www.frc.org/human-sexuality#homosexuality (last visited Mar. 23, 2011) ("Attempts to join two men or two women in 'marriage' constitute a radical redefinition and falsification of the institution.").

state level would have all the same rights and benefits as any other marriages at the state level, although they might not be recognized by other states. The end of DOMA, either by repeal or court injunction, would go a long way toward achieving same-sex marriage in America.

Nevertheless, comparing 1993, when *Baehr v. Lewin* was decided, and the present, it is hard to understand how anyone could believe that LGBT relationships do not enjoy greater social respect and state recognition, or that we are not closer than ever before to same-sex marriage becoming a norm. The fact that the same-sex marriage movement has encountered stiff political resistance does not change the fact that it has made significant headway in many places. Indeed, on May 9, 2012, President Obama became the first U.S. president to declare that same-sex marriage should be legal,[378] something that would have been unimaginable in 1993.

In sum, the United States has experienced a polarization of policy on same-sex marriage, even as it continues to rapidly change. A handful of more liberal states and the District of Columbia have implemented same-sex marriage policies, a much larger number of more conservative states have set up legal barriers to any change in policy, and a third group of states are still very much in flux in their recognition of same-sex relationships but have improved dramatically. This third group includes California, Illinois, and New Jersey—some of the most populous, diverse, and economically significant states in the union. The entire West Coast, Hawai'i, Illinois, and New Jersey now recognize same-sex marriage in all but name. Meanwhile, throughout the nation, public attitudes towards same-sex relationships and same-sex marriage are improving. This is what progress looks like, even if there is still a long road ahead before we achieve full marriage equality.

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[378] Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand On Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

Chief Justice Moon's Criminal Past

Kamaile Nichols and Richard Wallsgrove*

I. INTRODUCTION

Cheeky title aside, this article does *not* allege that Ronald Moon, Chief Justice of the Hawai'i Supreme Court from 1993 to 2010, has a secret criminal past. Instead, as the curtain closes on Chief Justice Moon's tenure at the helm of Hawai'i's judiciary, this article examines portions of the Moon Court's jurisprudence by selecting and reviewing several decisions in the context of criminal law. We also aim to contribute to the *University of Hawai'i Law Review*'s historical dialogue regarding the Hawai'i Supreme Court's trends and legacies. This special journal issue follows in the footsteps of earlier articles such as 1992's *The Protection of Individual Rights Under Hawai'i's Constitution*, which examined various issues decided by the Hawai'i Supreme Court under Chief Justice Herman Lum.[1]

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[1] Jon M. Van Dyke et al., *The Protection of Individual Rights Under Hawai'i's Constitution*, 14 U. HAW. L. REV. 311 (1992); *see also, e.g.*, Marcus L. Kawatachi, Comment,

With those goals, this article examines the Moon Court through the lens of two specific issues.[2] First, we review select decisions on evidentiary issues in criminal law cases. This discussion is framed by the fact that Moon sat as chief justice for more than half the present lifetime of the Hawai'i Rules of Evidence, which were codified in 1980. Recent decisions on the effect of that codification (e.g., *State v. Fetelee*[3]), and on elementary foundational requirements (e.g., *State v. Manewa*[4]), illustrate a strict approach to evidentiary issues in the criminal law context.

Second, we highlight select criminal law decisions that implicate privacy concerns. Focusing on search and seizure rulings in various contexts, we review a general trend of increasingly broad privacy protections under Hawai'i law and the correspondingly stringent "reasonable suspicion" requirements imposed on state law enforcement officers.

For each issue, we present a brief introduction to the state of affairs prior to Moon's appointment as chief justice. We then describe various related cases and their holdings. Finally, we conclude the discussion on each issue by identifying trends and other insights illuminated by the Moon Court decisions.

The cases described in this article paint a picture of the Moon Court as unrepentantly requiring prosecutors to adhere to limitations and rules in the criminal context. It is no surprise that along Hawai'i's long and tangled grapevine of law clerks and other young lawyers, Chief Justice Moon developed a reputation as a friendly stickler for the rules.

II. SELECT DECISIONS ON EVIDENCE LAW IN THE CRIMINAL CONTEXT

A. Background—Chief Justice Moon and the Hawai'i Rules of Evidence

Although the bulk of his private career was spent practicing in the civil context, Chief Justice Moon's first job was as a Deputy Prosecutor for the City and County of Honolulu, from 1966 to 1968.[5] Moon was appointed to sit on Hawai'i's First Circuit Court in 1980.[6]

Criminal Procedure Rights Under the Hawaii Constitution Since 1992, 18 U. HAW. L. REV. 683 (1996) (examining early decisions by the Moon Court).

[2] For a broader "sampling of the landmark cases of the Moon Court," see Susan Pang Gochros, *Aloha, Chief Justice Moon*, HAW. B.J., Sept. 2010, at 4.

[3] 117 Haw. 53, 175 P.3d 709 (2008).

[4] 115 Haw. 343, 167 P.3d 336 (2007).

[5] This was Chief Justice Moon's first legal job after clerking for United States District Court Judge Martin Pence. *See* Hon. Ronald T.Y. Moon, Profile, *available at* https://web2.westlaw.com/welcome (follow "Profiler-Professional" link to "Ronald T.Y. Moon") (copy on file with authors); *see also* Gochros, *supra* note 2, at 4.

[6] *See* Hon. Ronald T.Y. Moon, Profile, *supra* note 5.

That same year, during the term of Chief Justice William Richardson, the Hawai'i Legislature adopted the Hawai'i Rules of Evidence (the H.R.E.) as Hawai'i Revised Statutes (H.R.S.) chapter 626.[7] According to Addison Bowman, Emeritus Professor at the University of Hawai'i William S. Richardson School of Law (and author of the often-cited *Hawaii Rules of Evidence Manual*), the Hawai'i Supreme Court "could have unilaterally adopted the rules pursuant to its constitutional prerogative to fashion and enforce rules of practice and procedure."[8] Instead, "the supreme court chose to share this initiative with its sibling branch, recognizing that the legislature has some legitimate interest in evidence law, and harking back to the 1975 enactment of the Federal Rules of Evidence."[9]

In 1993, the same year that Moon was appointed chief justice, the Hawai'i Supreme Court continued this "shared initiative" tack. The court formed the Standing Committee on the Rules of Evidence and charged it with the mandate "to study and evaluate proposed evidence law measures referred by the Hawaii Legislature, and to consider and propose appropriate amendments to the Hawaii Rules of Evidence."[10] In Professor Bowman's view, the past "quarter century of committee oversight, legislative refinement, and appellate court application is a well integrated set of evidence rules that embody some of the best thinking in American evidence law."[11]

The Moon Court's seventeen-year history, spanning more than half the present lifetime of the H.R.E., thus played a fundamental role in setting Hawai'i's law on evidence on its course.

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[7] *See, e.g.*, *Fetelee*, 117 Haw. at 63 n.9, 175 P.3d at 719 n.9 ("The Hawai'i Rules of Evidence were codified in 1981. *See* 1980 Haw. Sess. L. Act 164, § 19 at 274 ('This Action shall take effect on January 1, 1981.').").

[8] ADDISON M. BOWMAN, HAWAII RULES OF EVIDENCE MANUAL vii (2010-2011 ed.). Note that even the Moon Court relied upon Professor Bowman's evidence manual. *See, e.g.*, State v. Fitzwater, 122 Haw. 354, 365, 227 P.3d 520, 531 (2010) (quoting the "*HRE Manual* § 803-3[5][B]").

[9] BOWMAN, *supra* note 8, at vii; *see also* Addison M. Bowman, *The Hawaii Rules of Evidence*, 2 U. HAW. L. REV. 431 (1981) (describing the early history of the H.R.E. adoption).

[10] BOWMAN, *supra* note 8, at viii.

[11] *Id.*

B. Case Summaries

1. Fetelee—*As a "singular and primary source" for the rules of evidence, the codified rules replace the long-accepted common law res gestae exception*

Hawai'i's mere adoption of formal rules of evidence did not answer the question of *how* such rules should be applied. This question is complicated when one recognizes that prior decisions on evidentiary issues, under the common law, might—or might not—be applicable under the codified H.R.E.

In a 2008 opinion written by Chief Justice Moon, *State v. Fetelee*,[12] the Hawai'i Supreme Court tackled one aspect of this thorny question, in the context of criminal law.

Following a jury trial, defendant Faa Fetelee was convicted of attempted murder, attempted assault, and theft.[13] The theft charge stemmed from Fetelee's confrontation with a woman in the parking lot of his apartment building.[14] He was accused of stealing ten dollars from the woman, but he testified that he merely asked the woman for a cigarette and did not take the money.[15]

The attempted murder and attempted assault charges stemmed from a confrontation with two men walking on the street fronting Fetelee's apartment building.[16] Fetelee was accused of stabbing one of the men and kicking the other in the face.[17] Fetelee testified that he was merely defending himself.[18]

Both of these incidents were preceded by an incident involving Fetelee inside an apartment in the complex (the "apartment incident").[19] Fetelee and prosecution witnesses testified that he entered the apartment in an agitated and intoxicated state and caused a fan to hit the ceiling.[20] Prosecution witnesses testified that Fetelee then attacked and chased two men in the apartment.[21] The

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[12] 117 Haw. 53, 175 P.3d 709.

[13] *See id.* at 55, 175 P.3d at 711.

[14] *See id.*

[15] *See id.* at 56-58, 175 P.3d at 712-14.

[16] *See id.* at 55, 175 P.3d at 711.

[17] *See id.* at 57, 175 P.3d at 713.

[18] *See id.* at 58-59, 175 P.3d at 714-15.

[19] *See id.* at 55, 175 P.3d at 711.

[20] *See id.* at 56, 58, 175 P.3d at 712, 714.

[21] *See id.* at 56, 175 P.3d at 712. Fetelee "testified that he was upset, but not mad," that the fan had accidentally hit the ceiling, and that he had neither attacked nor chased the men. *See id.* at 58, 175 P.3d at 714. Both Fetelee and the witnesses testified that he returned a short time later to apologize and appeared calm. *See id.* at 56, 58, 175 P.3d at 712, 714.

apartment incident did not lead directly to the charges that were the subject of the trial.[22]

Fetelee filed a motion in limine to block evidence of his uncharged "bad acts," such as the apartment incident.[23] Under H.R.E. Rule 404(b), the admissibility of "other crimes, wrongs, or acts" is limited; evidence of the bad act is not admissible to prove character, but can be admissible if probative "of another fact that is of consequence."[24]

The trial court denied Fetelee's motion and allowed evidence of the apartment incident to be admitted as res gestae,[25] or "circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act."[26] The trial court explained:

> It's the judgment of the court that there is sufficient evidence for a reasonable juror to conclude that within a time period of as short as three minutes before Mr. Fetelee's contact with Ms. Lincoln, he was angry and intoxicated . . . while engaging in assaultive behavior at [the apartment]. Accordingly, [the apartment incident] was sufficiently coincident with the alleged offenses as to constitute the *res gestae* of the alleged offenses. Though the incident does not constitute a prior bad act, it is noted that its relevance does include an explanation of [Mr. Fetelee's] motive, that is, to manifest the anger he continued to experience as a result of the incident in [the apartment].[27]

Fetelee appealed the trial court's decision on the basis that the common law res gestae doctrine did not constitute an exception to Hawai'i's now-codified rule of evidence.[28]

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[22] *See id.* at 55, 175 P.3d at 711.

[23] *See id.* at 59-60, 175 P.3d at 715-16.

[24] H.R.E. Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

[25] Literally, "things done." *See, e.g.*, BLACK'S LAW DICTIONARY 1173 (5th ed. 1979).

[26] *Fetelee*, 117 Haw. at 65, 175 P.3d at 721 (quoting Territory v. Lewis, 39 Haw. 635, 639 (1953)).

[27] State v. Fetelee, 114 Haw. 151, 154, 157 P.3d 590, 593 (App. 2007) (quoting the trial court), *rev'd*, 117 Haw. 53, 175 P.3d 709.

[28] On appeal:

> Fetelee argue[d] that the incident in [the apartment] constituted a prior bad act that [was] inadmissible under HRE 404(b) or, alternatively, under Rule 403. Specifically, Fetelee argue[d] that since the codification of HRE in 1981, there has been no indication that

Fetelee's codification argument was rejected by the Intermediate Court of Appeals (ICA).[29] The ICA reasoned that evidence of the apartment incident was "necessary to complete the story for the jury" because it was "linked to the crimes charged," and "relevant to provide the jury with an explanation as to why Fetelee was so angry and agitated."[30] Citing decisions from a number of appellate courts in other jurisdictions, the court concluded: "There is a *res gestae* exception to HRE Rule 404(b)."[31]

In a detailed opinion spanning thirty-four reported pages, the Hawai'i Supreme Court concluded otherwise: "the *res gestae* doctrine is no longer a legitimate independent ground for admissibility of evidence in Hawai'i inasmuch as . . . it is superseded by the adoption of the HRE."[32] Thus, the trial court and ICA judgments were vacated.[33]

Writing for Justices Levinson, Acoba, and Duffy,[34] Chief Justice Moon acknowledged that many jurisdictions and commentators continue to support a res gestae exception, but emphasized that the H.R.E. is "*a singular and primary source*" of evidentiary rules.[35] With this emphasis, *Fetelee* serves as a plain example of the Moon Court strictly applying evidentiary rules in the criminal context.

2. Manewa—*Strict foundational requirements for evidence concerning analyses of illegal drugs*

Fetelee is not the only example of the Moon Court strictly adhering to the requirements of evidentiary rules. In a series of cases near the end of Chief Justice Moon's tenure, the Moon Court similarly applied strict foundational requirements to evidence of test results introduced by the prosecution. This series spanned a broad contextual spectrum, ranging from drug cases involving the potential for decades-long prison sentences, to speeding cases involving no more than a small fine and license suspension.

Hawai'i courts intended to expand the *res gestae* doctrine to include an exception to wrongs, crimes, or acts encompassed under HRE 404.

Id. at 157, 157 P.3d at 596.

[29] *See id.* at 159, 157 P.3d at 598.

[30] *Id.*

[31] *Id.* at 157-59, 157 P.3d at 596-98.

[32] State v. Fetelee, 117 Haw. 53, 81, 175 P.3d 709, 737 (2008).

[33] *See id.* at 86, 175 P.3d at 742.

[34] Justice Nakayama concurred in Chief Justice Moon's opinion, but wrote "separately to emphasize the ongoing importance of the *res gestae* doctrine": "Although I join the majority in its holding that the HRE supersedes the *res gestae* doctrine, I do not believe the common law is antiquated." *Id.* at 90, 175 P.3d at 746 (Nakayama, J., concurring).

[35] *Id.* at 79, 175 P.3d at 735 (majority opinion) (quoting SEN. STAND. COMM. REP. NO. 22-80, *reprinted in* 1980 HAW. SEN. J. 1030, 1031) (emphasis added by Moon, C.J.).

In the 2007 *State v. Manewa* decision,[36] the court examined foundational requirements for evidence on the weight and nature of drugs seized from the defendant, Isaac Manewa.[37] Manewa appealed his conviction on the basis that the trial court abused its discretion by "allow[ing the State's] chemist to opine on the weight and identity of the State's drug evidence."[38]

Manewa argued that although the chemist was qualified as an expert in drug analysis and identification, and had personally analyzed the seized substance, the chemist had no "personal knowledge that the instruments he used were properly calibrated and/or serviced."[39] Without evidence to prove, beyond a reasonable doubt, the amount and type of substance seized, Manewa argued that his conviction could not stand.

The ICA rejected Manewa's appeal. Quoting the Hawai'i Supreme Court's 1996 decision in *State v. Wallace*,[40] the ICA reasoned that the prosecution was merely required to satisfy a "foundational prerequisite for the reliability of a test result [by] showing that the measuring instrument is in proper working order."[41] Although the prosecution had not produced maintenance records for the analytical balance used to weigh the substance, the ICA stated that the prosecution "did offer an independent source of reliable evidence that the balance was working properly," in the form of testimony from the chemist.[42] The chemist testified that he "personally verified and validated the balance monthly, in addition to the semi-annual service by the manufacturer's representative."[43]

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[36] 115 Haw. 343, 167 P.3d 336 (2007). Not surprisingly, *Manewa* was not the first Moon Court decision involving evidentiary foundation. For example, *Manewa* includes a discussion of *State v. Wallace*, 80 Haw. 382, 910 P.2d 695 (1996), decided relatively early in Chief Justice Moon's time on the court.

[37] Manewa was convicted by the trial court of promoting a dangerous drug in the first and second degree, under H.R.S. section 712-1241(1)(b)(ii)(A) and 1242(1)(b)(i), respectively. *See Manewa*, 115 Haw. at 345, 167 P.3d at 338.

[38] *Id.* at 349-50, 167 P.3d at 342-43.

[39] State v. Manewa (*Manewa ICA*), No. 27554, 2006 WL 3735966, at *3 (Haw. App. Dec. 20, 2006) (unpublished table decision), *rev'd*, 115 Haw. 343, 167 P.3d 336.

[40] 80 Haw. 382, 910 P.2d 695 (1996). Among other issues, *Wallace* addressed the foundational requirements for evidence on the weight of cocaine seized from the defendant. *See id.* at 411-12, 910 P.2d at 724-25. In a relatively brief analysis, the court noted that the forensic analyst who weighed the cocaine with an analytical balance, and who testified at trial, did not have personal knowledge that the balance had been properly calibrated. Thus, "[t]here being no reliable evidence showing that the balance was in proper working order . . . the prosecution failed to lay a sound factual foundation." *Id.* at 412, 910 P.2d at 725 (internal citations and quotations omitted).

[41] *Manewa ICA*, 2006 WL 3735966, at *2 (quoting *Wallace*, 80 Haw. at 406, 910 P.2d at 719); *see also Manewa*, 115 Haw. at 350, 167 P.3d at 343.

[42] *Manewa ICA*, 2006 WL 3735966, at *3.

[43] *Id.* In his appeal, Manewa summarized the ICA's decision:

Manewa then appealed the issue to the Hawai'i Supreme Court. The Moon Court[44] agreed with the ICA that *Wallace* applied, but vacated Manewa's convictions[45] on the basis that the prosecution had not satisfied the foundational requirement of showing that the balance was in proper working order:

> [The chemist] was not qualified as an expert in the calibration of the analytical balance. [The chemist] used the balance to weigh the evidence although he did not know how its mechanism functioned. The balance is an electronic instrument. [The chemist] himself did not know how to calibrate the balance or how to service it. He indicated that he had never calibrated the balance and that he would not be able to service the machines . . . .[46]

The court ruled the chemist "'lacked the personal knowledge that the balance had been correctly calibrated and merely assumed that the manufacturer's service representative had done so.'"[47] The court also suggested at least one seemingly simple solution to this foundational hurdle: the admission of "business records of the manufacturer indicating a correct calibration."[48] The prosecution, however, "did not offer such records into evidence."[49] Accordingly, all charges requiring proof of the *amount* of drugs seized were vacated.[50]

> Applying *Wallace*, the ICA noted that [the prosecution] did not produce any maintenance records, but reasoned that this was not necessary as [the prosecution] had offered an independent source of reliable evidence. SDO at 6-7. *This source was [the chemist], an expert, testifying that he personally verified and validated the balance each month in addition to its semi-annual servicing.* SDO at 7. This testimony, the ICA held, satisfied the proper working order test. *Id.* . . . The ICA held that this testimony was not hearsay as it was based on [the chemist's] own personal knowledge that the equipment had been verified and, thus, was working properly.

Manewa, 115 Haw. at 351, 167 P.3d at 344 (quoting Manewa's application for writ of certiorari) (emphasis in *Manewa*).

[44] Chief Justice Moon joined a concurring opinion by Justice Levinson, agreeing with the majority opinion that "a proper foundation for the *weight* of the methamphetamine was not established." *Manewa*, 115 Haw. at 359, 167 P.3d at 352 (Levinson, J., concurring) (quoting majority opinion) (emphasis in *Manewa*). The concurring opinion was written to explain a different rationale for the inapplicability of *State v. Schofill*, 63 Haw. 77, 621 P.2d 364 (1980), on an issue separate from this foundation question.

[45] *See Manewa*, 115 Haw. at 358, 167 P.3d at 351. Note, however, that Manewa was convicted of lesser included charges, where the charged counts only required evidence of the type of drug, not the amount. *See id.*

[46] *Id.* at 354-55, 167 P.3d at 347-48.

[47] *Id.* at 355, 167 P.3d at 348 (quoting State v. Wallace, 80 Haw. 382, 412, 910 P.2d 695, 725 (1996)).

[48] *Id.* at 355-56, 167 P.3d at 348-49.

[49] *Id.*

[50] *Id.* at 358, 167 P.3d at 351.

In contrast, the prosecution had satisfied the foundational requirements for reliability of the "GCMS"[51] and "FTIR"[52] instruments used to identify the *nature* of the seized substance (methamphetamine).[53] This was because the chemist testified that he conducted a "routine check" "each and every morning" on the GCMS, and had been "trained to ensure that the GCMS and FTIR instruments were in working order."[54] Thus, Manewa was convicted of lesser included crimes that only required proof of knowing possession of "any dangerous drug in *any* amount."[55]

3. Assaye, Werle, *and* Fitzwater—*Evidentiary requirements in the driving cases*

The court has also addressed essentially the same foundational question in a less drastic criminal context—speeding tickets. In the 2009 *State v. Assaye* case,[56] evidence collected by a police officer with a laser gun was used to convict Abiye Assaye of speeding. Assaye appealed his conviction to the ICA, on the basis that the State had "failed to establish the requisite foundation for such evidence."[57] In a summary disposition order, the ICA cited two prior cases regarding "speed gun" evidence, *State v. Tailo*[58] and *State v. Stoa*,[59] to conclude that the "district court did not err in admitting the laser-gun reading."[60]

On appeal from the ICA, the Moon Court took a more detailed look at the issue and distinguished the *Tailo* and *Stoa* decisions. In *Tailo*, the defendant had alleged that no foundation was laid to support the accuracy of a "tuning fork" test used to calibrate a radar gun.[61] The Hawai'i Supreme Court, in 1989, noted: "Because of the strength of the scientific principles on which the radar gun is based, every recent court which has dealt with the question has taken judicial notice of the scientific reliability of radar speedmeters as recorders of

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[51] Gas chromatograph/mass spectrometer. *See id.* at 347, 167 P.3d at 340.

[52] Fourier transform infrared spectrometer. *See id.*

[53] *Id.* at 354, 167 P.3d at 347.

[54] *Id.* at 354-55, 167 P.3d at 347-48 (internal quotation marks omitted).

[55] *Id.* at 359, 167 P.3d at 352 (quoting HAW. REV. STAT. § 712-1243(1)(c) (1993 & Supp. 2003)) (emphasis added).

[56] 121 Haw. 204, 216 P.3d 1227 (2009).

[57] State v. Assaye (*Assaye ICA*), No. 29078, 2009 WL 81871, at *1 (Haw. App. Jan. 13, 2009), *rev'd*, 121 Haw. 204, 216 P.3d 1227.

[58] 70 Haw. 580, 779 P.2d 11 (1989).

[59] 112 Haw. 260, 145 P.3d 803 (App. 2006), *overruled by Assaye*, 121 Haw. at 214, 216 P.3d at 1237.

[60] *Assaye ICA*, 2009 WL 81871, at *1.

[61] *Assaye*, 121 Haw. at 210, 216 P.3d at 1233 (citing *Tailo*, 70 Haw. at 582, 779 P.2d at 12).

speed."[62] Thus, the *Tailo* court concluded that the prosecution "is not required to prove the accuracy of the tuning fork" because "[r]equiring proof of the accuracy of those testing devices in every case would impose an inordinate burden upon" the prosecution.[63]

"In *Stoa*, the ICA extended *Tailo*'s analysis regarding the accuracy of a radar gun to that of a laser gun."[64] And in addition to taking judicial notice of the accuracy of laser guns, the ICA also held that a police officer's testimony that he performed a series of four functionality tests on the laser gun prior to his patrol was sufficient to set forth a "sound factual foundation."[65]

In *Assaye*, the Moon Court recognized that the officer had apparently performed the same four functionality tests as the officer in *Stoa*.[66] However, the court reached a starkly different conclusion on the admissibility of the evidence:

> [W]e hold that the ICA's decision in this case, and by implication the decision in *Stoa*, is obviously inconsistent with the court's decision in *Manewa* insofar as *Manewa* requires the prosecution to prove that the four tests performed by [the officer] were procedures recommended by the manufacturer for the purpose of showing that the particular laser gun was in fact operating properly. . . .[67]

In addition, the court also held that training must satisfy the same standard; the prosecution must prove that the officer's training "'meets the requirements' of the manufacturer of the laser gun."[68]

Assaye's conviction was reversed because the prosecution had not properly submitted evidence regarding the manufacturer's recommendations for calibration and training: "the trial court abused its discretion by concluding that [the officer's] testimony provided a proper foundation for the speed reading given by the laser gun."[69]

Days later, this evidentiary foundation question was addressed in another context in *State v. Werle*,[70] regarding evidence of intoxication from a blood alcohol test used to support the conviction of William Werle for drunk driving.[71] Rather than citing the *Manewa* line of cases, the court's analysis instead began with H.R.E. Rules 702 and 703 (regarding the admissibility of

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[62] *Id.* (quoting *Tailo*, 70 Haw. at 582, 779 P.2d at 13).

[63] *Id.* at 211, 216 P.3d at 1234 (quoting *Tailo*, 70 Haw. at 583-84, 779 P.2d at 14).

[64] *Id.* (citing *Stoa*, 112 Haw. at 265, 145 P.3d at 808).

[65] *Id.* at 211-12, 216 P.3d at 1234-35.

[66] *See id.* at 212, 216 P.3d at 1235.

[67] *Id.*

[68] *Id.* at 216, 216 P.3d at 1239 (citation omitted).

[69] *See id.* at 216, 216 P.3d at 1239.

[70] 121 Haw. 274, 218 P.3d 762 (2009).

[71] *See id.* at 276, 218 P.3d at 764. More precisely, Werle was convicted of operating a vehicle under the influence of an intoxicant under H.R.S. sections 291E-61(a) and (d). *See id.*

scientific or technical evidence).[72] But the fundamental concern with reliable test methods was the same as in *Manewa* and *Assaye*: "As part of the foundation, the prosecution must establish the reliability of the test results which establish intoxication."[73]

In *Werle*, the prosecution submitted testimony from the analyst who tested the defendant's blood sample.[74] The analyst explained his understanding of the scientific principles underlying the testing method, and also testified that Werle's blood alcohol level was outside the maximum range of the instrument, and thus the sample had to be diluted before testing.[75] The prosecution also submitted testimony from the Ph.D. biochemist who directed the Department of Health-licensed toxicology lab and its quality assurance program.[76]

Despite this testimony, the court held that "there was insufficient competent testimony in the record to establish the foundational reliability of Werle's blood alcohol test results," because "[n]either [the biochemist's] nor [the analyst's] testimony established the validity of the scientific principles" underlying the testing instrument and technique.[77] The court suggested that the biochemist "would have been the logical witness to testify as to the validity of the scientific

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[72] *See id.* at 282, 218 P.3d at 770 ("Blood alcohol tests are scientific in nature. In Hawai'i, the admissibility of scientific or technical evidence is governed by Hawai'i Rules of Evidence (HRE) Rules 702 and 703 (1993)."). Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, *the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.*

HAW. R. EVID. 702 (emphasis added). Rule 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. *The court may, however, disallow testimony in the form of an opinion if the underlying facts or data indicate lack of trustworthiness.*

HAW. R. EVID. 703 (emphasis added); *see also Werle*, 121 Haw. at 282, 218 P.3d at 770 (stating the test for reliability of scientific evidence under H.R.E. Rules 702 and 703: "Whether scientific evidence is reliable depends on three factors, the validity of the underlying principle, the validity of the technique applying that principle, and the proper application of the technique on the particular occasion." (quoting State v. Montalbo, 73 Haw. 130, 136, 828 P.2d 1274, 1279 (1992))).

[73] *Werle*, 121 Haw. at 282, 218 P.3d at 770 (citation omitted).

[74] *See id.* at 278, 218 P.3d at 766.

[75] *See id.*

[76] *See id.* at 279, 218 P.3d at 767.

[77] *Id.* at 286, 218 P.3d at 774.

principles," but he "was not asked to explain [those] principles."[78] Thus, Werle's conviction was reversed.[79]

The last in the series of cases identified here, *State v. Fitzwater*,[80] was decided in 2010 and addressed the foundational requirement in another relatively low-tech speeding case. This time, the vehicle's speed was measured by the speedometer in an officer's vehicle. Chief Justice Moon joined an opinion written by his eventual successor, then-Associate Justice Mark Recktenwald, and once again the court departed from the trial court's and ICA's rulings and vacated the conviction.

Citing *Wallace*, *Manewa*, and *Assaye*, the court held that the prosecution was required to establish the reliability of the officer's speedometer, which had been calibrated in a "speed check."[81] For the result of that speed check to be admissible, the State was required to establish (1) "how and when the speed check was performed, including whether it was performed in the manner specified by the manufacturer of the equipment used to perform the check, and (2) the identity and qualifications of the person performing the check, including whether that person had whatever training the manufacturer recommends in order to competently perform it."[82]

Perhaps aiming to comply with *Manewa*'s suggestion that calibration records from a manufacturer can lay the required foundation, the prosecution submitted a "speed check card" into evidence, to demonstrate that the officer's speedometer had been calibrated by an independent shop.[83] The prosecution, however, once again relied too heavily on the officer's testimony for this evidence. The court held that the officer could not properly authenticate the independent shop's speed check card under H.R.E. Rule 803(b)(6).[84] Under Rule 803(b)(6)—the "business records" exception to the hearsay rule—records of a regularly conducted activity can be authenticated by a "custodian or other qualified witness."[85] However, the officer was not the custodian of the speed

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[78] *Id.* at 285-86, 218 P.3d at 773-74.

[79] *See id.* at 287, 218 P.3d at 775.

[80] 122 Haw. 354, 227 P.3d 520 (2010).

[81] *See id.* at 378, 227 P.3d at 544.

[82] *Id.* at 376-77, 227 P.3d at 542-43.

[83] *See id.* at 357, 227 P.3d at 523.

[84] *See id.* at 365-70, 227 P.3d at 531-36.

[85] *See id.* at 365, 227 P.3d at 531. H.R.E. Rule 803(b)(6) allows, as an exception to the hearsay rule, admission of:

> Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness . . . .

check records, did not have personal knowledge of how the speed checks were done, and did not testify about who performed the checks.[86]

Thus, the officer was not a "qualified witness" because his testimony did not contain the necessary "indicia of reliability" to support authentication by a non-custodian.[87] "As a result, 'inadequate foundation was laid to show' that the speed check 'could be relied on as a substantive fact.'"[88]

C. Trends and Other Comments on the Evidence Cases

Together, these selected evidence cases hint at four general trends in the later years of the Moon Court.

First, the cases reflect an increasingly rule-based approach to evidentiary questions in the criminal context. This approach is clear in *Fetelee*, which strictly abolished the common law res gestae doctrine in favor of the H.R.E. The same trend is also evident, in various ways, in the foundation cases. For example, in *Fitzwater*, the court explained that although the "indicia of reliability" test remains relevant with respect to admissibility of business records, this common law test does not "supplant" the rules:

> Thus, we hold that when an entity incorporates records prepared by another entity into its own records, they are admissible as business records of the incorporating entity provided that it relies on the records, there are other indicia of reliability, and the requirements of Rule 803(b)(6) are otherwise satisfied. The requirements of (1) reliance and (2) indicia of reliability *do not supplant the provisions of the rule; rather, we view them as necessary in these circumstances to satisfy the rule's requirement that the records were "made in the course of a regularly conducted activity"* of the incorporating entity.[89]

Similarly, *Werle*'s foundational analysis began with H.R.E. Rules 702 and 703 as opposed to the common law.[90]

Thus, while codification of the rules cannot replace the need for a judiciary to apply those rules using appropriate tests, the Moon Court grounded its application more firmly in the modern rules than in prior case law. This approach may yet sway other jurisdictions. For example, Justices Albin and Long of the New Jersey Supreme Court favorably described and quoted the Hawai'i Supreme Court's *Fetelee* decision, leading them to conclude that "[r]es

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[86] *See Fitzwater*, 122 Haw. at 365-66, 369, 227 P.3d at 531-32, 535.

[87] *Id.* at 369, 227 P.3d at 535.

[88] *Id.* at 377, 227 P.3d at 543 (quoting State v. Wallace, 80 Haw. 382, 412, 910 P.2d 695, 725 (1996)).

[89] *Id.* at 367-68, 227 P.3d at 533-34 (citing HAW. R. EVID. 803(b)(6)) (emphasis added).

[90] *See* State v. Werle, 121 Haw. 274, 282, 218 P.3d 762, 770 (2009).

gestae is the moldy cardboard box in the basement, whose contents no longer have any utility."[91]

The second trend gleaned from these cases is a strict adherence to evidentiary requirements, even in the face of contrary decisions by other courts. For example, in *Fetelee*, the ICA had followed, and cited at length, decisions from appellate courts in Washington,[92] Michigan,[93] South Dakota,[94] and Colorado.[95] Each held that the common law res gestae exception survived codification of the rules of evidence. The Hawai'i Supreme Court also acknowledged that res gestae "has continued to be utilized by other courts as a viable concept . . . and an exception to Rule 404(b),"[96] citing decisions by federal courts of appeal in the Fifth,[97] Sixth,[98] Eighth,[99] Ninth,[100] Tenth,[101] and Eleventh[102] circuits.[103]

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[91] State v. Kemp, 948 A.2d 636, 652 (N.J. 2008) (Albin, J., concurring).

[92] *See* State v. Fetelee, 114 Haw. 151, 158, 157 P.3d 590, 597 (App. 2007) ("The [Washington] court concluded that such admission was proper under the *res gestae* or 'same transaction' exception to Rule 404(b)." (citing State v. Elmore, 985 P.2d 289, 311 (Wash. 1999))). "This exception permits the admission of evidence of other crimes or misconduct where it is a link in the chain of an unbroken sequence of events surrounding the charged offense in order that a complete picture be depicted for the jury." *Id.* (quoting State v. Acosta, 98 P.3d 503, 512 (Wash. App. 2004)).

[93] *See id.* ("Michigan courts have defined the *res gestae* exception to Rule 404(b) as that 'evidence of prior bad acts [that] is admissible where those acts are so blended or connected with the charged offense that proof of one incidentally involves the other or explains the circumstances of the crime.'" (quoting People v. Robinson, 340 N.W.2d 303, 304 (Mich. App. 1983))).

[94] *See id.* ("[T]he Supreme Court of South Dakota stated that 'evidence of 'other acts' may be admissible as *res gestae* evidence, . . . an exception to [South Dakota Codified Laws (SDCL)] 19-12-5 or Federal Rule 404(b).'" (citing State v. Pasek, 691 N.W.2d 301, 309 n.7 (S.D. 2004))).

[95] *See id.* at 159, 157 P.3d at 598 ("The [Supreme Court of Colorado] further emphasized that *res gestae* evidence is the antithesis of CRE [(Colorado Rules of Evidence)] 904(b) evidence. Where CRE 404(b) evidence is independent from the charged offense, *res gestae* evidence is limited to the offense." (quoting People v. Quintana, 882 P.2d 1366, 1373 n.12 (Colo. 1994))).

[96] State v. Fetelee, 117 Haw. 53, 68, 175 P.3d 709, 724 (2008).

[97] *See id.* (citing United States v. McDaniel, 574 F.2d 1224, 1227 (5th Cir. 1978)); *see also* United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990).

[98] *See id.* (quoting United States v. Hardy, 228 F.3d 745, 748 (6th Cir. 2000) (explaining that res gestae evidence "does not implicate Rule 404(b)")).

[99] *See id.* (citing United States v. Johnson, 463 F.3d 803, 808 (8th Cir. 2006)).

[100] *See id.* ("A jury is entitled to know the circumstances and background of a criminal charge." (quoting United States v. Daly, 974 F.2d 1215, 1217 (9th Cir. 1992))).

[101] *See id.* (citing United States v. Green, 175 F.3d 822, 831 (10th Cir. 1999)).

[102] *See id.* (citing United States v. Weeks, 716 F.2d 830, 832 (11th Cir. 1983)).

[103] *See id.* at 68-69, 175 P.3d at 724-25 (explaining that the res gestae exception continues to be utilized in a number of other jurisdictions, albeit sometimes with different terminology) (quoting, for example, *Green*, 175 F.3d at 831, which noted that "[d]irect or intrinsic evidence

However, after a long discussion of various opinions which analyzed the viability of the res gestae doctrine, the Hawai'i Supreme Court decided that such opinions merely "underscore[] the need" for the court to reach its own conclusion.[104]

Likewise, in *Assaye*, the court sharply curtailed application of the earlier *Tailo* and *Stoa* decisions, in favor of its more recent *Manewa* precedent. Instead of following *Tailo*, which permitted judicial notice of the reliability of radar speed measurements, or *Stoa*, in which the ICA logically extended the *Tailo* ruling to laser guns, the Moon Court diligently applied its foundational "reliability" requirements from the *Manewa* drug case. The court relied on the principles in *Manewa* despite the seemingly different factual contexts. Thus, it appears that neither prior cases from Hawai'i, nor cases from other jurisdictions, could steer the Moon Court from its own evidentiary course.

The third trend to be teased from these evidence decisions is an apparent insistence on the foundational reliability test, even at the expense of an arguably more "practical" perspective. For example, in *Assaye*, the court turned away from its prior rationale that "[r]equiring proof of the accuracy of [speed] testing devices in every case would impose an inordinate burden upon" the prosecution.[105] To the Moon Court, this practical burden was apparently outweighed by a need to follow the evidentiary rules.

Similarly, in *Fitzwater*, the officer testified that he trailed the defendant and measured him traveling at *twice* the thirty-five mile per hour limit.[106] Under those circumstances, it is difficult to imagine that a precise calibration was necessary to reliably test whether the defendant was speeding.

In *Werle*, the prosecution's laboratory analyst testified that he needed to dilute the defendant's blood sample, because the alcohol content was above the instrument's maximum analytical range.[107] Again, it is questionable whether a precisely calibrated instrument was necessary to reliably establish intoxication under those facts.

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of the crime does not fall within the ambit of the rule."). The *Fetelee* court also noted that courts from the Seventh Circuit, D.C. Circuit, Kansas, Maryland, Wyoming, Montana, Illinois, Maine, and Missouri have concluded, like the Hawai'i Supreme Court, that res gestae is no longer a viable doctrine. *See, e.g., id.* at 67-68, 175 P.3d at 724-25; *see also* State v. Kemp, 948 A.2d 636, 652 (N.J. 2008) (Albin, J., concurring).

[104] *See Fetelee*, 117 Haw. at 78, 175 P.3d at 734 ("The foregoing discussion underscores the need for this court to settle the question whether the *res gestae* doctrine can co-exist with the HRE.").

[105] State v. Assaye, 121 Haw. 204, 211, 216 P.3d 1227, 1234 (2009) (quoting State v. Tailo, 70 Haw. 580, 583, 779 P.2d 11, 14 (1989)).

[106] *See* State v. Fitzwater, 122 Haw. 354, 357, 227 P.3d 520, 523 (2010).

[107] *See* State v. Werle, 121 Haw. 274, 278, 218 P.3d 762, 766 (2009).

In *Manewa*, the relevant statute required evidence that the defendant possessed more than one-eighth of an ounce of a dangerous drug.[108] Although it is unclear from the court's opinion how close the analyst's measurement was to this cut-off, laboratory-grade analytical balances are typically far more precise than plus/minus several grams.[109]

To summarize this third trend, it appears that in the context of evidentiary challenges, the Moon Court forced practical considerations to yield to the procedural certainty and protection afforded by rules of evidence.

The fourth and final trend illustrated by these evidence cases is reflected in their authors. The transition from common law to codified rules began with Chief Justice Richardson and his successor Chief Justice Lum. Chief Justice Moon continued this movement and later penned the *Fetelee* decision. Current Chief Justice Recktenwald authored the *Fitzwater* opinion, which closely followed the *Wallace-Manewa-Assaye* line.[110] Thus, it appears that the court's approach to these evidence issues will survive Chief Justice Moon's retirement, at least for now.

III. SELECT DECISIONS IMPLICATING PRIVACY CONCERNS IN THE CRIMINAL CONTEXT

A. Background

In contrast to the Fourth Amendment to the U.S. Constitution's protection against "unreasonable searches and seizures,"[111] Hawai'i's corresponding

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[108] *See* State v. Manewa, 115 Haw. 343, 167 P.3d 336 (2007) (citing HAW. REV. STAT. § 712-1242 (1993 & Supp. 2003) (requiring possession of more than one-eighth of an ounce)).

[109] One of this article's authors has personal experience with analytical balances and GC/MS instruments in the laboratory. From that experience, it is readily apparent that analytical balances are routinely used to measure substances with much finer precision (such as micrograms—1/1000 of a gram—or less) than at issue in *Manewa*.

Furthermore, we question the court's differing conclusions on the analytical balance used to weigh the seized substance, as opposed to the GC/MS instrument used to identify the nature of the substance. The court took foundational solace in the fact that the GC/MS instrument was calibrated daily, while the balance was calibrated only semi-annually. *See id.* at 346-47, 167 P.3d at 353-54. However, a practical explanation for this discrepancy cuts against the court's conclusion. In the author's experience, analytical balances tend to be robust, maintaining their relative precision even with infrequent calibration. GC/MS instruments, in contrast, are often extraordinarily "finicky" and *require* calibration daily or more frequently. Thus, from a practical perspective, it is unlikely that the chemist's frequent calibrations in *Manewa* are a true indication of the GC/MS test's reliability relative to the analytical balance.

[110] Then-Associate Justice Recktenwald recused himself in *Werle* and *Assaye*, presumably because those cases were appealed to the ICA when he sat on that court.

[111] U.S. CONST. amend. IV. The Fourth Amendment provides:

constitutional provision contains an explicit right to privacy. Article I, section 7 provides that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated."[112]

Under the Lum Court, this constitutional right was interpreted to afford, in some respects, greater protections[113] for defendants in the criminal context.[114] The leading example of enhanced "search and seizure" protections for criminal defendants in the final years of the Lum Court was *State v. Quino*, in which the Lum Court ruled that the Honolulu Police Department's use of the "walk and talk" drug interdiction method at the Honolulu International Airport violated an individual's "right to be secure against unreasonable seizures guaranteed by article I, section 7 of the Hawaii Constitution."[115] The court, of which then-Associate Justice Moon was a part, expressly granted defendants greater protections against search and seizure than those afforded under federal law.[116] After *Quino*, an officer's deliberate and investigative questioning constitutes a seizure that requires an "objective basis for suspecting them of misconduct" (i.e., reasonable suspicion), or the individual's consent.[117] With this ruling, Hawai'i became one of the few states to lower the threshold for when questioning effects a "seizure" on the basis of state law.[118]

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[112] HAW. CONST. art. 1, § 7.

[113] *See* Van Dyke et al., *supra* note 1; Kawatachi, *supra* note 1.

[114] Because this article focuses on the Moon Court's criminal law jurisprudence, we do not discuss the Hawai'i Constitution's second clause bestowing a more general right to privacy outside of the criminal context. Article I, section 6 provides that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." HAW. CONST. art. 1, § 6. This provision has been the basis for a number of important decisions by the Moon Court regarding constitutional protection for activities that are "implicit in the concept of ordered liberty." *E.g.*, State v. Mallan, 86 Haw. 440, 950 P.2d 178 (1998) (holding that "the right to possess and use marijuana cannot be considered a 'fundamental' right that is 'implicit in the concept of ordered liberty'" and that "smoking marijuana is [not] a part of the 'traditions and collective conscience of our people'"); *see also* Julia B.L. Worsham, Note, *Privacy Outside of the Penumbra: A Discussion of Hawai'i's Right to Privacy After* State v. Mallan, 21 U. HAW. L. REV. 273 (1999).

[115] 74 Haw. 161, 175, 840 P.2d 358, 365 (1992).

[116] *See id.* at 170, 840 P.2d at 362.

[117] *See id.* at 175, 840 P.2d at 365.

[118] *See* Toby M. Tonaki et al., Comment, State v. Quino, *The Hawai'i Supreme Court Pulls Out All the "Stops"*, 15 U. HAW. L. REV. 289, 336 n.394 (1993); Gail Ezra Cary, *Warrantless Seizures*, 25 RUTGERS L.J. 1188, 1188-89 (1994).

The selected cases below demonstrate the Moon Court's willingness to continue this trend, but not without exception.

B. Case Summaries

1. Kearns *and* Trainor—*"Walk and talk" after* Quino

Less than two years after *Quino* was decided, in 1994, the relatively new Moon Court had occasion to reaffirm the *Quino* ruling and clarify the "consensual encounter" justification for a seizure in *State v. Kearns*.[119] As in *Quino*, the police officers in *Kearns* "seized" the defendant during the course of an investigative "walk and talk" encounter at the airport,[120] and "given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave."[121] The court rejected the State's argument that the seizure was permissible because Kearns had consented to it.[122] Instead, the court held that "mere acquiescence to questioning" is "insufficient to establish consent" during a walk and talk investigation.[123] In order for a walk and talk encounter to be constitutionally upheld as "consensual," the defendant must have been informed of his or her "right to decline to participate in the encounter and . . . leave at any time" and must have voluntarily participated.[124] Because Kearns had not been so informed and could not have consented, the court ruled that the evidence obtained after the seizure should have been suppressed, and the conviction was vacated.[125] *Kearns* received national attention for its imposition of a more rigorous "consent" standard.[126]

Two years after *Kearns*, the Moon Court addressed the "reasonable suspicion" exception to the warrant requirement.[127] In *State v. Trainor*, the officer initiated a walk and talk encounter with the defendant based on purportedly "objective reasons," including Trainor's baggy clothing, lack of

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[119] 75 Haw. 558, 867 P.2d 903 (1994). Chief Justice Moon was recused from this case.

[120] *See id.* at 564, 867 P.2d at 905.

[121] *See id.* at 566, 867 P.2d at 907.

[122] *See id.* at 569-72, 867 P.2d at 908-9.

[123] *Id.* at 571, 867 P.2d at 909.

[124] *Id.*

[125] *Id.* at 572, 867 P.2d at 910.

[126] *See* Robert J. Burnett, Comment, *Random Police-Citizen Encounters: When is a Seizure a Seizure?*, 33 DUQ. L. REV. 283 (1995); Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 56-60 (2001).

[127] *See* State v. Trainor, 83 Haw. 250, 925 P.2d 818 (1996). Chief Justice Moon was recused from this case.

check-on baggage, "flushed and shiny" complexion, and harried demeanor.[128] These characteristics, however, were too broad to create a reasonable suspicion of criminal activity.[129] The court noted that "[i]t is precisely because article I, section 7 . . . was designed, among other things, to safeguard [against] . . . arbitrary, oppressive, and harassing conduct by the police that we have conditioned an investigative stop on the police officer's capacity to point to specific and articulable facts . . . that criminal activity is afoot."[130] Without such specific and articulable facts, the officer "was unjustified in initiating an investigative 'encounter' with Trainor."[131]

2. Lopez *and* Cuntapay—*Privacy in the home*

A similar concern for the individual's right to privacy can be seen in the Moon Court's jurisprudence relating to searches of the home. For instance, early in the Moon Court's tenure, the court reaffirmed its commitment to an "actual authority" consent requirement when it ruled in *State v. Lopez*[132] that one must have actual authority to consent to the search of another person's home in order for the search to be constitutional.[133] In *Lopez*, the Moon Court expressly declined to adopt the federal concept of "apparent authority."[134] Thus, when the mother of a defendant granted the investigating officer permission to enter the defendant's home without having first received permission from the defendant to do so, the court ruled the nonconsensual search unconstitutional under article I, section 7.[135] Citing to *Quino*, the court noted that it was "free to provide broader protection under [the] state constitution" than the U.S. Constitution provides and that "[i]n the area of searches and seizures under article I, section 7, [it had] often exercised this freedom."[136]

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[128] *See id.* at 252, 925 P.2d at 820.

[129] *See id.* at 257-58, 925 P.2d at 825-26.

[130] *Id.* at 259, 925 P.2d at 827 (quoting State v. Quino, 74 Haw. 161, 178-80, 840 P.2d 358, 366 (1992) (Levinson, J., concurring) (internal quotations and citations omitted)).

[131] *Id.*

[132] 78 Haw. 433, 896 P.2d 889 (1995).

[133] *See id.* at 445, 896 P.2d at 901.

[134] *See id.* (stating that although "the concept of apparent authority is well-recognized on the federal level, this court has always required a showing of 'actual authority'").

[135] *See id.* at 447, 896 P.2d at 903.

[136] *Id.* at 445, 896 P.2d at 901; *see also* State v. Detroy, 102 Haw. 13, 22, 72 P.3d 485, 494 (2003) (citing *Lopez* with approval). The court did, however, adopt the "inevitable discovery exception" with respect to tangible physical evidence, allowing the prosecution to "present clear and convincing evidence that any evidence obtained in violation of article I, section 7, would inevitably have been discovered by lawful means." *Lopez*, 78 Haw. at 451, 896 P.2d at 907.

Later, in *State v. Cuntapay*,[137] the court similarly departed from federal precedent in its approach to a guest's right to privacy in the host's home.[138] Whereas the U.S. Supreme Court recognized an *overnight* guest's Fourth Amendment right to privacy, the Moon Court declined to so limit the scope of a guest's rights, ruling that a guest "should share his [or her] host's shelter against unreasonable searches and seizures" under article I, section 7 of the Hawai'i Constitution.[139] The court concluded that evidence of drug paraphernalia belonging to the house guest was properly suppressed on the basis that the guest shared a reasonable expectation of privacy in the host's garage and was protected from the warrantless, nonconsensual search of the premises.[140] Justice Nakayama and Chief Justice Moon dissented, not on constitutional principles, but on the basis that the defendant had failed to establish that he held the status of a house guest.[141]

3. Heapy, Spillner, *and* Estabillio—*Privacy on the road*

More recently, the Moon Court revisited these privacy concerns in the context of investigatory traffic stops. Under *State v. Heapy*,[142] an officer cannot establish reasonable suspicion to conduct a traffic stop solely on the basis that the driver turned to avoid a sobriety checkpoint.[143] The officer had effected the traffic stop based on the officer's prior experience that "in every case" in which a driver avoids a checkpoint, the driver was violating the law in some other way.[144] The majority opinion concluded that when a driver engages in no suspicious acts other than making a lawful turn away from the checkpoint, there is no "'reasonable suspicion' that the person stopped was engaged in criminal conduct" to warrant a stop under article I, section 7.[145] Accordingly, the court declined to expand the reasonable suspicion standard to include an officer's generalized knowledge of criminal behavior.[146] Chief Justice Moon dissented, suggesting instead that an otherwise legal turn off the road might create reasonable suspicion considering the totality of the circumstances.[147]

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[137] 104 Haw. 109, 85 P.3d 634 (2004).

[138] *See id.* at 110, 85 P.3d at 635.

[139] *See id.* at 116, 85 P.3d at 641 (quoting Minnesota v. Carter, 525 U.S. 83, 106 (1998) (Ginsburg, J., dissenting)).

[140] *See id.* at 116-18, 85 P.3d at 641-42.

[141] *Id.* at 119, 85 P.3d at 644 (Nakayama, J., dissenting).

[142] 113 Haw. 283, 151 P.3d 764 (2007).

[143] *See id.* at 285, 151 P.3d at 766.

[144] *Id.* at 288, 151 P.3d at 769.

[145] *Id.* at 290, 292, 299, 151 P.3d at 771, 773, 780.

[146] *Id.* at 295-96, 151 P.3d at 776-77.

[147] *See id.* at 308, 151 P.3d at 789 (Moon, C.J., dissenting). Chief Justice Moon also emphasized the State's interest in protecting the safety of the public. *See id.* at 306, 151 P.3d at

The same year *Heapy* was issued, the court did expand the "reasonable suspicion" standard to permit an officer to rely on "knowledge of a suspected ongoing law violation engaged in by the individual in question" when effecting a traffic stop.[148] In *State v. Spillner*, the officer who stopped the defendant's car learned one week earlier that the defendant's truck had no valid insurance and learned two weeks earlier that the defendant had no valid license.[149] The Moon Court ruled that this knowledge of prior violations was enough to provide reasonable suspicion of ongoing criminal activity the *third* time the officer stopped the same defendant, even without any obvious signs of criminal activity before the third stop.[150] This time, Justice Acoba, who authored the majority opinion in *Heapy*, dissented, arguing that the officer did not have "specific and articulable facts" that the defendant was driving a vehicle without a license at the time the stop was made.[151]

In 2009, Chief Justice Moon offered an overview of the court's "case law regarding investigatory detentions" in the course of his opinion in *State v. Estabillio*.[152] In this case, an officer's reasonable suspicion that a defendant was speeding did not constitute reasonable suspicion of drug dealing.[153] The officers stopped the defendant for a traffic offense and eventually discovered drugs in the vehicle.[154] The Moon Court agreed with Estabillio that investigative detention and questioning must be related to the scope of the original detention, which in this case was unrelated to drug paraphernalia.[155] Relying in part on the walk and talk line of cases regarding "inquisitive questioning," the court ruled that the officer's "drug investigation constituted a seizure separate and distinct from the traffic investigation" and was unconstitutional under article I, section 7 because it was unsupported by reasonable suspicion.[156]

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787. *See also* Jacob Matson, Note, *Drunk, Driving, and Untouchable: The Implications of* State v. Heapy *on Reasonable Suspicion in Hawai'i*, 31 U. HAW. L. REV. 607 (2009).

148 *See* State v. Spillner, 116 Haw. 351, 360, 173 P.3d 498, 507 (2007).

149 *See id.* at 363, 173 P.3d at 510.

150 *See id.* at 355, 364, 173 P.3d at 502, 511.

151 *See id.* at 365, 173 P.3d at 512 (Acoba, J., dissenting). *See also* Alana Peacott-Ricardos, Note, State v. Spillner: *An Investigatory Stop Based on Unreasonable Suspicion*, 31 U. HAW. L. REV. 631 (2009) (arguing that *Spillner* was incorrectly decided).

152 121 Haw. 261, 269-70, 218 P.3d 749, 757-58 (2009). Then-Associate Justice Recktenwald was recused from this case.

153 *Id.* at 273, 218 P.3d at 761.

154 *See id.* at 262-63, 218 P.3d at 750-51.

155 *Id.* at 272, 218 P.3d at 760.

156 *Id.* at 274, 218 P.3d at 762.

4. Jane Doe *and* John Doe—*Privacy at school*

There is a distinct line of cases implicating privacy rights in the school setting. Early in his tenure as chief justice, Moon authored an opinion expressly declining to bestow broader protection to school children under article I, section 7 than would otherwise be awarded by the Fourth Amendment.[157] In upholding the family court's denial of a high school defendant's motion to suppress evidence of marijuana uncovered after a search of her purse, the Moon Court ruled in *In re Jane Doe* that "public school officials do not need search warrants or probable cause to search or seize evidence from students under their authority" so long as the search is "reasonably related in scope to the circumstances which justified the interference."[158] Recognizing the school's need to maintain order in a learning environment, the court "perceive[d] no sound or logical reason to afford our public school students greater constitutional protections than that afforded by the federal constitution."[159]

The Moon Court returned to privacy questions in the school context ten years later in *In re John Doe*.[160] Here, school officials had no basis for suspecting the high school student of possessing and selling marijuana other than an anonymous tip from Crime Stoppers.[161] The court ruled that the tip failed to provide either probable cause or reasonable suspicion to justify the search.[162] The tip "bore no indicia of reliability" because the school officials knew nothing about the circumstances under which the tip was provided or the basis of the informant's knowledge.[163] Accordingly, the court affirmed the family court's order suppressing the seized evidence.[164] This case did not, however, alter the earlier *In re Jane Doe* ruling, and the court did not broaden privacy protections under article I, section 7 for the general student population.

C. *Trends and Other Comments on the Privacy Cases*

The principles expounded in the walk and talk cases appear to have shaped the Moon Court's protection of a defendant's right to privacy even beyond the walk and talk encounter. The broader concern for individual privacy rights

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[157] *In re* Jane Doe, 77 Haw. 435, 887 P.2d 645 (1994).

[158] *Id.* at 437, 887 P.2d at 647.

[159] *Id.* at 440, 887 P.2d at 650.

[160] 104 Haw. 403, 91 P.3d 485 (2004), *overruled on other grounds by In re* Jane Doe, 105 Haw. 505, 100 P.3d 75 (2004).

[161] *See id.* at 404-05, 91 P.3d at 486-87.

[162] *See id.* at 408, 91 P.3d at 490.

[163] *Id.* at 411, 91 P.3d at 493.

[164] *Id.* at 404, 91 P.3d at 486.

expressed in *Quino*, *Kearns*, and *Trainor* is mirrored in the *Lopez* ruling on reasonable expectations of privacy in the home and in the *Estabillio* ruling regarding investigatory stops. *Lopez*, which was decided in 1995, and *Estabillio*, which was decided in 2009, essentially bookend the Moon Court's tenure and reflect a consistent adherence to the trend begun in the Lum Court.

This trend is not without exception. Because *Spillner* permitted an officer's own knowledge about the defendant's prior traffic violations to create reasonable suspicion, it is difficult to reconcile *Spillner* with *Heapy*'s ruling that an officer may not use his or her own knowledge of checkpoint avoidance behavior to effect a traffic stop. Neither *Heapy* nor *Spillner* involved any immediate, overt justification for the stop. The explanation for these seemingly disparate rulings may lie in the facts. Unlike in *Heapy*, the officer in *Spillner* had prior contact with the specific defendant and had reason to suspect ongoing violations. The traditionally "objective" nature of reasonable suspicion, as reflected in *Heapy* and Justice Acoba's *Spillner* dissent, suggests that the *Spillner* ruling should be limited to its unusual facts.

In *In re Jane Doe*, the court expressly declined to extend to students the broader privacy protections that it had extended to defendants in other contexts. The court did, however, take special care to limit its ruling to the school context and has not used its school cases to limit privacy rights in other circumstances. These school cases may not be so much a repudiation of the privacy principles from the walk and talk cases as a carefully carved out exception to the broader philosophy of the Moon Court with respect to privacy rights.

Regarding the walk and talk cases specifically, the heightened standard under state law has obvious consequences for state versus federal drug enforcement efforts. Indeed, the Hawai'i State Legislature has acknowledged as much. In 2004, the Legislature released its Final Report on Ice and Drug Abatement.[165] The Joint House-Senate Task Force concluded that the "majority of the Task Force does not recommend a constitutional amendment to permit 'walk and talk' at this time."[166] In response to requests from state law enforcement officers to be able to "prosecute drug offenders under the same standards as federal prosecutors,"[167] the Task Force declined, and noted the ability of federal agents to conduct the walk and talk encounters.[168]

The Legislature's approach effectively shifts the primary responsibility for drug interdiction efforts from state courts to federal courts. And, the chance that a defendant may wind up in federal court instead of state court for these

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[165] JOINT HOUSE-SENATE TASK FORCE, FINAL REPORT OF THE JOINT HOUSE-SENATE TASK FORCE ON ICE AND DRUG ABATEMENT, 22nd. Leg, Reg. Sess. (Haw. 2004), *available at* http://www.capitol.hawaii.gov/session2004/lists/ice_finalrpt.pdf.

[166] *Id.* at 7.

[167] *Id.* at 48.

[168] *See id.* at 7, 52.

offenses serves as a reminder that enhanced rights under article I, section 7 of the Hawai'i Constitution does not equate to a free pass under the Fourth Amendment to the U.S. Constitution.

IV. CONCLUSION

These decisions, selected from Hawai'i's criminal law jurisprudence concerning privacy rights and evidence rules, illustrate a certain freedom and willingness by the Moon Court to forge its own judicial path when applying legislative and constitutional mandates. This appears to be true even if the results were contrary to decisions in other jurisdictions, and where they were perhaps less popular with segments of the legal and law enforcement communities.

In his final State of the Judiciary address, Chief Justice Moon reflected on this freedom, extolling the importance of judicial independence and the court's ability to rule according to its reasoned judgment, without fear of reprisal—what he described as "decisional independence."[169] It remains to be seen exactly how the new Recktenwald Court will exercise its own decisional independence.

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[169] *See* Ronald T.Y. Moon, Chief Justice, Haw. Sup. Ct., *State of the Judiciary Address* (Jan. 27, 2010), http://www.courts.state.hi.us/news_and_reports/featured_news/2010/01/state_of_the_judiciary_2010.html.

Key Issues in Hawai'i Insurance Law Answered by the Moon Court

Hazel Beh, with Tred Eyerly, Keith Hiraoka, Peter Olson, Michael Tanoue, and Alan Van Etten

I. INTRODUCTION[1]

In this article, attorneys with Hawai'i practices principally focused on insurance law comment on some of the major cases during the two decades when Chief Justice Moon led the court.[2] Chief Justice Moon's Supreme Court resolved several fundamental questions about insurance,[3] and its contributions will have an enduring impact on Hawai'i insurance law.

Although the cases discussed are considered important in Hawai'i, many of the legal questions that the court addressed had already been decided in other jurisdictions, so the court broke little new ground. In most instances, the court adopted a moderately pro-insured position, often specifically rejecting more liberal or conservative positions.

Indicative of that moderate trend is the court's approach to the reasonable expectations doctrine. Heralded forty years ago as an insurance doctrine that might correct the imbalance of power between insured and insurer, Professor and Judge Robert E. Keeton first stated the principle: "[t]he objectively reasonable expectations of applicants and intended beneficiaries of the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[4] Over the years, some

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[2] Tred Eyerly, an attorney with Damon Key Leong Kupchak Hastert LLP, has practiced insurance law in Hawai'i since 2001 and has also practiced in Alaska and Saipan. Keith Hiraoka, an attorney with Roeca Luria Hiraoka LLP, has practiced insurance law in Hawai'i since 1983. Peter Olson, an attorney with Cades Schutte LLP, has practiced insurance law in Hawai'i since 1983. Michael Tanoue, an attorney with the Pacific Law Group, has practiced insurance law in Hawai'i since 1986. Alan Van Etten, an attorney with Deeley King Pang & Van Etten, has practiced insurance law in Hawai'i since 1984.

[3] University of Hawai'i Law Review student notes on two important cases are extensive, scholarly, and thorough. *See* Lane Christine Boyarski, Note, The Best Place, Inc. v. Penn America Insurance Company: *Hawai'i Bad Faith Cause of Action for Insurer Misconduct*, 19 U. HAW. L. REV. 845 (1997); Allison M. Mizuo, Note, Finley v. Home Insurance Co.: *Hawaii's Answer to the Troubling Tripartite Problem*, 22 U. HAW. L. REV. 675 (2000).

[4] Robert E. Keeton, *Insurance Law Rights At Variance With Policy Provisions: Part One*, 83 HARV. L. REV. 961, 967 (1970). *See also* Robert E. Keeton, *Insurance Law Rights At Variance With Policy Provisions: Part Two*, 83 HARV. L. REV. 1281 (1970).

jurisdictions have squarely rejected it, others have used a strong substantive form of it that "privileges the Insured's reasonable expectations above the explicit language of the contract,"[5] and others have used a lesser form, regarding it merely as an interpretative tool when confronted with a contract ambiguity or some other justifying circumstances. In the 1980s, Hawai'i cited and invoked the doctrine, but it was unclear in what camp Hawai'i stood.[6] During the Moon years, the reasonable expectations doctrine continued to be invoked within a frequently recited catechism of insurance contract interpretation; however, the author's view is that Hawai'i's construction squarely places it in the "weak" form camp to date.[7]

Moderate, cautious, and mainstream best sums up the Moon Court's insurance cases. Cases involving alleged insurer misconduct reveal a persistent optimism that mechanisms within the existing tort and regulatory system will suffice to check abuse without judicial imposition of novel torts or punitive measures.

Looking forward, I question whether these middle ground choices will achieve optimal outcomes. Insurance is a complex product marketed by sophisticated and powerful corporations that sometimes wield power and influence more akin to governmental action than private endeavor. Insurance is

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[5] Dudi Schwartz, *Interpretation and Disclosure in Insurance Contracts*, 21 LOY. CONSUMER L. REV. 105, 128 (2008) (describing strong, weak, and intermediate approaches of the reasonable expectations rule).

[6] In analyzing Hawai'i opinions from the 1980s, Professor Roger Henderson wrote, "one must admit the possibility that the Hawai'i court views the doctrine more as a rule of construction and may not embrace its broader, substantive application." Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 831-32 (1990).

[7] The court typically recites the reasonable expectations doctrine as an interpretative tool together with the plain meaning doctrine and contra proferentum. For example:

> It is well settled in Hawai'i that the objectively reasonable expectations of policyholders and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. These "reasonable expectations" are derived from the insurance policy itself, which is subject to the general rules of contract construction. This involves construing the policy according to the entirety of its terms and conditions, and the terms themselves should be interpreted according to their plain, ordinary, and accepted sense in common speech unless it appears from the policy that a different meaning was intended. Because insurance policies are contracts of adhesion and are premised on standard forms prepared by the insurer's attorneys, we have long subscribed to the principle that they must be construed liberally in favor of the insured and any ambiguities must be resolved against the insurer.

Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins., 117 Haw. 357, 183 P.3d 734 (2007) (internal brackets, ellipses, quotation marks, and citations omitted).

vital to safeguarding the financial future of individuals and the nation; it is far more than a private contractual relationship between an insured and a business.[8]

Young v. Allstate Insurance Co.,[9] a 2008 case that broke no new ground but could have, compels the question whether the middle path was the right path. In *Young*, the court had the opportunity to recognize a novel cause of action by third parties against insurers. The court declined to do so, even on particularly compelling facts. In 1998, an Allstate insured fell asleep at the wheel of his car and rear-ended eighty-four-year-old Priscilla Young's 1984 Ford.[10] Young's car was totaled and Young suffered substantial injuries that limited her activities of daily living and caused depression.[11] Although Young was not Allstate's insured, Allstate began a campaign to induce Young to settle the suit for far less than her actual damages.

The court described several of Allstate's alleged national practices, including its strategic direct contact with the victim designed to elicit the victim's trust that Allstate would deal fairly when its purposeful intention was not to be fair.[12] Among other things, Allstate's dealings with third-party victims encouraged them not to retain an attorney but to deal directly with Allstate.[13] At the same time, Allstate allegedly used a computerized valuation program that consistently undervalued claims.[14] Allstate, adhering to its claims model, rigidly made low settlement offers to victims, even against the advice of local counsel.[15]

Moreover, if accident victims hired attorneys to press their claims, Allstate's litigation stance was deliberately tyrannical.

> If a settlement offer were not accepted or the claimant hired an attorney, Allstate would fully litigate virtually every claim, irrespective of its insured's liability or

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[8] In a series of compelling articles, Professor Jeffrey Stempel demonstrates that courts should not merely view the insurance policy through the lens of contract law. He explains, "In addition to functioning as contracts, products, and statutes, insurance policies exist as social institutions or social instruments that serve important, particularized functions in modern society—often acting as adjunct arms of governance and reflecting social and commercial norms." Jeffrey Stempel, *Insurance as a Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1492 (2010). *See also* Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203 (2010) [hereinafter Stempel, *Insurance Policy as Statute*] (discussing the statute-like qualities of insurance policies, justifying and implicating a statutory interpretation approach); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT & TRIAL INS. PRAC. L.J. 813 (2009) (discussing "product-like" aspects of an insurance policy).

[9] 119 Haw. 403, 198 P.3d 666 (2008).

[10] *Id.* at 408, 198 P.3d at 671.

[11] *Id.*

[12] *Id.* at 406-08, 198 P.3d at 669-71.

[13] *Id.* at 408, 198 P.3d at 671.

[14] *Id.* at 407, 198 P.3d at 670.

[15] *Id.* at 408, 198 P.3d at 671.

> the real physical harm and value of the injuries suffered by the claimant. Allstate thereby sought to subject claimants to unnecessary and oppressive litigation and expenses, or, in other words, "scorched-earth litigation tactics." Allstate intended to force claimants and their attorneys through arbitration and trial unnecessarily. For example, if a non-binding arbitration award were anything more than nominal, Allstate's practice was to appeal the award. The insurer employed these tactics to discourage claimants from pursuing injury claims. Allstate also sought to discourage attorneys from representing claimants by creating so much work and expense that they could not afford to advocate for a client with minor, moderate, or sometimes even serious injuries.[16]

In the underlying accident case, Young eventually did hire an attorney and secured a nearly $200,000 judgment by jury trial.[17] Allstate's best and final settlement offer never exceeded $5,300.[18]

Young filed suit against Allstate and its local attorney, claiming, among other things,[19] that Allstate's conduct amounted to a tort that the plaintiff cast as "malicious defense."[20] Justice Nakayama, writing the majority decision of a divided court, refused to recognize the new tort.[21] The court took a gladiator-like view of litigation; and in doing so, championed an insurer's right to vigorously defend itself. In distinguishing malicious defense from the tort of malicious prosecution, the majority reasoned that the initiation of a suit, and not conduct during a suit, gives rise to a claim of malicious prosecution.[22] Once haled into court, litigation is no-holds barred in the majority's view. "The tort of malicious prosecution acknowledges the special, particular harms that a defendant suffers when a lawsuit is maliciously initiated against it."[23] In rejecting the tort, the majority viewed the plaintiff (in this case Priscilla Young) as *choosing* to be a litigant and voluntary assuming the attendant risks that Allstate would relentlessly defend itself. The court expressed concern that recognition of the tort of malicious defense might inhibit a defendant's ability

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[16] *Id.* at 407, 198 P.3d at 670.

[17] *Id.* at 409, 198 P.3d at 672.

[18] *Id.*

[19] "Young asserted Defendants were liable for, among other things, (1) abuse of process, (2) malicious defense, and (3) IIED, and that Allstate had breached an assumed duty of good faith and fair dealing. For each claim, she requested compensatory and punitive damages." *Id.* at 410, 198 P.3d at 673. The Hawai'i Supreme Court remanded the case on the intentional infliction of emotional distress claim. *Id.* at 430, 198 P.3d at 693.

As a general rule, third party suits against insurers are not allowed. *See* Olokele Sugar Co. v. McCabe, Hamilton & Renny Co., 53 Haw. 69, 487 P.2d 769 (1971) (an injured person has no cause of action against a liability insurer in the absence of a contractual or statutory provision authorizing direct action).

[20] *Young*, 119 Haw. at 411, 198 P.3d at 674.

[21] *Id.* at 416-17, 198 P.3d at 679-80.

[22] *Id.*

[23] *Id.* at 418, 198 P.3d at 681.

to defend itself vigorously.[24] This view, however, ignores the fact that absent sanctions, an insurer benefits the less it pays and the longer it withholds paying valid claims. In fact, the legislature has defined unfair settlement practices to include "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear."[25]

Following a recurrent theme in its insurance cases,[26] the court declared that existing judicial and regulatory mechanisms were adequate to remedy insurer misconduct. It noted that the insurer and its attorney's conduct were sufficiently governed by existing court rules and statutes to check misconduct and tort laws to remedy it.[27] "In light of the plethora of remedies available to plaintiffs when defendants' litigation tactics are brought in bad faith, and because we should not chill the defendants' right "to conduct a vigorous defense," we decline to adopt the tort of malicious defense."[28] The court regarded a judge's inherent authority over the conduct of litigation to be sufficient to curb the abuses of insurers and their attorneys.[29] The court declined to join New Hampshire and become the second state to recognize the tort,[30] even though it could have limited its application to insurance as it had the tort of bad faith in *Best Place*.[31]

Young exposed a systematic insurance practice that makes one question whether any court can adequately protect consumers, let alone whether a

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[24] *Id.*

[25] HAW. REV. STAT. § 431:13-103(a)(11)(H) (2005).

[26] *See, e.g.*, Finley v. Home Ins. Co., 90 Haw. 25, 34, 975 P.2d 1145, 1154 (1998) (rejecting the need for *Cumis* counsel in Hawai'i and expressing the view that an attorney acting in accord with the Rules of Professional Responsibility can adequately safeguard insured from inappropriate insurer interference and that sufficient remedies exist to discourage misconduct); Sentinel Ins. Co. v. First Ins. Co., 76 Haw. 277, 875 P.2d 894 (1994) (rejecting the blanket rule that prohibits an insurer from litigating coverage following a breach of the duty to defend because other lesser remedies are adequate).

[27] The Supreme Court of Hawai'i explained:

> By rejecting the tort of malicious defense, we are by no means authorizing or condoning malicious action on the part of a defendant. In our view, however, such offenses are sufficiently deterred by Hawaii's rules and statutes that authorize the court to sanction the malicious defendant. Accordingly, the tort of malicious defense is unnecessary.

Young, 119 Haw. at 423, 198 P.3d at 686 (internal citations and footnotes omitted).

[28] *Id.* at 426, 198 P.3d at 689.

[29] *Id.* at 423, 198 P.3d at 686.

[30] *See* Aranson v. Schroeder, 671 A.2d 1023, 1028-29 (N.H. 1995); *see also* William Jordan, *Court Declines to Recognize Cause of Action for "Malicious Defense,"* 34 PROFESSIONAL LIABILITY REPORTER 6 (Feb. 2009) (identifying *Aranson* as the only case recognizing the tort of malicious defense).

[31] Best Place, Inc. v. Penn Am. Ins. Co., 82 Haw. 120, 132, 920 P.2d 334, 346 (1996). However, the court did allow Young to proceed against Allstate and its attorney on a theory of intentional infliction of emotional distress because of the extent of direct contact with her and the failed promises it made to her. *Young*, 119 Haw. at 429, 198 P.3d at 692.

moderate judicial approach is prudent. *Young* suggests that the gross imbalance of power between insurers and consumers warrants a strongly pro-insured judicial stance. After all, for every litigated case where insurers wrongfully delay payment, refuse to settle, decline an owed defense or coverage, or manipulate defense counsel, there are many more instances that do not even reach the court.

With *Young*, perhaps we should ask whether our so-called existing plethora of judicial and regulatory remedies can adequately protect consumers. As we reflect on the insurance law decisions over the last two decades, the question time will answer is whether, in choosing a middle ground, the court struck a balance that sufficiently protected insureds without creating the moral hazards that attend giving insureds more than they deserve under their agreements, or whether the court overestimated the resources of consumer insureds and victims and underestimated the power of insurers to work the system to their own advantage.

The insurance industry's ability to "overrule" courts also compels adopting a strong judicial preference for the insured's position. Through the Insurance Services Office (ISO), the insurance industry's organization that drafts standardized forms, insurers collectively respond to judicial decisions across the nation by re-drafting insurance policies.[32] Professor Jeffrey Stempel observed that "[i]nsurance policies act, to a degree, as private legislation by insurers controlling the shape and contour of coverage sold."[33] Stempel recounts the policy-drafting history of various coverage disputes such as Y2K, terrorism, and asbestos litigation, explaining the process that insurers collectively follow to cure what they fear are excessive exposures.[34] Stempel notes that policyholders have less power in the drafting process because "[i]nsurer groups or affiliated organizations (such as ISO) are not, of course, representative democracies. If insurers dislike judicial decisions they regard as excessively expanding coverage, their efforts to amend the policy language in question will not be impeded by any legislative caucus of policyholder representatives."[35] He notes that, while ISO and insurers, as a matter of sound business sense, include token representation of insureds and government regulators during drafting, "policyholders and the government are powerless to prevent insurers from revising policy language if the insurers determine this to be the best response to disfavored judicial precedent."[36] Thus, the industry has a power to affect the future in ways that policyholders and even the courts

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[32] Stempel, *Insurance Policy as Statute*, *supra* note 8, at 206.

[33] *Id.* at 215.

[34] *Id.* at 206.

[35] *Id.* at 248.

[36] *Id.*

cannot. The insurer's ability to respond to negative decisions justifies a heavy judicial thumb in favor of insureds on the scales of justice in these cases.

In the following sections, insurance practitioners discuss both the practical and policy implications of some of the more important insurance cases of the Moon years. The Moon Court took up a number of important and unresolved questions regarding coverage and defense and provided more certainty in this dynamic area of practice. In *Finley v. Home Insurance Co.*[37] and *Delmonte v. State Farm Fire and Casualty Co.*,[38] discussed in Part II of this article, the court settled a basic question about professional conduct that vexed Hawai'i for years: when an insurer selects and pays for counsel to defend an insured, does that counsel represent the insurer, the insured, or both? The court adopted the rule that insurance defense counsel represents only the insured, rejecting the dual representation model a majority of courts follow.

In *Sentinel Insurance Co., Ltd. v. First Insurance Co. of Hawai'i, Ltd.*[39] and *Dairy Road Partners v. Island Insurance Co., Ltd.*,[40] discussed in Part III, the court clarified just what "potential for coverage" means in establishing when and whether the liability insurer's duty to defend its insured is triggered.

In *Sentinel* and *Hawaiian Holiday Macadamia Nut Co. v. Industrial Indemnity Co.*,[41] discussed in Part IV, the court provided important guidance on the meaning of an "occurrence" under a CGL policy in Hawai'i.

In *Best Place, Inc. v. Penn America Insurance Co.*,[42] discussed in Part V of this article, the court finally recognized the tort of insurance bad faith, joining an overwhelming majority of states that had concluded that the unique status of insurers vis-à-vis their insureds justified potential exposure to tort liability for misconduct.

Part VI of this article addresses Moon Court decisions regarding Hawai'i's motor vehicle insurance law in three respects: decisions that defined—indeed broadened—the universe of who qualifies as an "insured" or "covered person"; decisions clarifying the number of "per person" or "each person" limits available to claimants who are not actually involved "in" motor vehicle accidents; and decisions guiding the settlement of underinsured motorists' insurance claims.

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[37] 90 Haw. 25, 975 P.2d 1145 (1998).
[38] 90 Haw. 39, 975 P.2d 1159 (1999).
[39] 76 Haw. 277, 875 P.2d 894 (1994).
[40] 92 Haw. 398, 992 P.2d 93 (2000).
[41] 76 Haw. 166, 872 P.2d 230 (1994).
[42] 82 Haw. 120, 920 P.2d 334 (1996).

II. ETHICAL ISSUES RELATING TO AN ATTORNEY'S REPRESENTATION OF THE INSURED[43]

Most liability insurance policies include duty to defend provisions, and typically those provisions provide the insurer with the right to select defense counsel and control the defense.[44] Customarily, the appointed defense counsel comes from an approved "panel" of attorneys. Attorneys on that panel will be familiar with the insurer's reporting requirements, defense practices and policies, and the insurer's billing guidelines and instructions. Frequently, the lawyer's relationship with the insurance company is a longstanding one; and he or she may have developed personal relationships and friendships with the claims professionals who work there. Implicitly, one of the lawyer's goals is to maintain that business relationship and, with it, the prospect of future case assignments. The lawyer's relationship with the insured, on the other hand, is more short-lived and is ordinarily confined to the defense of a single lawsuit.

When an insurer appoints counsel to defend its insured against a claim, who is the client in this situation? Is it the insured or the insurer? Or, as some jurisdictions hold, does the attorney engage in a dual representation, creating an attorney-client relationship with both?[45] When an insurer provides a defense under a reservation of rights,[46] as frequently happens, does this, by itself, create

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[43] The principal author of this section is Honolulu attorney Peter Olson of Cades Schutte LLP.

[44] Typical policy language expresses defense of the claim both as an insurer's right and duty, and the appointment of counsel as a right. For example:

> If a claim is made or a suit is brought against an *insured* for damages because of *bodily injury* or *property damage* caused by an *occurrence* to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the *insured* is legally liable; and
> 2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the *occurrence* equals our limit of liability.

See Ins. Servs. Office, Homeowners 3 Special Form, HO 00 03 0491, *reprinted in* ALLIANCE OF AMERICAN INSURERS, THE INSURANCE PROFESSIONAL'S POLICY KIT: A COLLECTION OF SAMPLE INSURANCE FORMS 38 (2000) (emphases in original).

[45] For an excellent overview of the many legal and ethical issues relating to an attorney's representation of the insured, see Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship between Insurer, Insured and Insurance Defense Counsel*, 73 NEB. L. REV. 265 (1994). *See also* Mizuo, *supra* note 3.

[46] Liability insurers commonly use reservation of rights letters to provide notice to insureds that even though the insurer is handling or defending a claim, some or all of the losses claimed by the plaintiff may not be covered by the policy and the insurer is preserving or "reserving" its right to deny coverage at a later date. Finley v. Home Ins. Co., 90 Haw. 25, 975 P.2d 1145 (1998); Delmonte v. State Farm Fire & Casualty Co., 90 Haw. 39, 975 P.2d 1159 (1999); AIG

a conflict of interest between the insurer and insured and allow the insured to select counsel of his or her own choice? The Moon Court provided some clarity to these vexing questions in a pair of decisions decided in late 1998 and early 1999: *Finley v. Home Insurance Co.*[47] and *Delmonte v. State Farm Fire & Casualty Co.*[48] *Finley* decided that an attorney representing an insured has only one client—the insured—even though the insurance company has selected the attorney and will pay for the legal services. With that decision, the court placed its trust in the integrity of Hawai'i's legal professional to place the interests of an insured client first, without regard to the lawyer's business relationship with the insurer. Weeks later, *Delmonte* delivered a warning to lawyers who do not scrupulously follow the mandates of *Finley*.

A. Finley

The *Finley* case addressed the issue of whether an insured defended by the insurer under a reservation of rights is entitled to reimbursement for the costs of independent counsel retained by the insured, sometimes referred to as "*Cumis*" counsel.[49] The plaintiffs, James and Vanida Finley, sued their employer for wrongful termination.[50] The employer carried a workers' compensation insurance policy through Hawaiian Insurance & Guaranty Co., Ltd., which had

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Haw. Ins. Co. v. Smith, 78 Haw. 174, 177, 891 P.2d 261, 264 (1995) (holding that an insurance company "may initially assume the unconditional defense of an insured while it performs its own reasonable investigation to determine whether coverage exists. . . . Once the insurer receives information concerning the possible absence of coverage, the insurer must promptly serve upon the insured a reservation of rights").

[47] 90 Haw. 25, 975 P.2d 1145.

[48] 90 Haw. 39, 975 P.2d 1159.

[49] Under the so-called *Cumis* doctrine, an insurer that defends the insured under a reservation of rights must retain and pay for independent counsel selected by the insured. San Diego Navy Fed. Credit Union v. Cumis Ins. Soc., Inc., 208 Cal. Rptr. 494 (App. 1984). Because it led to some abusive billing and defense practices by the insured's selected defense counsel, the *Cumis* doctrine came under much criticism from the insurance industry and was subsequently codified and modified by statute in California. *See* CAL. CIV. CODE § 2860 (West 2011). Under the statute, a conflict of interest exists—and the insured is entitled to the appointment of independent counsel—where the insurer's reservation of rights turns on an issue that can be controlled by defense counsel appointed by the insurer. *Id.* A conflict does not exist, however, merely because the insurer has reserved rights on an issue independent of those that will be litigated in the underlying case. In situations where the insured is entitled to the appointment of independent counsel, the insurer: is only required to pay the hourly rates customarily paid by the insurer for appointed defense counsel; may require that independent counsel selected by the insured possesses certain minimum qualifications; and may require that the attorney carries malpractice insurance. *Id.*

[50] *Finley*, 90 Haw. at 27, 975 P.2d at 1147.

become insolvent.[51] Pursuant to the Hawai'i insurance code,[52] the Hawai'i Insurance Guaranty Association (HIGA) assumed the handling of the claim. Prior to tendering the defense of the wrongful termination action to HIGA, however, the employer retained its own independent personal counsel to defend it in the action.[53] HIGA accepted the employer's tender under a reservation of rights letter but appointed its own panel counsel to defend the case.[54] The Finleys and the employer later entered into a stipulated judgment to settle the action. As part of the settlement, the employer assigned the stipulated judgment to the Finleys, including its claim against HIGA to recover the fees of its independent counsel, which HIGA had refused to pay.[55] The Finleys sued HIGA to recover those unreimbursed fees.[56]

The circuit court granted HIGA's motion for summary judgment and dismissed the Finleys' claim.[57] On appeal, however, the Hawai'i Intermediate Court of Appeals (ICA) vacated the circuit court's ruling and held:

> [W]here a conflict of interest arises between an insurer and an insured, because the insurer has reserved its right to assert noncoverage at a later date, the insurer is required to pay for independent counsel for the insured.
>
> [A] reservation of rights can create a conflict of interest if 'the insurer's reservation of rights on the ground of noncoverage [is] based on the nature of the insured's conduct, which as developed at trial would affect the determination as to coverage.' When such a conflict of interest exists, the insurer is obligated to either obtain informed consent of the insured to the conflict of interest, or must pay the reasonable cost for hiring independent counsel by the insured.[58]

The Hawai'i Supreme Court granted certiorari to address two issues: (1) whether a conflict of interest arises when an insurer defends its insured under a reservation of rights based on the nature of the insured's conduct; and (2) if so, the appropriate remedy for such a conflict, whether actual or perceived.[59] The Hawai'i Supreme Court reversed the ICA's vacatur and affirmed the circuit court's grant of summary judgment in favor of HIGA.[60]

According to the Hawai'i Supreme Court, the fundamental flaw with the case law recognizing a right to independent counsel, as embraced by *Cumis* and its

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[51] *Id.*

[52] HAW. REV. STAT. § 431:16-108 (1993).

[53] *Finley*, 90 Haw. at 27, 975 P.2d at 1147.

[54] *Id.*

[55] *Id.* at 28, 975 P.2d at 1148.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 29, 975 P.2d at 1149.

[59] *Id.*

[60] *Id.* at 39, 975 P.2d at 1159.

progeny, was that these cases implicitly assume that an insurer-appointed defense attorney is engaging in a dual representation, i.e., that both the insurer and the insured are the attorney's client.[61] The court, however, held that when an attorney is appointed by an insurer to represent its insured, the attorney's *sole* client is the insured. The court noted that this was "a matter of substantive state law" and looked to the Hawai'i Rules of Professional Conduct (HRPC) for guidance.[62] The better solution to the *Cumis* problem, the *Finley* court held, is not to engage in a conflict of interest analysis, but instead to rely upon the integrity of appointed defense counsel and his or her rigorous adherence to the rules of professional responsibility.[63] The court emphasized that an attorney who represents the insured must not allow the insurer to interfere with that attorney-client relationship.[64]

Thus, the court held an attorney has only one client and that client is the insured. Ethical obligations require the lawyer to place the insured's interest above the lawyer's own practical interests in preserving good relations with the insurer paying for the legal services.

The court recognized that under the insurance contract between the insurer and the insured, the insurer typically retains a contractual right to control the defense of the case.[65] Nonetheless, the insurer's desire to limit the costs of defending the insured "must yield to the attorney's professional judgment and his or her responsibility to provide competent, ethical representation to the insured."[66]

Although the insurer retains the contractual right to appoint defense counsel, *Finley* also holds that the insured retains the right to reject that appointment.[67]

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[61] *Id.* at 32, 975 P.2d at 1152.

[62] *Id.* at 32-33, 975 P.2d at 1152-53. The Hawai'i Supreme Court characterized this rule as the "modern view," *id.* at 33, 975 P.2d at 1153, but according to one legal treatise, the Hawai'i rule is apparently the minority rule. *See* 4 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 30:3 (2008) (footnote omitted).

[63] *Finley*, 90 Haw. at 31-32, 975 P.2d at 1151-52. As the court would outline in *Finley*, there are a host of ethical rules that provide guidance to appointed defense counsel. *See* HAW. R. PROF'L CONDUCT 1.2 (relating to scope of representation), 1.4 (relating to client communications), 1.5 (relating to fees), 1.6 (relating to confidentiality of information), 1.7 (relating to conflicts of interest), 1.8 (relating to prohibited transactions), and 5.4 (relating to professional independence). The *Finley* and *Delmonte* decisions subsequently generated two Hawai'i Disciplinary Board opinions that are relevant to the role of insurance defense counsel. *See* ODC Formal Op. 36 (1999) (addressing the scope of permissible disclosure of confidential client information); ODC Formal Op. 37 (1999) (relating to insurer-issued billing guidelines).

[64] *Id.* at 33, 975 P.2d at 1153.

[65] *Id.* at 31 n.9, 975 P.2d at 1151 n.9 (citation omitted).

[66] *Id.* at 34, 975 P.2d at 1154.

[67] *Id.* at 35, 975 P.2d at 1155. The *Finley* decision does not make clear whether the burden to inform the insured of his or her right to reject the insurer's appointment of defense counsel falls upon the insurer or rests with appointed defense counsel. Logically, it would seem that the

If the insured chooses to conduct the defense, then the insured is responsible for all defense costs. The insurer is still obligated to indemnify the insured as to any judgment or settlement falling within the scope of coverage under the policy.

To avoid any temptation defense counsel might have in caving in to the insurer's possible desire to minimize litigation costs and provide a "token" defense, or to possibly slant the defense toward a claim that is not covered by insurance, the court enumerated the alternate remedies available to the insured where appointed defense counsel does not meet his or her ethical duties:

> If the duties prescribed by the HRPC are not followed by retained counsel, various remedies exist to protect the insured. These remedies include: (1) an action against the attorney for professional malpractice; (2) an action against the insurer for bad faith conduct; and (3) estoppel of the insurer to deny indemnification.[68]

Finally, and of critical importance to a potential bad faith claim against the insurer, the court held that an "enhanced" standard of good faith is applicable where the insurer defends under a reservation of rights,[69] which the court explained as follows:

> First, the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Second, it must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the *insured* is the client. Third, the company has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself, but of *all* developments relevant to his policy coverage and the progress of his lawsuit. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the company. Finally, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk.[70]

B. Delmonte

In *Finley*, the Hawai'i Supreme Court set out a template for how defense counsel must defend the insured under a reservation of rights. In *Delmonte*, the

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burden should fall on the insurer; however, defense counsel may want to have that right made clear in the engagement letter with the insured.

[68] *Id.*

[69] *Id.* at 36, 975 P.2d at 1156 (adopting Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133 (Wash. 1986)).

[70] *Id.* at 35-36, 975 P.2d at 1155-56 (emphases in original). The court observed that the responsibility to communicate settlement offers to the insured is a duty "more properly placed on the attorney, rather than the insurer." *Id.* at 36 n.12, 975 P.2d at 1156 n.12.

court addressed some pitfalls that might arise during the course of such representation.

The underlying dispute arose after the Delmontes sold their personal residence in Kailua under a DROA.[71] The buyers later sued the Delmontes for alleged misrepresentations made in connection with the sale.[72] The Delmontes retained counsel to defend the action.[73] Later, the Delmontes also tendered the defense of the action to their homeowner's insurer, State Farm, asserting that at least some claims were covered under their homeowner's policy.[74] Shortly before trial was to begin on the action brought by the buyers, State Farm appointed the law firm of Watanabe Ing & Kawashima (Watanabe) to represent the Delmontes under a written reservation of rights.[75]

Soon thereafter, Watanabe advised State Farm that, based upon its investigation and evaluation of the case, the Delmontes would likely be found liable and that there was a strong possibility that punitive damages would also be awarded against the Delmontes.[76] The buyers subsequently expressed a willingness to settle the case for approximately $120,000.[77] Mr. Delmonte indicated he was willing to pay two-thirds of the settlement if State Farm paid the other third.[78] State Farm, however, declined to contribute anything toward the settlement.[79] A few months later, Mr. Delmonte sent Watanabe a letter requesting that they perform certain work in connection with their defense of the case.[80] Watanabe consulted with State Farm about Mr. Delmonte's request, but State Farm declined to authorize the performance of the requested work.[81]

The case proceeded to a bench trial, at which the Delmontes were jointly represented by their personal counsel and Watanabe.[82] The trial judge awarded damages of almost $700,000 against the Delmontes, including punitive damages of $500,000.[83] Separate coverage counsel retained by State Farm advised it that it had a duty to appeal the judgment if "reasonable grounds"

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[71] Delmonte v. State Farm Fire & Cas. Co., 90 Haw. 39, 42, 975 P.2d 1159, 1162 (1999). A Deposit, Receipt, Offer and Acceptance (DROA) is a standard form contract for the sale of real property. *Id.*

[72] *Id.*

[73] *Id.* at 43, 975 P.2d at 1163.

[74] *Id.*

[75] *Id.* at 43-44, 975 P.2d at 1163-64.

[76] *Id.* at 44, 975 P.2d at 1164.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 45, 975 P.2d at 1165.

[81] *Id.*

[82] *Id.*

[83] *Id.*

existed for doing so.[84] State Farm then instructed Watanabe to prepare an opinion letter as to the merits of an appeal and a recommendation as to whether an appeal should be filed. However, State Farm also instructed Watanabe: "'[w]hen you prepare the [opinion] letter, please do not conduct any research and you need not detail every reason for or against your recommendation [as to whether to pursue an appeal].'"[85]

Watanabe filed a notice of appeal on behalf of the Delmontes, but then withdrew the appeal at State Farm's direction,[86] after having sent State Farm a letter advising that Watanabe did not see reasonable grounds for an appeal.[87] The Delmontes' personal attorney, on the other hand, wrote to State Farm and opined that there were reasonable grounds for appeal.[88]

Because the Delmontes were unable to afford a bond in order to stay the execution of the judgment, they settled with the buyers by paying the full amount of the judgment, plus interest—an amount totaling almost $765,000.[89] The Delmontes then sued both State Farm and Watanabe, alleging: (1) breach of contract by State Farm; (2) breach of the duty of good faith and fair dealing by State Farm; (3) that State Farm was liable for indemnification of the settlement; (4) that State Farm breached its duty to provide counsel of their choosing to the Delmontes and/or different counsel; (5) that State Farm was estopped from denying coverage; (6) that Watanabe's representation of the Delmontes was tainted by a conflict of interest between State Farm and the Delmontes; and (7) that Watanabe breached its fiduciary duties to the Delmontes.[90]

State Farm filed an answer and counterclaim, seeking a declaratory judgment that it owed no duty to defend or indemnify the Delmontes and otherwise had no liability for claims arising from the underlying lawsuit.[91]

The circuit court concluded that State Farm did not have a duty to prosecute an appeal from the underlying judgment because none of the findings in the judgment were covered claims under the applicable State Farm insurance policies.[92] The court also ruled that State Farm's insurance policies conferred upon State Farm the right to select counsel.[93] If Watanabe breached any duty

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[84] *Id.* State Farm's counsel advised State Farm to "seek a written opinion from defense counsel as to the merits of an appeal and rely upon that opinion in deciding whether to continue with the defense of the Delmontes." *Id.*

[85] *Id.* (emphasis omitted).

[86] *Id.* at 45-46, 975 P.2d at 1165-66.

[87] *Id.* at 46, 975 P.2d at 1166.

[88] *Id.* at 45, 975 P.2d at 1165.

[89] *Id.* at 46, 975 P.2d at 1166.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 46-47, 975 P.2d at 1166-67.

of care or loyalty to the Delmontes, their remedies rested in the malpractice action against Watanabe.[94] The Delmontes appealed.[95]

Just a few weeks after the *Finley* opinion came out, the Hawai'i Supreme Court issued its opinion in *Delmonte*, reaching several holdings.

First, the court ruled that the insurer's duty to defend includes a duty to appeal an adverse judgment against the insured where reasonable grounds exist for an appeal.[96] State Farm was required to consider *both* Watanabe's opinion that there were no reasonable grounds for an appeal, and the opinion expressed by the Delmontes' personal counsel that there were. The court noted that Watanabe's opinion was reached only after State Farm had given specific instructions to *not* conduct any legal research.[97] The court was troubled by the implication that State Farm might have influenced how the law firm represented the Delmontes.[98]

Second, State Farm's potential liability for bad faith could not be determined until there was a ruling on the malpractice claims against Watanabe.[99] Accordingly, the court reversed the summary judgment entered by the trial court in favor of State Farm as to the Delmontes' bad faith claim. The court explained:

> If Watanabe's conduct of the defense breached its duties toward its client, the Delmontes, then Watanabe may be liable for its breach. In addition, if such a breach was causally induced by State Farm's actions, then State Farm may potentially be liable for a breach of its duty of good faith and fair dealing.[100]

Finally, the court noted that "[t]he circuit court's determination that State Farm did not have a duty to defend the Delmontes d[id] *not* foreclose the possibility of a cognizable bad faith claim.[101]

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[94] *Id.* at 47, 975 P.2d at 1167.

[95] *Id.*

[96] *Id.* at 49, 975 P.2d at 1169.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 54, 975 P.2d at 1174.

[100] *Id.*

[101] *Id.* at 55, 975 P.2d at 1175 (emphasis added). The Hawai'i Supreme Court also expressly disapproved of State Farm's conduct in contacting the attorney representing the plaintiffs in the underlying case and attempting to have him amend the complaint to remove the allegations that triggered potential coverage under State Farm's insurance policies. No damage flowed from this conduct, however, because the circuit denied the motion to amend, and State Farm continued to defend through trial. *Id.* at 55-56, 975 P.2d at 1175-76.

C. *The Significance of* Finley *and* Delmonte

In declining to hold that a defense provided by an insurer under a reservation of rights creates an irreconcilable conflict of interest between insurer and insured and thereby requires the appointment of independent counsel, the Moon Court squarely rejected the cynical view that appointed defense counsel lacks the inherent ability to place the insured's interests above the attorney's own interest in future employment by the insurer. As the court explained in *Finley*, "[w]hen retained counsel, experienced in the handling of insurance defense matters, is allowed full rein to exercise professional judgment, the interests of the insured will be adequately safeguarded."[102] In so holding, the Moon Court made a clear if unspoken statement about its trust and confidence in the integrity and ethics of the Hawai'i bar in general, the insurance defense bar in particular, and provided some needed clarity to an area of the law that was not without some confusion.

If *Finley* provided a legal framework for how appointed defense counsel should represent the insured, *Delmonte* may be viewed as something of a cautionary tale about the pitfalls that may result when defense counsel succumbs to the temptation to subordinate the insured's interests to those of the insurer. For attorneys who practice in this area, both *Finley* and *Delmonte* are fruitful reading and hold some very important lessons.

III. DEFINING THE DUTY TO DEFEND[103]

During Chief Justice Moon's tenure, the Hawai'i Supreme Court more fully developed the contours of the liability insurer's duty to defend. In two key cases, the court established that an insurer's obligation to defend exists where policy language suggests *any* possibility of coverage based upon the allegations in the underlying case. In assessing whether there is any possibility of coverage, the court struck a moderate position, neither as expansive in favor of insureds nor as narrow in favor of insurers as other jurisdictions have constructed the duty to defend.

Under a commercial general liability (CGL)[104] policy, defense of the insured is regarded as both an insurer's right and a duty. The policy provides that an insurer must defend a claim against an insured and pay claims as follows:

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[102] Finley v. Home Ins. Co., 90 Haw. 25, 34, 975 P.2d 1145, 1154 (1998).

[103] The principal authors of this section were Honolulu attorneys Tred Eyerly of Damon Key Leong Kupchak Hastert and Alan Van Etten of Deeley King Pang & Van Etten.

[104] A CGL policy was formerly known as a "Comprehensive General Liability" policy. In 1986, the industry changed the name to "Commercial General Liability" policy to avoid its title implying a broader scope of coverage than the policy provided. *See* ROBERT H. JERRY & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 517 (2007).

> [The insurer] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence and [*the insurer*] *shall have the right and duty to defend any suit against the insured seeking damages* on account of such bodily injury or property damage, even if the allegations are groundless, false or fraudulent . . . .[105]

The Moon Court considered when the insurer's duty to defend may be triggered based upon the nature of the factual and legal allegations in the underlying tort claim, as well as other circumstances that become evident during the course of the investigation of that claim.[106]

A. Triggering the Insurer's Duty to Defend

Sentinel Insurance Co. v. First Insurance Co. of Hawai'i considered both defense and indemnity obligations of multiple insurers issuing policies covering periods where continuing bodily injury or property damage occurs.[107] Authored by Chief Justice Moon, *Sentinel* also established a duty to defend where legal uncertainty exists as to whether allegations in the underlying complaint are potentially covered by the policy.[108]

In *Sentinel*, an apartment owners' association sued an insured contractor and developer, Honofed, alleging that defective design, construction, and materials caused water infiltration and property damage to a building project completed in April 1981.[109] Notably, the parties disagreed as to when the water infiltration and property damage began and how long it continued.[110]

Honofed was continuously insured under annual CGL policies alternately issued by Sentinel and First Insurance from April 1981 to April 1988. When the property owners filed suit, Honofed only tendered its defense to Sentinel, which agreed to defend the suit under a reservation of rights.[111]

Although Sentinel accepted the defense, Sentinel informed Honofed that its investigation revealed that much of the damage claimed was not covered by Sentinel's policies because the damage appeared to have occurred during periods of time outside Sentinel policy periods.[112] Consequently, Sentinel

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[105] Sentinel Ins. Co. v. First Ins. Co. of Haw., 76 Haw. 277, 287, 875 P.2d 894, 904 (1994) (emphasis added).

[106] *Sentinel*, 76 Haw. 277, 875 P.2d 894; Dairy Rd. Partners v. Island Ins. Co., 92 Haw. 398, 992 P.2d 93 (2000).

[107] 76 Haw. 277, 875 P.2d 894.

[108] *Id.* at 287-290, 875 P.2d at 904-907.

[109] *Id.* at 284, 875 P.2d at 901.

[110] *Id.* at 284-285, 875 P.2d at 901-902.

[111] *Id.* at 285, 875 P.2d at 902.

[112] *Id.*

advised Honofed to notify other liability insurers covering periods outside Sentinel's policy periods.[113] After Honofed notified First Insurance, the insurer disclaimed any responsibility and refused to contribute to the defense.[114] First Insurance argued that the damage was "first discovered" at a time when First was not "on the risk"; therefore, the entire risk should be allocated to the insurer covering the first manifestation of the damage.[115]

Ultimately, the underlying case settled for less than the policy limits under any single year.[116] Sentinel and Honofed jointly contributed $75,000 to the settlement, and Sentinel paid an additional $48,642.37 in attorneys' fees to defend the underlying action.[117] Sentinel then filed suit against First Insurance seeking contribution for the costs of defense and settlement.[118] The circuit court determined that because First Insurance had a duty to defend and wrongfully failed to defend, it was obligated to contribute to the settlement and defense costs.[119]

On appeal, the Hawai'i Supreme Court established the analytic framework to determine whether an insurer has a duty to defend. The court first examined the First Insurance policy language.[120] Invoking an enduring tenet of insurance law, the court instructed that insurance provisions defining the insurer's duty to defend are construed broadly and liberally in favor of the insured:

> "the obligation to defend . . . is broader than the duty to pay claims and arises wherever there is the mere *potential* for coverage." . . . In other words, the duty to defend "rests primarily on the *possibility* that coverage exists. This possibility may be remote, but if it exists[,] the [insurer] owes the insured a defense." . . . "All doubts as to whether a duty to defend exists are resolved against the insurer and in favor of the insured[.]"[121]

Next the court tested the policy language versus the allegations of the underlying claim against the insured to determine whether the allegations raised the possibility that the insured would be entitled to indemnification under the

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[113] *Id.*

[114] *Id.*

[115] *Id.* at 286, 875 P.2d at 903.

[116] The settlement within a single policy limit means that another important legal issue remains undecided. Other courts are divided on the high-stakes issue of how much coverage is available when a tort continues over multiple coverage periods. Does the insured obtain the coverage limit of a single policy, or can multiple policies be stacked to expand the amount available? *See* Thomas M. Jones & Jon D. Hurwitz, *An Introduction to Insurance Allocation Issues in Multiple Trigger Cases*, 10 VILL. ENVTL. L.J. 25 (1999) (discussing the apportionment of liability for insureds with multiple insurance policies).

[117] *Sentinel*, 76 Haw. at 285, 875 P.2d at 902.

[118] *Id.* at 285-286, 875 P.2d at 902-903.

[119] *Id.* at 286, 875 P.2d at 903.

[120] *Id.* at 287, 875 P.2d at 904.

[121] *Id.* (emphases in original; internal citations omitted).

policy.[122] The underlying complaint against Honofed alleged that the property was damaged by water infiltration caused by construction defects,[123] but the complaint did not specify whether the damage occurred during any particular policy period.[124] Relying on *Standard Oil Co. of California v. Hawaiian Insurance & Guaranty Co.*,[125] the court explained the following principle:

> [a]n insurer must look beyond the effect of the pleadings and must consider any facts brought to its attention or any facts which it could reasonably discover in determining whether it has a duty to defend .... The possibility of coverage must be determined by a good faith analysis of all information known to the insured or all information reasonably ascertainable by inquiry and investigation.[126]

Accordingly, a court must now conduct the following analysis to determine if an insurer's refusal to defend is justified: (1) the court must review the relevant policies and allegations of the underlying complaint, and (2) if the complaint is not clear, the court must also review all information known to the insurer or reasonably ascertainable by inquiry and investigation by the insurer at the time it made its decision.[127]

Additionally, the court in *Sentinel* expanded the duty to defend beyond factual possibilities raised by the underlying claim and held that the duty encompassed possibilities raised by unsettled legal theories as well. At the time First Insurance declined to defend based on a "manifestation of loss trigger," the law in Hawai'i was unsettled.[128] In fact, whether the insurer providing

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[122] *Id.*

[123] It is interesting to note that *Sentinel* never raised the question of whether construction defects constitute an "occurrence" under the CGL policies at issue. *See id.*, 76 Haw. 277, 875 P.2d 394. In contrast, the ICA recently decided that construction defects are not an "occurrence" under a liability policy, but instead constitute a breach of contract by the insured, thus eliminating the possibility of coverage. *See* Group Builders v. Admiral Ins. Co., 123 Haw. 142, 231 P.3d 67 (App. 2010).

[124] A typical CGL policy defines property damage to include "physical injury to or destruction of tangible property which occurs *during the policy period*, including loss of use thereof at a time resulting therefrom ...." *Sentinel*, 76 Haw. at 287, 875 P.2d at 904 (emphasis in original).

[125] 65 Haw. 521, 527, 654 P.2d 1345, 1349 (1982).

[126] *Sentinel*, 76 Haw. at 288, 875 P.2d at 905 (quoting *Standard Oil Co.*, 65 Haw. at 527, 654 P.2d at 1349).

[127] *Id.* at 288, 875 P.2d at 905. The principle was later reinforced by the court's decision in *Tri-S Corp. v. Western World Insurance Co.*, 110 Haw. 473, 497, 135 P.3d 82, 106 (2006).

[128] The relevant policies provided indemnification for "occurrences" that resulted in property damage "which occurs during the policy period." The court explained that under the manifestation of loss trigger, "property damage occurs when the latent defect first manifests itself, and the insurer on the risk at the time of first manifestation is solely liable for the entire loss, even if the property damage progresses after the policy expires." *Sentinel*, 76 Haw. at 297, 875 P.2d at 914 (quoting Chemstar, Inc. v. Liberty Mut. Ins. Co., 797 F. Supp. 1541, 1548-49 (C.D. Cal. 1992)). The court eventually adopted the injury-in-fact trigger. *Id.* at 298-99, 875

coverage at the time of manifestation was solely responsible for the entire loss, even though a portion of the loss extended into subsequent policy periods, was a subject of dispute nationwide.[129]

The court rejected First Insurance's position on two grounds. The court not only rejected the "manifestation of loss" as the preferred causation theory when damage is ongoing,[130] it also held that insurers must defend insureds in the face of an unanswered question of law. The court explained, "[t]he mere fact that the answers to those questions in this jurisdiction were not then and are not presently conclusively answered demonstrates that, based on the allegations in the underlying action, it was *possible* that the Honofed entities would be entitled to indemnification under the First Insurance policies."[131] As the duty to defend rests primarily on the *possibility* that coverage exists, the determination that First Insurance had a duty to defend was affirmed.[132]

The court then prescribed the consequences where the insurer wrongfully refuses to defend: "Where the insured seeks indemnification after the insurer has breached its duty to defend, (1) coverage is rebuttably presumed, (2) the insurer bears the burden of proof to negate coverage, and (3) where relevant, the insurer carries its traditional burden of proof that an exclusionary clause applies."[133] These penalties reflect a moderate approach. The court acknowledged that a "fair number of jurisdictions" adhere to a far more pro-insured rule that prohibits an insurer from "taking the position that the judgment or settlement did not involve a covered risk" after wrongfully declining to defend.[134] However, drawing a sharp distinction between coverage and the duty to defend, the court concluded that precluding a breaching insurer from challenging coverage altogether would unfairly penalize an insurer and might provide a windfall to the insured.[135]

P.2d at 915-16. Under this trigger, "an injury occurs whether detectable or not; in other words, an injury need not manifest itself during the policy period, as long as its existence during that period can be proven in retrospect." *Id.* at 298, 875 P.2d at 915.

[129] *Id.* at 289, 875 P.2d at 906.

[130] *Id.* at 301, 875 P.2d at 918.

[131] *Id.* at 290, 875 P.2d at 907 (emphasis in original).

[132] *Id.* The Ninth Circuit Court of Appeals qualified *Sentinel*'s legal ambiguity holding. In *Burlington Insurance Co. v. Oceanic Design & Construction, Inc.*, it held that under *Sentinel* the mere fact that a legal question is unanswered in Hawai'i is insufficient to create a possibility of coverage. 383 F.3d 940, 952-53 (9th Cir. 2004). Instead, the Ninth Circuit interpreted *Sentinel* to require a "level of uncertainty" amounting to a "notable dispute nationwide" to trigger coverage. *Id.* at 953.

[133] *Sentinel*, 76 Haw. at 297, 875 P.2d at 914 (citing Polaroid Corp. v. Travelers Indem. Co., 610 N.E.2d 912, 922 n.22 (Mass. 1993)).

[134] *Id.* at 295, 875 P.2d at 912. In doing so, the court rejected *Gray v. Zurich Insurance Co.*, 419 P.2d 168 (Cal. 1966), and the so-called "Illinois Rule" that effectively precludes an insurer that breaches the duty to defend from disputing grounds for coverage. *Id.*

[135] *Id.*

Chief Justice Moon's decision in *Sentinel* firmly establishes that the duty to defend broadly exists whenever there is any possibility of coverage under the policy language, whether that possibility exists based on unresolved facts or law. In *Sentinel*, the court also struck a middle ground in prescribing the consequences an insurer bears for breaching that duty, by nevertheless allowing insurers to challenge whether the claim was covered. While the court imposed some penalties upon insurers, particularly with regard to their burden of proof on coverage, it stopped short of holding that once an insurer wrongfully refuses to defend and abandons the insured, it loses its right to challenge the insured on the coverage issue.

B. The Duty to Defend on Disputed Facts

Dairy Road Partners v. Island Insurance Co.,[136] a unanimous opinion authored by Justice Levinson, clarified the extent to which a liability insurer could look beyond the pleadings to avoid the duty to defend. The underlying facts in *Dairy Road* were straightforward. Garth Nakamura, the son of the Kahului Shell station manager, was involved in an after-hour drinking binge at the Shell station.[137] Thereafter, Nakamura was driving home when his vehicle struck and killed pedestrian Alvin K. Vierra, Jr.[138] Suits against Nakamura, Shell, and Dairy Road alleged that Nakamura was employed by Dairy Road and was acting within the scope of his employment when he caused the accident that killed Vierra.[139]

Dairy Road was insured under four liability policies issued by Island Insurance that potentially provided coverage for the defendants: (1) a business auto policy; (2) a commercial garage liability policy; (3) a commercial general liability policy; and (4) a commercial umbrella policy.[140] The commercial garage liability policy, under which a duty to defend was eventually found, stated Island Insurance had "the right and the duty to defend any suit asking for . . . damages. However we have no duty to defend suits for bodily injury or property damage not covered by this policy."[141] The policy considered employees as insureds, but only while acting within the scope of their duties.[142]

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[136] 92 Haw. 398, 992 P.2d 93 (2000).

[137] *Id.* at 403, 992 P.2d at 98.

[138] *Id.*

[139] *Id.* Shell was alleged to be vicariously liable but was apparently dismissed prior to the appeal. *Id.* at 402 n.1, 992 P.2d at 97 n.1.

[140] *Id.* at 403-04, 992 P.2d at 98-99. Only the issues related to defense under the garage liability policy will be discussed here.

[141] *Id.* at 405, 992 P.2d at 100.

[142] *Id.*

Further, the policy only covered specific autos, including those of employees while used in the insured's garage business.[143]

Dairy Road and Shell tendered the defense of the Vierra suit to Island Insurance, but Island declined to assume their defense.[144] Island maintained that its investigation had revealed that prior to the accident Nakamura had been off duty, drinking with friends, and driving his personal vehicle home from the service station.[145] Therefore, Island asserted that the accident was not covered by Dairy Road's various liability policies.[146]

Dairy Road and Shell then filed suit seeking a declaration that Island was obligated to defend and indemnify them in the underlying lawsuits.[147] Island moved for summary judgment. In support of its motion, Island included portions of Nakamura's deposition in which Nakamura conceded that the consumption of alcohol was not permitted at the station, that the gathering the night of the accident was unauthorized, and that he was driving a friend home from the after-hours party when the accident occurred.[148] The circuit court denied Island's motion in part, holding that under the garage policy there was a genuine issue of material fact as to whether Nakamura's actions were necessary or incidental to the business.[149]

The parties appealed from lower court rulings on cross motions for summary judgment.[150] The salient issue on appeal regarding the duty to defend on the garage policy was whether Island could rely upon factual evidence outside the complaint's allegations to terminate its duty to defend.[151] Relying on *Sentinel*, the Hawai'i Supreme Court reiterated that an insurer bears a heavy burden in establishing that it has no duty to defend an insured. It again explained that an insurer's duty is broad, arising whenever there is a possibility of coverage based on the underlying claims, and that "[a]ll doubts [. . .] are resolved against the insurer and in favor of the insured."[152] It noted that Island's burden of proof was great, while Dairy Road's was slight:

> Island bore the burden of proving that there was no genuine issue of material fact with respect to whether a *possibility* existed that [Dairy Road] would incur liability for a claim covered by the policies. In other words, Island was required

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[143] *Id.* at 406-407, 992 P.2d at 100-01.

[144] *Id.* at 407, 992 P.2d at 102.

[145] *Id.*

[146] *Id.* at 407-08, 992 P.2d at 102-03.

[147] *Id.* at 408, 992 P.2d at 103.

[148] *Id.*

[149] *Id.* at 409-10, 992 P.2d at 104-05.

[150] *Id.*

[151] *Id.* at 413-14, 992 P.2d at 108-09.

[152] *Id.* at 412, 992 P.2d at 107 (quoting Trizec Prop., Inc. v. Bitmore Constr. Co., 767 F.2d 810, 812 (11th Cir. 1985)).

> to prove that it would be *impossible* for the [underlying plaintiffs] to prevail against [Dairy Road] in the underlying lawsuits on a claim covered by the policies. Conversely, [Dairy Road]'s burden with respect to its motion for summary judgment was comparatively light, because it had merely to prove that a *possibility* of coverage existed.[153]

Dairy Road then broke new ground in Hawai'i law by considering the extent to which an insurer may rely on extrinsic evidence—evidence outside the plaintiff's complaint—to determine whether it had a duty to defend. The gist of the conflict in this case was that, while the complaint in the underlying lawsuit alleged that Nakamura was acting within the course and scope of employment, a fact which implicated garage operations under the insurance policy, the uncontested facts adduced after the underlying complaint was filed established that Nakamura was not acting in the course and scope of employment.[154] Thus, relying on extrinsic evidence would favor the insurer by negating rather than creating a potential basis of coverage.

Just as it had done in *Sentinel*, the court again drew a sharp distinction between the duty to defend and the duty to indemnify. While the duty to defend is determined at the outset of the case and arises irrespective of the outcome, the duty to indemnify turns on establishing liability at the outcome of the underlying case.[155]

The court emphasized that the duty to defend depends on finding any possibility of coverage based on the policy language and the allegations in the underlying complaint.[156] The court conceded that earlier decisions had left Hawai'i law unclear as to the appropriate use of evidence beyond the underlying pleadings to establish the insurer's duty to defend.[157] It noted that under the commercial garage liability policy, the underlying complaints unambiguously triggered the possibility of coverage and therefore established a duty to defend.[158] Thus, in this case there was no need to rely on any extrinsic evidence to trigger the duty to defend at the outset.[159]

The court then explored the role of extrinsic evidence in establishing and disclaiming a duty to defend. To begin with, the court continued adherence to a rule first announced in *Standard Oil Co. of California v. Hawaiian Insurance*

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[153] *Id.* at 412-13, 992 P.2d at 107-08 (emphases in original; citation omitted).

[154] *Id.* at 423, 992 P.2d at 118.

[155] *Id.* at 413-14, 992 P.2d at 108-09.

[156] *Id.*

[157] *Id.* at 415-17, 992 P.2d at 110-12 (discussing Hawaiian Ins. & Guar. Co. v. Blanco, 72 Haw. 9, 804 P.2d 876 (1990); Hawaiian Ins. & Guar. Co. v. Brooks, 67 Haw. 285, 686 P.2d 23 (1984)).

[158] *Id.* at 414, 992 P.2d at 109.

[159] *Id.* at 415, 992 P.2d at 110.

& Guaranty Co.,[160] that when the underlying pleadings do not clearly allege a covered claim, the insurer "must look beyond the effect of the pleadings and must consider any facts brought to its attention" to establish a duty to defend.[161] However, striking a moderate position, the court rejected cases in other jurisdictions that more broadly impose upon insurers an obligation to assume a defense where the pleadings unambiguously negate coverage but an investigation of extrinsic facts would raise a possibility of coverage.[162]

The court next considered whether, once the duty to defend was triggered, an insurer was permitted to use extrinsic evidence to overcome the duty to defend. Island argued that a trio of earlier Hawai'i cases had allowed the insurer to look beyond the pleadings and conduct a factual investigation in order to avoid a duty to defend: *Hawaiian Insurance & Guaranty Co. v. Brooks*;[163] *Hawaiian Insurance & Guaranty Co. v. Blanco*;[164] and *Bayudan v. Tradewind Inc. Co.*[165] The court noted that those cases attempted "to ensure that plaintiffs could not, through artful pleading, bootstrap the availability of insurance coverage under an insured defendant's policy by purporting to state a claim for negligence based on facts that, in reality, reflected manifestly intentional, rather than negligent, conduct."[166] But this time the court was troubled by the unanticipated consequences that looking beyond the pleadings could have on the duty to defend.[167]

The court decided that the implication of these cases went too far and might deprive an insured of a deserved defense:

> One consequence . . . is that the insured may be saddled with the Procrustean dilemma of being forced to adduce facts proving his or her own liability in the underlying lawsuit in order to satisfy the insurer that there may be merit to the underlying covered claim. . . .
>
> Additionally, . . . the potential for inconsistent judgments [exists]. A circuit court presiding over a declaratory judgment action might rule, based on an insurer's superior production of evidence concerning material facts that will be directly in dispute in the underlying lawsuit, that there is no possibility of coverage. Subsequently, the trier of fact in the underlying lawsuit, not bound by

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[160] 65 Haw. 521, 654 P.2d 1345 (1982).

[161] *Dairy Road*, 92 Haw. at 414, 992 P.2d at 109 (quoting *Standard Oil Co.*, 65 Haw. at 526, 654 P.2d at 1349).

[162] *Id.* at 415 n.9, 992 P.2d at 110 n.9 (noting and rejecting the more expansive view adopted in *Spruill Motors, Inc. v. Universal Underwriters Insurance Co.*, 512 P.2d 403 (Kan. 1973), and *Gray v. Zurich Insurance Co.*, 419 P.2d 168 (Cal. 1966)).

[163] 67 Haw. 285, 686 P.2d 23 (1984).

[164] 72 Haw. 9, 804 P.2d 876 (1990).

[165] 87 Haw. 379, 957 P.2d 1061 (App. 1998).

[166] *Dairy Road*, 92 Haw. at 417, 992 P.2d at 112.

[167] *Id.*

> the ruling in the declaratory judgment action (the latter having no preclusive effect upon a non-party putative plaintiff), and perhaps relying upon different evidence adduced by the injured plaintiff, might find that the insured *is* liable on a claim covered by the policy. Such a result would be fundamentally unfair to the insured, inasmuch as, in retrospect, there must have been a possibility of coverage if, in fact, it is so adjudicated in the underlying lawsuit. Inasmuch as the circuit court would already have ruled that there was no possibility of coverage, and therefore no duty to defend, the insured would be barred by *res judicata* from recovering post-trial attorney's fees and costs from the insurer.[168]

Noting a split of authority in other jurisdictions on whether an insurer may use extrinsic evidence to disclaim its duty to defend, the court adopted the majority rule: "the insurer may only disclaim its duty to defend by showing that *none* of the facts upon which it relies might be resolved differently in the underlying lawsuit."[169] Accordingly, the court held that Dairy Road was entitled to partial summary judgment on the duty to defend under the commercial garage liability policy.[170] The court hedged a bit, however, adopting a "limited exception" to the majority rule, allowing "an insurer to rely upon extrinsic facts to disclaim liability only when the relevant facts 'will not be resolved by the trial court of the third party's suit against the insured.'"[171]

In summary, *Dairy Road* expounded upon that basic principle of liability insurance that insurers have a duty to defend whenever there is a potential for coverage. It established rules for the use of extrinsic evidence in instances where that evidence proves or disproves the possibility of coverage and established a rule that is favorable to insureds. First, *Dairy Road* provided that the duty to defend is principally determined by the claims in the underlying case, and an insurer may not turn to extrinsic evidence to disclaim that duty when the pleadings allege a potentially covered claim. Second, it continued to adhere to the rule stated in *Standard Oil* that when pleadings do not clearly allege a covered claim, the insurer may not simply deny a defense but must instead first consider extrinsic evidence that points to a potential for coverage. The court, however, also articulated several caveats to moderate these pro-insured rules. The court advised that under *Standard Oil*, insurers need not

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[168] *Id.* (emphases in original)

[169] *Id.* at 422, 992 P.2d at 117 (emphasis in original).

[170] *Id.* at 423, 992 P.2d at 118. The court also found a duty to defend under the business auto policy because there were genuine issues of fact regarding whether the policy included coverage for Nakamura's truck. *Id.* at 426, 992 P.2d at 121.

[171] *Id.* at 418, 992 P.2d at 113 (quoting Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 483 A.2d 402, 406 (N.J. 1984)). The *Hartford Accident* court explained, "if a policy covered a Ford but not a Chevrolet also owned by the insured, the carrier would not be obligated to defend a third party's complaint against the insured which alleged the automobile involved was the Ford when in fact the car involved was the Chevrolet." *Hartford Accident*, 483 A.2d at 406.

conduct an investigation to establish a potentially covered claim when the pleadings do not allege one. Additionally, the court held that not all extrinsic evidence is barred when deciding whether an insured has a duty to defend. Furthermore, the court allowed insurers to consider extrinsic evidence to disclaim the duty to defend when that evidence would not be resolved differently in the underlying lawsuit.[172]

C. *The Significance of* Sentinel *and* Dairy Road

Through these decisions, the Hawai'i Supreme Court during the Moon years joined the vast majority of jurisdictions that determine the existence of a duty to defend based on whether the underlying allegations present a possibility of coverage under the policy.[173] Generally, the decisions regarding the insurer's duty to defend are favorable to the insured. *Sentinel*'s rule that insurers must defend whenever the law is unsettled prevents insurers from asserting untested legal positions unilaterally to deny a defense, and *Dairy Road* preserves the insured's right to a defense in the liability suit based upon what the plaintiff claims, regardless of how the facts might later emerge.

Notably, however, the Moon Court, in *Sentinel*, imposed only limited sanctions against insurers who abandon their insureds, not nearly as harsh as some jurisdictions have established. *Dairy Road* placed two restrictions on the insurer's defense obligation. First, as a limitation on *Standard Oil*, the court decided the insurer has no duty to search for extrinsic evidence to create the potential of coverage where the underlying allegations demonstrate there is no coverage under the policy. Second, the court allowed the use of extrinsic

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[172] Ultimately, the court held that Island had no continuing duty to defend because it held there was no duty to indemnify Dairy Road. The undisputed facts from Nakamura's deposition established that the accident occurred (1) ten hours after he finished his work day, (2) while he was driving home, and (3) after having given a ride to a friend. *Dairy Road*, 92 Haw. at 423, 992 P.2d at 118. Therefore, the court granted summary judgment to Island on the duty to indemnify. *Id.* This, according to the court, effectively terminated its duty to defend. *Id.* It seems contradictory to refuse to allow extrinsic facts to determine the duty to defend, but to allow it to decide coverage during an ongoing case. Significantly, the court suggested that an insured might seek a stay "pending the adjudication of the underlying lawsuit" in response to a declaratory action on indemnification to avoid this paradoxical result. *Id.* at 413 n.8, 992 P.2d at 108 n.8.

[173] *See* Westport Ins. Corp. v. Energy Fin. Servs. LLC, No. 08-5046, 2009 U.S. App. LEXIS 6218, at *7 (6th Cir. Mar. 29, 2009) (noting the majority of jurisdictions have adopted the rule that "if there is any allegation in the complaint which potentially, possibly or might come within the coverage of the policy, then the insurance company has a duty to defend"); GC Fin., LLC v. Old Republic Nat'l Title Ins. Co., No. 3:06-0913, 2008 U.S. Dist. LEXIS 81385, at *23-24 (M.D. Tenn. Sept. 30, 2008) (noting that "it is accepted in the overwhelming majority of jurisdictions that the obligation of a liability insurance company to defend . . . is to be determined solely by the allegations in the complaint").

evidence in determining the duty to defend where relevant facts will not be resolved differently in the underlying case. Consequently, the court adopted a moderate approach to the duty to defend that holds some advantages to both insureds and insurers.

IV. COMMERCIAL GENERAL LIABILITY POLICIES[174]

The CGL policy is the principal form of insurance covering businesses against liability for bodily injury and property damage. Thus, how courts interpret CGL coverage provisions can have a substantial economic impact on an industry. Two important cases, *Sentinel* and *Hawaiian Holiday*, provided important guidance on the meaning of an "occurrence" under a CGL policy in Hawai'i.

A. Trigger of Coverage Implications When Multiple Insurers Are on the Risk

During the mid- to late-1980s, then-Circuit Court Judge Ronald T.Y. Moon presided over many settlement conferences involving complex construction litigation. Construction litigation commonly involves multiple defendants whose defective work is alleged to have caused property damage over a period of years. CGL policies are typically issued for one-year periods of time. Thus, construction litigation potentially implicates multiple liability insurance policies for each defendant, sometimes issued by different insurers. Settlement of these cases was often frustrated by the defendants' liability insurers taking adverse positions on the applicable "trigger of coverage," which affected whether the insurer would be obligated to indemnify the insured defendant against eventual liability. For example, under the "manifestation of loss" trigger, property damage occurs when a latent construction defect first manifests itself, and the insurer on the risk at the time of first manifestation is solely liable for the entire loss, even if the property damage progresses after the policy expires.[175] Under the "exposure" trigger, coverage is triggered each time a person or property is exposed to a damage-causing agent.[176] Under the "injury-in-fact" trigger, coverage is triggered by the actual occurrence during the policy period of an injury-in-fact.[177] Not surprisingly, because the trigger of coverage affected which insurer or insurers would be obligated to pay the construction defect claim, an insurance company advocating a particular trigger of coverage in one

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[174] The principal author of this section was Keith K. Hiraoka of Roeca Luria Hiraoka LLP.

[175] Sentinel Ins. Co. v. First Ins. Co., 76 Haw. 277, 297, 875 P.2d 894, 914 (1994).

[176] *Id.*

[177] *Id.* at 298, 875 P.2d at 915.

case might advocate for a different trigger of coverage in another case depending upon the facts of the lawsuit which it was being asked to settle.

In addition to clarifying an insurer's duty to defend, discussed in the previous section of this article, *Sentinel* adopted the "injury-in-fact" trigger of coverage for occurrence-based liability insurance policies.[178] Briefly, Sentinel Insurance Company and First Insurance Company of Hawai'i insured a developer at different times and disagreed as to when certain property damage first occurred.[179] First Insurance maintained that the "structural damage in the way of water infiltration and associated damage became evident no later than December of 1982,"[180] while Sentinel was on the risk.[181] Sentinel maintained that "[t]he [AOAO] indicated . . . that damage from the water infiltration . . . began on or about December 11, 1984"[182] while First Insurance was on the risk. After discussing the various triggers of coverage employed by different courts, the Hawai'i Supreme Court adopted the "injury-in-fact" trigger, reasoning that "the injury-in-fact trigger is compelled by the plain language of the policies, and it does not violate the objectively reasonable expectations of the parties or relevant policy considerations."[183]

Under the injury-in-fact trigger, an injury occurs whether detectable or not—that is, the injury need not manifest itself during the policy period so long as its existence during that period can be proven in retrospect.[184] The supreme court recognized that determining when an injury in fact occurs may be a difficult task requiring expert scientific evidence, but held that proof of the precise onset of injury was not necessary. The court also recognized that injury may, in fact, occur over the span of several years and held that, in such a situation, the "continuous injury" trigger of coverage may be employed to equitably apportion liability among insurers.[185]

> Under this theory, property damage is deemed to have "occurred" continuously for a fixed period (the "trigger period"), and every insurer on the risk at any time during that trigger period is jointly and severally liable to the extent of their policy limits, the entire loss being equitably allocated among the insurers. The trigger period begins with the inception of the injury and ends when the injury ceases. Before the continuous injury trigger may be applied, the party urging its

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[178] An "occurrence policy" provides coverage if the event insured against (the "occurrence") takes place during the policy period, irrespective of when the injured party's claim is actually presented. *Id.* at 288, 875 P.2d at 905 (citations omitted).

[179] *Id.* at 285, 875 P.2d at 902.

[180] *Id.*

[181] *Id.* at 286, 875 P.2d at 903.

[182] *Id.* at 285, 875 P.2d at 902.

[183] *Id.* at 298, 875 P.2d at 915.

[184] *Id.* at 297, 875 P.2d at 914.

[185] *Id.* at 300, 875 P.2d at 917.

> application must make two factual showings. It must be established that: (1) some kind of property damage occurred during the coverage period of each policy under which recovery is sought; and (2) the property damage was part of a continuous and indivisible process of injury.[186]

The effect of this decision has been to bring all of the insurers that have accepted payments of premiums to the table when an occurrence spans their coverage period.

B. Sharpening the Line between Contract and Tort

In 1994, the Moon Court also recognized the distinction between contract and tort in the liability insurance coverage context—a distinction that would continue to be made in a subsequent non-insurance-related opinion authored by Chief Justice Moon,[187] and which foreshadowed an important 2010 insurance decision by the ICA.[188]

In *Hawaiian Holiday*, the Hawai'i Supreme Court held that a claim for breach of contract did not allege an "occurrence" within the coverage of a CGL insurance policy.[189] The case arose from a dispute between Hawaiian Holiday, a corporation that grew, processed, and retailed macadamia nuts, and two limited partnerships.[190] Hawaiian Holiday had promoted the limited partnerships to investors in Dallas, Texas.[191] The limited partnerships' business plan was to lease real property in Hawai'i from Hawaiian Holiday, purchase macadamia nut seedlings from Hawaiian Holiday, and pay Hawaiian Holiday to plant and tend the seedlings on the leased property and to harvest the macadamia nut crop.[192] Hawaiian Holiday was then to purchase the harvested nuts from the limited partnerships for processing into retail nut products.[193] "Unfortunately," as noted by the supreme court, "the venture did not progress as expected[,]"[194] and the limited partnerships sued Hawaiian Holiday in federal court in Texas. The Texas complaint alleged that Hawaiian Holiday made fraudulent misrepresentations in soliciting the investors' purchase of

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[186] *Id.* at 298, 875 P.2d at 915 (citations omitted).

[187] *See* Francis v. Lee Enterprises, Inc., 89 Haw. 234, 971 P.2d 707 (1999).

[188] *See* Group Builders, Inc. v. Admiral Ins. Co., 123 Haw. 142, 231 P.3d 67 (App. 2010).

[189] Hawaiian Holiday Macadamia Nut Co. v. Indus. Indem. Co., 76 Haw. 166, 872 P.2d 230 (1994).

[190] *Id.* at 167, 872 P.2d at 231.

[191] *Id.* at 167-68, 872 P.2d at 231-32.

[192] *Id.*

[193] *Id.*

[194] *Id.* at 168, 872 P.2d at 232.

shares in the limited partnerships and breached its farming contracts with the limited partnerships.[195]

Hawaiian Holiday tendered the defense of the Texas lawsuit to its CGL insurer, Industrial Indemnity Company.[196] Industrial Indemnity declined to defend.[197] Hawaiian Holiday then sued the insurer in Hawai'i state court alleging bad faith failure to defend.[198] The circuit court held that the Texas complaint alleged a claim for "property damage" and entered summary judgment for Hawaiian Holiday.[199] The insurance company appealed.[200]

The Hawai'i Supreme Court reversed.[201] The circuit court determined that the Texas plaintiffs' allegation that many of the macadamia nut seedlings were damaged or killed constituted a claim for "property damage."[202] The supreme court, however, then stated that in order for coverage to potentially exist, the "property damage" had to have been caused by an "occurrence."[203] The term "occurrence" was defined by the insurance policy as: "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[204] The court held that the alleged property damage—the damage to and killing of the seedlings—was "part and parcel of the alleged acts committed by Hawaiian Holiday that resulted in the claims for breach of contract and fraud."[205] Hawaiian Holiday's breach of contract, the court held, was not accidental, and the property damage resulting from the breach of contract—for which the plaintiffs sought benefit of the bargain damages or restitution[206]—was not caused by an "occurrence."

The court concluded by drawing a distinction between claims sounding in tort and those sounding in contract:

> The [Texas] plaintiffs confined their claims for relief to claims for causes of action for breach of contract and fraud. These claims are not negligence claims resulting from accidental conduct. Because the CGL policy provides coverage for accidental conduct only, the underlying complaint did not allege any basis for

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195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.* at 169, 872 P.2d at 233.
201 *Id.* at 167, 872 P.2d at 231.
202 *Id.* at 170, 872 P.2d at 234.
203 *Id.*
204 *Id.* (emphasis removed).
205 *Id.* at 171, 872 P.2d at 235.
206 *Id.* at 168, 872 P.2d at 232.

> recovery that was covered by the policy. Industrial, therefore, had no duty to defend Hawaiian Holiday.[207]

The sharpening of the line between tort and contract drawn during Chief Justice Moon's tenure signaled the beginning of a substantial contraction of coverage for construction litigation in Hawai'i.

C. Significance of Sentinel *and* Hawaiian Holiday

When an injury occurs over multiple policy periods, *Sentinel*'s interpretation of the trigger of coverage under a CGL "occurrence" policy expanded how many insurers could be on the risk for defense and indemnity. *Sentinel* also left important questions open. For example, questions remain regarding issues of stacking multiple insurance limits and in what order parties must pay where primary, excess, and retained risks cover multiple periods.[208] However, by providing that all insurers must participate in the cost of defense and indemnification when an injury occurs over several policy periods, the court's decision generally favored the interests of the insured.

The Moon Court would later reinforce the doctrinal distinction between tort and contract drawn in *Hawaiian Holiday* in *Francis v. Lee Enterprises, Inc.*,[209] a decision authored by Chief Justice Moon. The court in *Francis* held that a tort recovery, including a recovery of punitive damages, is not allowed for breach of a contract in the absence of conduct that violates a duty that is independently recognized by principles of tort law and that transcends the breach of the contract.[210] The ICA would later draw the same distinction—although directly citing neither *Hawaiian Holiday* nor *Francis*[211]—in a 2010 decision holding that breach of contract claims based on allegations of defective construction and tort claims deriving from those breach of contract claims are not covered under commercial general liability policies.[212]

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[207] *Id.* at 171, 872 P.2d at 235.

[208] *See* EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, 934 A.2d 517, 524 (N.H. 2007) (identifying and discussing allocation and stacking approaches in continuous trigger cases).

[209] 89 Haw. 234, 971 P.2d 707 (1999).

[210] *Id.* at 235, 971 P.2d at 708.

[211] The ICA's opinion, *Group Builders, Inc. v. Admiral Insurance Co.*, 123 Haw. 142, 231 P.3d 67 (App. 2010), extensively discussed *Burlington Insurance Co. v. Oceanic Design & Construction, Inc.*, 383 F.3d 940 (9th Cir. 2004), which cited to both *Hawaiian Holiday* and *Francis*.

[212] *Group Builders*, 123 Haw. 142, 231 P.3d 67.

V. INSURER BAD FAITH[213]

In the court's 1996 *Best Place* decision, Hawai'i finally recognized a bad faith tort cause of action against insurers. In the four decades leading up to the decision, nearly every state had adopted some form of the tort of bad faith specifically against insurers.[214] The Hawai'i Supreme Court's late recognition of insurance bad faith can be explained in part by the dominant role the federal courts play in Hawai'i insurance law. With few domestic insurers, many important insurance issues are decided by the federal courts sitting in diversity.[215] In light of the mixed signals emanating from state court decisions,[216] Hawai'i's federal court had consistently held that Hawai'i law did not recognize the tort of insurance bad faith.[217]

The facts of *Best Place* were straightforward. Best Place, a first party insured, lost its floundering business in a suspicious fire.[218] For its part, Penn, the property insurer, balked at paying the claim, as Best Place was slow to submit its business records for examination.[219] As the stalemate progressed, Penn eventually broke off communications, ignoring Best Place's entreaties to settle the claim.[220] Best Place filed suit, alleging tortious breach of good faith and fair dealing.[221]

Justice Paula Nakayama, writing for a unanimous court, finally held that in Hawai'i "there is a legal duty, implied in a first- and third-party insurance contract, that the insurer must act in good faith in dealing with its insured, and a breach of that duty of good faith gives rise to an independent tort cause of action."[222] Thus, although *Best Place* involved first party insurance, there was no room to doubt that the court would recognize the tort in both the first- and third-party context.

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[213] The principal author of this section was Professor Hazel Beh.

[214] *See* Boyarski, *supra* note 3, at 848 (observing that Hawai'i was the forty-seventh state in the nation to recognize the tort "in either the first- or third-party context, or in some statutory form" and tracing recognition of the tort to *Comunale v. Traders & General Insurance Co.*, 328 P.2d 198 (Cal. 1958), and *Crisci v. Security Insurance Co.*, 426 P.2d 173 (Cal. 1967)).

[215] *See* Hazel Beh et al., *Emerging Insurance Issues*, 11 HAW. B.J. 6, 16 (2007) (Co-author Noelle Catalan discussing the role of federal courts in state insurance cases and exploring possible procedural and jurisdictional options to put cases before the state courts).

[216] *See* Boyarski, *supra* note 3, at 862-66 (discussing cases both acknowledging the trend in other states with approval yet also refusing to recognize bad faith in the at-will employment context).

[217] *See, e.g.*, Genovia v. Jackson Nat'l Life Ins. Co., 795 F. Supp. 1036 (D. Haw. 1992).

[218] Best Place, Inc. v. Penn Am. Ins. Co., 82 Haw. 120, 123, 920 P.2d 334, 337 (1996).

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.* at 132, 920 P.2d at 346.

In 1996, the decision to recognize the tort of insurer bad faith in *Best Place* was easy because nearly every state had adopted the tort of insurance bad faith at least in some form. The court's greater challenge was articulating the standard required to establish liability; after all, with four decades of national case law, a wide variety of legal standards existed for the court to consider.[223] The court reviewed the development of the tort nationally, and ultimately adopted California's "reasonableness" or negligence standard.[224] The standard is a middle-ground choice requiring the plaintiff to prove that the insurer acted in bad faith or took unreasonable action in dealing with its insured.[225] It was a middle-ground choice because, on one hand, by only requiring the plaintiff to prove that the insurer acted unreasonably, the insured need not prove that the insurer acted willfully, maliciously, or deliberately as would be required if the tort were characterized as intentional as it is in some jurisdictions.[226] On the other hand, the standard also granted latitude to insurers by not imposing a form of strict liability on insurers[227] for reasonable but erroneous business judgments and interpretations of its obligations under the insurance contract.[228]

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[223] *Id.* (observing that "there is a significant variation in the standards by which liability is imposed").

[224] *Id.*

[225] *Id.* at 133, 920 P.2d at 347.

[226] *Id.* at 132-33, 920 P.2d at 346-47 (citing Aetna v. Broadway Arms, 664 S.W.2d 463, 465 (Ark. 1984); Nat'l Savings Life Ins. Co. v. Dutton, 419 So. 2d 1357 (Ala. 1982); McCorkle v. Great Atl. Ins. Co., 637 P.2d 583, 587 (Okla. 1981)).

[227] For example, the Supreme Court of Rhode Island adopted a fiduciary standard in *Asermely v. Allstate Insurance Co.*, holding:

> It is not sufficient that the insurance company act in good faith. An insurance company's fiduciary obligations include a duty to consider seriously a plaintiff's reasonable offer to settle within the policy limits. Accordingly, if it has been afforded reasonable notice and if a plaintiff has made a reasonable written offer to a defendant's insurer to settle within the policy limits, the insurer is obligated to seriously consider such an offer. If the insurer declines to settle the case within the policy limits, it does so at its peril in the event that a trial results in a judgment that exceeds the policy limits, including interest. If such a judgment is sustained on appeal or is unappealed, the insurer is liable for the amount that exceeds the policy limits, unless it can show that the insured was unwilling to accept the offer of settlement. The insurer's duty is a fiduciary obligation to act in the best interests of the insured. Even if the insurer believes in good faith that it has a legitimate defense against the third party, it must assume the risk of miscalculation if the ultimate judgment should exceed the policy limits.

728 A.2d 461, 464 (R.I. 1999).

The Supreme Court of Appeals of West Virginia adopted an even stricter standard, holding that an insurer's failure to settle within policy limits when it has an opportunity to do so establishes "that the insurer has prima facie failed to act in its insured's best interest and . . . constitutes bad faith toward insured." Shamblin v. Nationwide Mut. Ins. Co., 396 S.E.2d 766, 776 (W. Va. 1990).

[228] *Best Place*, 82 Haw. at 133, 920 P.2d at 347 (citing Hanson v. Prudential Ins. Co. of Am.,

Allowing insurers to exercise reasonable business judgment without exposure to excess liability, even when that judgment is erroneous and harmful to the insured, is a theme that pervades Hawai'i cases.[229] The court has steadfastly asserted that erroneous decisions by an insurer alone would not amount to bad faith unless the insurer's conduct has also been "improper."[230] Similarly, even when there has been bad faith, the plaintiff must establish "something more" to warrant punitive damages.[231] "[T]he plaintiff must prove by clear and convincing evidence that 'the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some wilful [sic] misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.'"[232] Thus, Hawai'i's bad faith standard represents a middle approach that places a burden on the insured to prove some negligent culpability. However, by rejecting the notion that the erroneous judgment speaks for itself, the court pits David against Goliath, placing a formidable burden on insureds to ferret out impropriety.

B. The Significance of Best Place

The tort of insurance bad faith serves as an important check on insurer misconduct, and its recognition in Hawai'i was long overdue. In recognizing the tort, the court implicitly acknowledged its own obligation to police this uniquely unequal relationship between insured and insurer. It explained:

> the adhesionary aspects of an insurance contract further justify the availability of a tort recovery . . . . [A] bad faith cause of action in tort will provide the necessary compensation to the insured for all damage suffered as a result of insurer misconduct. Without the threat of a tort action, insurance companies have little incentive to promptly pay proceeds rightfully due to their insureds, as they stand to lose very little by delaying payment.[233]

The recognition of the tort of bad faith has a normative influence on insurers by prescribing standards of conduct, providing access to tort remedies, and promoting accountability.

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772 F.2d 580 (9th Cir. 1985); Opsal v. United Servs. Auto. Ass'n, 283 Cal. Rptr. 212 (App. 1991); Olive v. Great Am. Ins. Co., 333 S.E.2d 41 (N.C. App. 1985); Austero v. Nat'l Cas. Co., 148 Cal. Rptr. 653 (App. 1978)).

[229] *See, e.g.*, Guajardo v. AIG Haw. Ins. Co., 118 Haw. 196, 204, 187 P.3d 580, 588 (2008) (noting that it is a question of fact whether the insurer's refusal to consent to settlement was based on an "unreasonable" interpretation of its policy).

[230] *See, e.g., id.*; Enoka v. AIG Haw. Ins. Co., 109 Haw. 537, 551, 128 P.3d 850, 864 (2006).

[231] *Best Place*, 82 Haw. at 134, 920 P.2d at 348.

[232] *Id.* (quoting Masaki v. Gen. Motors Corp., 71 Haw. 1, 11, 780 P.2d 566, 572 (1989)).

[233] *Id.* at 132, 920 P.2d at 346.

VI. MOTOR VEHICLE INSURANCE LAW[234]

A. Qualification as an "Insured" or "Covered Person"

In *Dawes v. First Insurance Co. of Hawaii, Ltd.*,[235] the Moon Court ruled that a pedestrian, left stranded by a stalled, insured motor vehicle, was still "occupying" that vehicle when she was struck and killed by a driver of an uninsured motor vehicle after walking "twenty to twenty-five minutes and having traveled approximately one mile from the insured vehicle."[236] On its face, the majority opinion, drafted by Justice Levinson, appeared to defy the common understanding of the word "occupying," thereby eliciting a lively dissenting opinion from Chief Justice Moon.[237] However, the legacy of *Dawes* is the analytical framework it set up to analyze one's qualification as an "insured" or "covered person"—namely, "class one" insureds, i.e., the named insured and family members residing in the named insured's household; and "class two" insureds, i.e., persons occupying, operating, or using a covered auto.[238]

In *Dawes*, Eric Shimp, Elizabeth Jean Bockhorn, and two friends left a beach gathering in a vehicle owned by Shimp's father and insured by First Insurance.[239] Shimp's vehicle overheated, so the group parked the vehicle along the highway.[240] Rather than wait for a police officer to render aid, the group decided to walk to the Kona airport "to obtain alternative transportation and repair assistance."[241] "[A]fter walking alongside the shoulder of the

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[234] The principal author of this section was Honolulu attorney Michael N. Tanoue of The Pacific Law Group.

[235] 77 Haw. 117, 883 P.2d 38 (1994). Although *Dawes* was decided by the Moon Court, Chief Justice Moon (joined by ICA Judge Walter Heen) filed a dissenting opinion.

[236] *Id.* at 119, 883 P.2d at 40.

[237] *Id.* at 133-44, 883 P.2d at 54-65 (Moon, C.J., dissenting). In a concurring opinion rendered in *Liki v. First Fire & Casualty Insurance of Hawaii, Inc.*, 118 Haw. 123, 185 P.3d 871 (App. 2008), Judge Craig Nakamura of the ICA wrote, inter alia, "[a]lthough I feel constrained by *Dawes* to concur in this case, I write separately because I share the concern of the *Dawes* dissent . . . ." *Id.* at 131, 185 P.3d at 879 (Nakamura, J., concurring). Judge Nakamura continued, "If I were writing on a clean slate, I would adopt the analysis of the dissent in *Dawes* . . . ." *Id.*

[238] *See, e.g.*, Foote v. Royal Ins. Co. of Am., 88 Haw. 122, 962 P.2d 1004 (App. 1998) (ruling that plaintiff, who was the vice-president, treasurer, director, and fifty-percent shareholder of the corporation designated as the named insured, did not qualify as a class one insured because corporations cannot have family members and that the plaintiff did not qualify as a class two insured because he was not occupying, operating, or using an insured vehicle).

[239] *Dawes*, 77 Haw. at 119, 883 P.2d at 40.

[240] *Id.*

[241] *Id.*

highway—well clear of the pavement—for twenty to twenty-five minutes and having traveled approximately one mile from the insured vehicle," Bockhorn was struck and killed by an uninsured motor vehicle operated by an uninsured motorist.[242]

Jeanette Dawes, individually and as special administrator of her daughter Bockhorn's estate, asserted a claim for uninsured motorist (UM) benefits against First Insurance, the insurer of the vehicle owned by Shimp's father.[243] In response to First Insurance's denial of the claim, Dawes filed a complaint for declaratory judgment, seeking a judicial declaration of coverage; First Insurance responded by answering and asserting a counterclaim, praying for a contrary ruling.[244]

At the time of the accident, Hawai'i Revised Statutes sections 431:10-213 and 431:10C-301 governed UM benefits.[245] The majority pointed out that these statutes

> are considered to be remedial in nature designed to afford maximum protection to the state's residents, and to fill the gaps in compulsory insurance plans. Their purpose is to provide a remedy where injury is caused by an uninsured motorist; or, as has been more frequently stated, to provide a remedy to the innocent victims of irresponsible motorists who may have no resources to satisfy the damages they cause.[246]

Being remedial in nature, the majority noted that the two UM statutes must be "construed liberally in order to accomplish the purpose for which they were enacted."[247]

The majority then noted that two general principles apply to UM coverage: "[f]irst, *either* 'an insured *or* an insured vehicle must be involved in the accident in order to collect under the UM endorsement'";[248] and "[s]econd, 'almost all modern forms of UM coverage include *passengers*, or occupants, of an automobile injured by an uninsured motorist; indeed an exclusion of them would, in most states, be invalid.'"[249] As the majority indicated, these two

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[242] *Id.* at 119-20, 883 P.2d at 40-41.

[243] *Id.* at 119, 883 P.2d at 40.

[244] *Id.* at 120, 883 P.2d at 41.

[245] Currently, uninsured motorist (UM) coverage is governed only by H.R.S. section 431:10C-301. Section 431:10-213 was repealed by the Legislature in 1989, "[p]resumably . . . because it was substantially duplicative of HRS § 431:10C-301." *Dawes*, 77 Haw. at 122 n.2, 883 P.2d at 43 n.2.

[246] *Id.* at 123, 883 P.2d at 44 (quoting 8C JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 5067.45, at 41-46 (1981)) (footnotes omitted).

[247] *Id.* (quoting Flores v. United Air Lines, Inc., 70 Haw. 1, 12, 757 P.2d 641, 647 (1988)).

[248] *Id.* (quoting 12A GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:634, at 127 (R. Anderson & M. Rhodes eds., 2d ed. 1981)) (emphases in original).

[249] *Id.* at 123-24, 883 P.2d at 44-45 (quoting 8C JOHN ALAN APPLEMAN & JEAN APPLEMAN,

general principles coalesce and are typically reflected in a "two class paradigm" of "covered persons" in UM policies:

> [O]n the one hand, the named insured, and while resident of the same household, the spouse of any such named insured, and relatives of either; and on the other, those who use, with the consent, express or implied of the named insured, the vehicle to which the policy applies and those who are guests in such vehicle. . . . And second group persons are only covered when an accident takes place while they are occupying, operating or using the insured vehicle. This is to be contrasted with the fact that first group persons are not required to be associated with the insured auto in order for coverage to attach. . . . *Coverage for the first of the classes listed above, but not for the second, extends to injury suffered while a pedestrian.*[250]

Put another way,

> [i]njury received as a pedestrian generally is limited to the [first class], at least *unless some connection with the insured vehicle is shown.* . . . [N]ot every departure from a vehicle necessarily divorces one from his status as a covered passenger. One may be considered still to be "occupying" the vehicle if in reasonable relationship to it at the time of injury.[251]

The Moon Court then considered, but rejected, the Washington Court of Appeals' formula for determining whether the claimant has sufficient "connection with the insured vehicle" in order for a "class two-insured" to be entitled to UM benefits.[252] The court explained that tests requiring sufficient connection to the vehicle "fail . . . to avoid the anomaly that when 'class one' and 'class two' persons 'are travelling together, a different result may follow where injury is received by each.'"[253] The Moon Court then noted that it was "apparent . . . that application of the *Rau* test would result in the same anomaly had Shimp and Bockhorn both been struck and killed."[254] More specifically, "Shimp, as a covered 'family member,' would be entitled to UM benefits but Bockhorn would not, although both had been occupants of the insured vehicle

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INSURANCE LAW AND PRACTICE § 5080.45, at 255-56 (1981)) (emphasis in original). The majority noted that the word "passenger" means "any *occupant* of a vehicle other than the person operating it." *Id.* at 124 n.7, 883 P.2d at 45 n.7 (quoting BLACK'S LAW DICTIONARY 1123 (6th ed. 1990)) (emphasis in original). Thus, the majority elaborated, "for purposes of UM coverage, a 'passenger' is synonymous with a 'person occupying' a 'covered auto.'" *Id.*

[250] *Id.* at 126, 883 P.2d at 47 (quoting 12A GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:635, at 130-32 (R. Anderson & M. Rhodes eds., 2d ed. 1981)) (emphasis in original).

[251] *Id.* (quoting 8C JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 5092.35, at 381-82, 386-87 (1981)) (emphasis in original).

[252] Rau v. Liberty Mut. Ins. Co., 585 P.2d 157 (Wash. App. 1978).

[253] *Dawes*, 77 Haw. at 127, 883 P.2d at 48 (quoting 8C JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 5092.35, at 381 (1981)).

[254] *Id.*

and both were identically situated with respect to the uninsured Honda Accord."[255] In light of the remedial purpose of the UM statute, the Moon Court opined that "such a result is absurd."[256] "Indeed, [the Moon Court believed] that a layperson would be shocked to learn that such a result could be reached by way of legal intellectual gymnastics."[257]

The Moon Court then sternly reminded insurers that requiring "'covered persons' other than the named insured and 'family members' [to] be 'occupying a covered auto' (i.e., be occupying an insured vehicle) at the time of injury" under a UM policy was previously declared void "as conflicting with the Hawai'i UM statutes" in *National Union Fire Insurance Co. v. Olson*.[258] Because "class-two insureds" need not be "occupants" of an insured vehicle but must still have "some connection with the insured vehicle" in order to qualify for UM benefits, the Moon Court then turned to "the heart of Dawes' appeal: was Bockhorn a 'covered person' under the [First Insurance] auto policy at the time of the accident or was she not?"[259] To answer that question, the court revisited *Olson*,[260] which had held that an emergency medical technician setting a warning flare in the roadway was entitled to UM benefits, despite policy language limiting coverage to those occupying the vehicle.[261] While agreeing with the result, the court in *Dawes* retreated from the analysis that coverage extended only to "accidents resulting from activities prescribed 'in the immediate vicinity of the vehicle.'"[262]

Rejecting formulations that focused on connectedness or proximity, but mindful of the need for a sufficient "connection with the insured vehicle," the Moon Court adopted the "chain of events" test articulated by the Oklahoma Supreme Court in *Safeco Insurance Co. of America v. Sanders*:[263]

> (1) if a person was a passenger in an insured vehicle being operated by a named insured or a named insured's family member, (2) during the chain of events resulting in injury to the person caused by an accident involving an uninsured motor vehicle, (3) then the person is a "covered person" at the time of his or her injury to the same extent as the named insured or the named insured's family

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[255] *Id.*

[256] *Id.*

[257] *Id.* at 128, 883 P.2d at 49.

[258] *Id.* at 129, 883 P.2d at 50 (citing Nat'l Union Fire Ins. Co. v. Olson, 69 Haw. 559, 751 P.2d 666 (1988)).

[259] *Id.*

[260] *Olson*, 69 Haw. 559, 751 P.2d 666; *Dawes*, 77 Haw. at 130, 883 P.2d at 51.

[261] *Olson*, 69 Haw. at 564, 751 P.2d at 669.

[262] *Dawes*, 77 Haw. at 131, 883 P.2d at 52.

[263] 803 P.2d 688 (Okla. 1990).

> members would be entitled to receive UM benefits under the applicable UM policy.[264]

The Moon Court applied the "chain of events" test and ruled, as a matter of law, that Bockhorn was a "covered person" because:

> (1) Bockhorn was a passenger in the insured vehicle; (2) the insured vehicle was being operated by Shimp, a "family member" of the named insured; (3) the insured vehicle broke down; (4) as a result of the breakdown, the occupants of the insured vehicle, including Bockhorn, exited and proceeded on foot to the Kona airport in order to obtain alternative transportation and repair assistance; and (5) en route to the group's destination, Bockhorn sustained fatal injuries as a result of the operation of an uninsured vehicle by an uninsured motorist.[265]

Chief Justice Moon, with whom Substitute Justice Walter Heen joined, dissented on the ground that "the majority's analysis [ran] afoul of two fundamental tenets of statutory construction and imprudently adopted an overly broad rule that will lead to inequitable and undesirable results."[266] The dissent contended that the majority

> depart[ed] from the plain meaning of the statute and the legislative history, and adopt[ed] a rule that will ironically produce the absurd results it allegedly attempts to avoid . . . .[267] Under the majority's hypothetical [where both Shimp and Bockhorn are struck and injured], Shimp and Bockhorn were indeed both occupants of the vehicle at one time, and both were struck by the same vehicle. However, in the context of *insurance coverage*, the two are worlds apart.[268]

Under the hypothetical,

> Shimp derives his entitlement to coverage based on his status as a family member of a named insured, who entered into a contract of insurance with the insurer and paid premiums in exchange for coverage, not because he was an occupant of the vehicle. As a 'family member,' Shimp's coverage under the policy is relatively comprehensive.[269]

"Bockhorn's entitlement to coverage, however, would arise only by virtue of her status as an occupant of the Shimp Family's insured vehicle."[270]

After reviewing relevant portions of the legislative history, the dissent concluded that

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[264] *Dawes*, 77 Haw. at 133, 883 P.2d at 54.

[265] *Id.*

[266] *Id.* at 133, 883 P.2d at 54 (Moon, C.J., dissenting).

[267] *Id.* at 138, 883 P.2d at 59.

[268] *Id.* at 138-39, 883 P.2d at 59-60 (emphasis in original).

[269] *Id.*

[270] *Id.* at 139, 883 P.2d at 60.

> [t]he legislature made explicit its intent to accord full UM protection to a named insured and his or her family. Nowhere is there voiced a similar intent to accord coextensive coverage to passengers of insured vehicles, let alone former passengers, long since separated from the insured vehicle by time, space, and state of mind. . . . Here, the patent, sensible, and ultimately fair distinction as recognized by the legislature between Shimp and Bockhorn is that Bockhorn never paid a single premium to the insurer; accordingly she is not entitled to the same *scope of coverage* as Shimp. The supposed "absurdity" as set forth by the majority is unfounded and cannot form the basis in which to depart from the intent of the legislature.[271]

The dissent closed its criticism of the majority's new "chain of events" test by portending "virtually limitless coverage once a claimant has occupied an insured vehicle," especially because "[t]here is hardly any activity in our society which is not preceded by the use of an automobile."[272] In the dissent's view, a claimant would be entitled to UM coverage simply if he or she is injured by an uninsured motorist after occupying the insured vehicle, "regardless of time, physical distance, or, seemingly, even intervening events."[273] More importantly, the dissent pointed out that under the "chain of events" test, there is no need to examine why the claimant exited the insured vehicle in order to invoke coverage:

> Thus, whether the passenger leaves a vehicle because it breaks down or is simply parked, or because he or she was dropped off at some destination, according to the new rule, UM coverage continues to be extended to the former passenger for some undefined period of time or distance from the insured vehicle.[274]

Regardless of the ultimate holding of the majority and the dissenting opinion's sharp criticism of the majority opinion, the legacy of *Dawes* is its clear delineation and explanation of the different classifications of insureds or covered persons: class-one insureds, as the named insured and "family members"; and class-two insureds, as those occupying or having some connection with the insured vehicle.[275] These classifications have served and will continue to serve courts, insurance law practitioners, insurers, and insureds well whenever they attempt to analyze questions regarding a claimant's qualification for coverage under automobile insurance policies.[276]

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[271] *Id.* at 140, 883 P.2d at 61 (emphasis in original).

[272] *Id.* at 143, 883 P.2d at 64.

[273] *Id.*

[274] *Id.*

[275] As the dissent in *Dawes* points out, there is a third distinct classification of insureds—persons with respect to damages those persons are entitled to recover because of bodily injury sustained by class one or class two insureds. *Id.* at 139 n.7, 883 P.2d at 60 n.7 (quoting 1 ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 4.1, at 59 (2d ed. 1992)).

[276] A fourth classification of covered persons under an automobile liability policy was

B. Determination of "Per Person" or "Each Person" Limits

In *First Insurance Co. of Hawaii v. Lawrence*,[277] Chief Justice Moon, writing for a unanimous court, ruled that, under Hawai'i's motor vehicle insurance law and the wording of First Insurance's policy, the claims of negligent infliction of emotional distress ("NIED") asserted by the parents of a decedent who were not involved "in" the motor vehicle accident that killed their son were derivative claims limited to a single "each person" limit of liability applicable to the "host" plaintiff. Frederick D. Lawrence, Jr. (Frederick) had been drinking beer with some friends, including Orlando Bitanga.[278] Frederick, an unlicensed minor who was allegedly intoxicated, drove a vehicle owned by Orlando Bitanga's older brother.[279] The police attempted to stop Frederick when they noticed he was having difficulty controlling the vehicle.[280] During the ensuing chase, Frederick struck and killed Christopher T.F.K. Smith, Jr., a pedestrian.[281] The decedent's family members "were not involved in nor did they witness the accident."[282] Smith's family filed suit against Frederick and his parents and asserted, among other claims, claims for NIED, loss of consortium, and wrongful death.[283] First Insurance took the position that these claims "were derivative and, therefore, subject to a single limit of liability coverage under the policy."[284] As a corollary, First Insurance also argued that "recovery for accidental harm is limited to persons at the accident scene."[285]

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analyzed in *AIG Hawai'i Insurance Co. v. Smith*, 78 Haw. 174, 891 P.2d 261 (1995). Chief Justice Moon, writing for a unanimous court, held that an automobile liability policy afforded "covered person" status to an alleged tortfeasor who transported alcohol to a beach party on the day of the accident. *Id.* at 176, 891 P.2d at 263. Neither the alleged tortfeasor, nor his vehicle, were actually involved in the accident. *Id.* The decision was perplexing. After quoting the relevant portion of the definition of "covered person"—what the court called "clause four"—and inserting the names of the individuals involved in the underlying lawsuit, the court reached a conclusion that is apparently neither grammatically nor syntactically correct. More importantly and of greater impact in the field of insurance policy drafting and insurance coverage analysis, the Moon Court clarified that an insurer's selective choice of labels for different classifications of insureds could create mutually exclusive classifications of insureds. *Id.* at 183, 891 P.2d at 270.

[277] 77 Haw. 2, 881 P.2d 489 (1994).

[278] *Id.* at 4, 881 P.2d at 491.

[279] *Id.*

[280] *Id.* at 5, 881 P.2d at 492.

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.* at 6, 881 P.2d at 493.

[285] *Id.*

The Moon Court analyzed the relevant statutory provision that abolished tort liability for accidental harm arising from motor vehicle accidents and its exceptions[286] and explained:

> Although the Smiths claim that their emotional distress claims *arose out of* a motor vehicle accident in which Christopher was killed, none of the Smiths sustained their accidental harm *in* the accident. Thus, the plain language of HRS § 294-6(a) appears to mandate that the Smiths are unable to bring a separate, independent suit for their alleged emotional distress.[287]

However, because the statute was "in derogation of principles of common law tort liability,"[288] the Moon Court's analysis did not end there. Rather, the court noted that the statute "must be strictly construed and, where it does not appear that there was a legislative purpose in the statute to supersede the common law, the common law applies."[289]

The Moon Court then "acknowlege[d] that within the tort context, there exists independent legal protection for NIED claims in this jurisdiction"[290] and that "[t]he absence of resulting physical injury is not a bar to recovery[.]"[291] In addition, "'there is no requirement that plaintiffs must actually witness the tortious event in order to recover,'"[292] such factors bearing instead on the "degree of emotional distress suffered."[293] The Moon Court observed, however, that "the crucial distinction . . . is that the Smiths' NIED claims are *not* being reviewed within a 'pure' tort context."[294]

"Because the Smiths' claims clearly originate from the primary claim—the death of Christopher[,]" the Moon Court concluded, "such claims are derivative . . . in the sense that their viability is dependent on the viability of the main

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[286] The statute provided, in relevant part, that tort liability is abolished "except as to the following persons or their personal representatives, or legal guardians, and in the following circumstances": "(1) Death occurs *to such person in such a motor vehicle accident* . . ."; "(2) Injury occurs *to such a person in a motor vehicle accident* in which the amount paid or accrued exceeds the medical-rehabilitative limit . . ."; and "(3) Injury occurs *to such person in such an accident* and as a result of such injury the aggregate limit of no-fault benefits . . . payable to such person are exhausted." *Id.* at 8, 881 P.2d at 495 (quoting HAW. REV. STAT. § 294-6(a)) (emphases in original). The current version of Hawai'i Revised Statutes section 294-6 is Hawai'i Revised Statutes section 431:10C-306.

[287] *Lawrence*, 77 Haw. at 8, 881 P.2d at 495 (emphases in original).

[288] *Id.*

[289] *Id.* (quoting Doi v. Hawaiian Ins. & Guar. Co., 6 Haw. App. 456, 465, 727 P.2d 884, 890 (1986)) (internal citations omitted).

[290] *Id.*

[291] *Id.* (citing Leong v. Takasaki, 55 Haw. 398, 403, 520 P.2d 758, 762 (1974)).

[292] *Id.* (quoting Campbell v. Animal Quarantine Station, 63 Haw. 557, 557, 632 P.2d 1066, 1066 (1981)).

[293] *Id.* (citing *Leong*, 55 Haw. at 403, 520 P.2d at 762).

[294] *Id.* at 9, 881 P.2d at 496 (emphasis added).

claim."[295] The motor vehicle insurance statute, the court said, "codifies the treatment of derivative claims consistent with the great majority of jurisdictions that do not allow separate 'each person' limits for derivative claims, including NIED. These courts have held that recovery of insurance proceeds for derivative claims [is] limited to a single 'each person' limit applicable to the 'host' plaintiff."[296]

Importantly, the Moon Court rejected the Smith family's argument that some derivative NIED claims could meet a separate tort threshold,[297] thereby potentially triggering separate "each person" limits. The court clarified that "[e]ven if one of the Smith claimants could meet one of the aforementioned thresholds, he or she must first meet the threshold requirement that his or her accidental harm occurred 'in' the accident. Moreover, meeting one of the aforementioned thresholds does not change the fact that his or her claim is 'derivative.'"[298]

In *Lawrence*, the court noted, it was "undisputed that the Smiths did not witness the accident nor were they 'timely present at the immediate scene of the accident.'"[299] However, the court forewarned that "if the Smiths had been witnesses to the event that caused Christopher's death, they would have *non-derivative* and wholly independent NIED claims that would trigger separate single limits under the policy as to each proven claim."[300]

Having concluded that the Smith family's NIED claims were derivative, the Moon Court then turned to the question of whether the motor vehicle insurance statute "is consistent with the proposition that derivative claims are limited to a single per person limit."[301] The relevant statute required, inter alia, that automobile insurance policies include liability coverage of not less than $35,000 *"for all damages arising out of accidental harm sustained by any one person as a result of any one accident applicable to each person sustaining accidental harm* arising out of ownership, maintenance, use, loading, or unloading, of the insured vehicle."[302] The statutory phrase "all damages,"

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[295] *Id.* at 9-10, 881 P.2d at 496-97.

[296] *Id.* at 10, 881 P.2d at 497.

[297] The tort thresholds referenced by the Smith family were the medical-rehabilitative limit (which was $6400 at the time of the accident) and the exhaustion of all no-fault benefits (which aggregate limit was $15,000 at the time of the accident). *Id.* at 11 nn.11-12, 881 P.2d at 498 nn.11-12. Under current law, the personal injury protection limit is $5000 and there is no comparable no-fault aggregate limit. *See* HAW. REV. STAT. § 431:10C-306(b) (2005).

[298] *Lawrence*, 77 Haw. at 11, 881 P.2d at 498.

[299] *Id.* at 13, 881 P.2d at 500 (quoting Crabtree v. State Farm Ins. Co., 632 So. 2d 736, 745 n.19 (La. 1994)).

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

[301] *Id.*

[302] *Id.* (quoting HAW. REV. STAT. § 294-10(a)(1) (1985)) (emphasis in original). The current version of this statute is Hawai'i Revised Statutes section 431:10C-301(b)(1), the comparable

included in the longer phrase "all damages arising out of accidental harm sustained by any one person as a result of any one accident," the Moon Court noted, was construed by three Hawai'i decisions to include "derivative claims arising from the injury or death of the host plaintiff and are therefore subject to the 'one person' statutory minimum."[303] The Moon Court "agree[d] with the . . . analysis of all three courts and therefore h[e]ld that the no-fault statute does not require a separate statutory minimum to cover each of the Smiths' derivative NIED claims."[304]

The Moon Court ultimately held that "in the context of Hawai'i's no-fault law and under the limitation of liability provision in First Insurance's policy, emotional distress claims under the circumstances of this case are derivative and as such do not require separate 'each person' coverage to the Smiths."[305]

Eleven years later, in *Liberty Mutual Fire Insurance Co. v. Dennison*,[306] the Moon Court had an opportunity to more clearly define the rule that an NIED claim asserted by a family member of the host plaintiff is derivative and therefore entitled to only one "per person" limit, along with the "exception" that, if the family member was "in" the motor vehicle with the host plaintiff at the time of the collision or "witness[ed] the actual collision itself," such family member's NIED claim would be considered independent and subject to a separate "per person" limit.[307]

In *Dennison*, Tyrone Dennison (Tyrone), a teenager, suffered severe injuries, including brain damage, in a motor vehicle accident.[308] Both of Tyrone's parents, Donald H. Dennison (Donald) and Lynn Dennison, were not in the accident vehicle, and "they did not witness the actual collision."[309] Less than thirty minutes after the accident, the police went to the Dennison home and informed the Dennisons that Tyrone had been in an accident and they were going to transport him by helicopter to a nearby hospital.[310] At the time, Donald had already heard a helicopter overhead.[311] Immediately after speaking to the police officer, Donald "ran out the side door of his garage, jumped a wall

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portion of which provides that motor vehicle insurance policies shall include liability coverage not less than $20,000 per person, with an aggregate limit of $40,000 per accident, "for all damages arising out of accidental harm sustained as a result of any one accident and arising out of ownership, maintenance, use, loading, or unloading of a motor vehicle."

[303] *Lawrence*, 77 Haw. at 13, 881 P.2d at 500.

[304] *Id.* at 14, 881 P.2d at 501. The court then rejected the claim that First Insurance policy language provided for coverage even if the statute did not. *Id.* at 15-16, 881 P.2d at 502-03.

[305] *Id.* at 16, 881 P.2d at 503.

[306] 108 Haw. 380, 120 P.3d 1115 (2005).

[307] *Id.* at 384-85, 120 P.3d at 1119-20.

[308] *Id.* at 380, 120 P.3d at 1115.

[309] *Id.* at 382, 120 P.3d at 1117.

[310] *Id.*

[311] *Id.*

behind his house and ran to the triage area where the ambulance and firemen had congregated which was down the street from the site of the collision," an area about the length of a football field from his house.[312] Upon arriving at the triage area, Donald noticed two boys who appeared uninjured, so he knew the helicopter flying overhead was for his son.[313]

When Donald peered into the ambulance, he saw medical technicians and a fireman intubating a patient, whose face was partially covered.[314] Donald could not recognize his son until one of the medical technicians pointed out Tyrone, who was unconscious and completely unresponsive.[315] Donald realized his son's condition was serious when he saw the emergency workers intubating Tyrone, but no one could give Donald information about the extent of Tyrone's injuries other than to report that Tyrone would be flown to Queen's Medical Center.[316] The medical technician then took Tyrone from the ambulance and wheeled him by gurney to the waiting helicopter.[317] During this transport, Donald could see blood on Tyrone's face.[318]

The Moon Court identified the "sole issue" on appeal: "Whether Donald [was] precluded from making a claim on a separate policy limit of UIM coverage for his emotional distress allegedly suffered in the subject . . . motor vehicle collision, because Donald was not in the motor vehicle with his son Tyrone at the time of the collision and did not witness the actual collision itself?"[319] The court noted that "[a]lthough the parties in this case agree that, pursuant to HRS § 431:10C-306(b), Donald may not recover insurance benefits from Liberty Mutual unless he suffered emotional distress 'in' the . . . car accident, they disagree as to whether Donald was 'in' the accident for purposes of [that statute]."[320] Thus, the more fact-specific issue on appeal, according to the Moon Court, was "whether Donald, who was not a passenger in the [accident] car, did not witness the car accident, and arrived 'down the street from the site of the collision' approximately thirty minutes after the accident occurred, sustained his emotional distress 'in' the car accident" under the insurance code and could maintain an independent claim against the insurer.[321]

The Moon Court acknowledged that, in *Lawrence*, it had "recognized the potential for an independent claim by a family member for 'witnessing serious

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312 *Id.*
313 *Id.*
314 *Id.*
315 *Id.*
316 *Id.*
317 *Id.* at 383, 120 P.3d at 1118.
318 *Id.*
319 *Id.* at 384-85, 120 P.3d at 1119-20 (first brackets added and other brackets removed).
320 *Id.* at 385, 120 P.3d at 1120.
321 *Id.*

injury to a close relation coming onto the scene of the event soon thereafter[.]'"[322] However, the Moon Court ruled that the undisputed facts demonstrated that Donald did not "timely arrive at the immediate scene of the accident."[323] "Rather, Donald learned of the accident while at home and arrived at the 'triage area' which was 'down the street from the site of the collision,' . . . approximately thirty minutes after the accident occurred and saw Tyrone unconscious in the ambulance."[324] Thus, the Moon Court held that Donald was "precluded from asserting a separate and independent UIM benefits claim for his emotional distress."[325]

Justice Simeon Acoba dissented, observing that the *Lawrence* court had "acknowledged a corollary to the witness exception that included a claim of one 'timely present at the immediate scene of the accident,'" and recognized a "cause of action for witnessing serious injury to a close relation in either viewing the event causing the injury or *coming onto the scene of the event soon thereafter*."[326] "The parameters of the 'scene' and the measurement of the 'soon thereafter,'" Justice Acoba opined, should have been "issues to be determined by the fact finder on a case-by-case basis subject only to this court's determination on 'whether the case presents questions on which reasonable men would disagree.'"[327]

The significance of *Lawrence* and *Dennison* in the context of motor vehicle insurance law cannot be overstated. The classification of emotional distress claims as derivative versus independent, and the limitation of such recoveries to single versus multiple "per person" limits of insurance, help to safeguard one of the objectives of the motor vehicle insurance law—"to reduce the cost of motor vehicle insurance by establishing a uniform system of motor vehicle insurance."[328] While those who are "in" a motor vehicle accident may be entitled to assert independent NIED claims, those who are not "in" the accident and who therefore did not witness the collision are limited to asserting derivative NIED claims and recovering under the single "per person" limit available to the host claimant.

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[322] *Id.* at 388 n.8, 120 P.3d at 1123 n.8 (quoting *id.* at 389, 120 P.3d at 1124 (Acoba, J., dissenting)).

[323] *Id.* (quoting Crabtree v. State Farm Ins. Co., 632 So. 2d 736, 745 n.19 (La. 1994)).

[324] *Id.* at 388 n.8, 120 P.3d at 1123 n.8.

[325] *Id.* at 388, 120 P.3d at 1123.

[326] *Id.* at 389, 120 P.3d at 1124 (Acoba, J., dissenting) (emphasis added; citation omitted).

[327] *Id.* at 390, 120 P.3d at 1125 (quoting Rodrigues v. State, 52 Haw. 156, 175 n.8, 472 P.2d 509, 521 n.8 (1970)).

[328] AIG Haw. Ins. Co. v. Vicente, 78 Haw. 249, 256, 891 P.2d 1041, 1048 (1995) (citations and emphasis omitted). As the court stated, "the enactment of HRS ch. 431:10C benefits persons injured as a result of motor vehicle accidents, named insureds, and the automobile liability insurance industry." *Id.*

C. Settling UIM Claims without Exhausting Bodily Injury Liability Limits

In *Taylor v. Government Employees Insurance Co. (GEICO)*,[329] the Moon Court examined and ruled upon two common UIM provisions: the consent-to-settle clause and the exhaustion clause. In that case, Rosalina Taylor (Rosalina) was injured in a motor vehicle accident involving a tortfeasor insured by State Farm.[330] Rosalina and her husband, Emilio Taylor, were insured under their own automobile insurance policy, issued by GEICO, which included UIM coverage.[331] As a result of the injuries she sustained in the accident, Rosalina incurred medical expenses of $15,196.56, was given a medical discharge from the United States Navy, and obtained an economist's projection of $584,116.00 in future economic losses.[332]

After the Taylors filed suit against the tortfeasor, their attorney wrote to GEICO, the Taylors' UIM carrier, informing it that State Farm, the tortfeasor's carrier, had offered to settle the lawsuit in exchange for payment of $33,000.00, just $2000 under the State Farm limits of $35,000, subject to approval of the Taylors and GEICO.[333] The GEICO claims examiner refused to approve the settlement citing the exhaustion and consent to settle clauses of the policy.[334] The exhaustion clause of the GEICO policy provided that "we will not pay until the total of all bodily injury liability insurance available has been exhausted by payment of judgments or settlements."[335] The consent-to-settle clause provided that the UIM "coverage does not apply to bodily injury to an insured if the insured or his legal representative has made a settlement or has been awarded a judgment of his claim without our prior written consent."[336]

The Moon Court first considered the validity of the consent-to-settle clause. It held that "consent-to-settle provisions do not necessarily violate either the letter or the spirit" of the motor vehicle insurance statute.[337] However, a consent-to-settle clause, in the court's view, "does not . . . give a UIM insurance carrier carte blanche to deny UIM benefits to an insured victim."[338] Because insurers are required to act in good faith in dealing with their insureds, the court held that "a UIM carrier's grounds for denying UIM benefits under a

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[329] 90 Haw. 302, 978 P.2d 740 (1999).
[330] *Id.* at 304, 978 P.2d at 742.
[331] *Id.*
[332] *Id.*
[333] *Id.*
[334] *Id.*
[335] *Id.*
[336] *Id.* (emphasis removed).
[337] *Id.* at 309, 978 P.2d at 747.
[338] *Id.*

consent-to-settle provision in a UIM policy must be *reasonable*, in good faith, and within the bounds of the intent underlying HRS § 431:10C-301(b)(4)."[339]

Protection of the UIM carrier's subrogation right, the Moon Court noted, is a "reasonable basis for a refusal to consent to settlement."[340] Indeed, "the sole function of the consent-to-settle clause is the preservation of the subrogation right."[341] Because the UIM carrier that pays benefits "succeeds to the insured's rights against the tortfeasor," the UIM carrier may decide to pursue the tortfeasor if he or she "has sufficient assets to offset his or her lack of insurance."[342] Thus, consent-to-settle clauses serve the salient function of protecting the UIM insurer's subrogation rights.[343] The subrogation right, however, does not give the UIM carrier the right to block a liability settlement "on the unsupported assertion that it is doing so in order to protect its subrogation interests."[344] Rather, the UIM insurer must show "prejudice from the insured's failure to obtain the insurer's consent before settling with the tortfeasor."[345] Put another way, "'[i]f the carrier denies the claim of its insured *without a good faith investigation* into its merits, or if the carrier does not conduct its investigation in a reasonable time,' . . . the carrier may not deny UIM benefits to its insured."[346] In order to assess its subrogation prospects, the UIM carrier should investigate "the amount of assets held by the tortfeasor, the likelihood of recovery via subrogation, and the expenses and risks of litigating the insured's cause of action."[347]

The Moon Court then addressed the practical problem that the tortfeasor's liability insurer would unlikely agree to any settlement that does not include a general release. Such a general release, however, would prejudice the UIM carrier, whose rights, being no greater than the rights of the claimant, would then be precluded from pursuing its subrogation claim against a released tortfeasor. To address this conundrum, the Moon Court held that

> an underinsured tortfeasor's automobile insurance carrier discharges its duty to indemnify its insured when, as a condition of a good faith settlement, it provides its insured with the protection of an agreement in which the victim releases the

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[339] *Id.* (emphasis in original). Hawai'i Revised Statutes section 431:10C-301(b)(4), to which the court referred, is the statute that defines UIM insurance in the motor vehicle insurance law. *See* HAW. REV. STAT. § 431:10C-301(b)(4) (2005).

[340] *Taylor*, 90 Haw. at 310, 978 P.2d at 748.

[341] *Id.* (quoting Longworth v. Van Houten, 538 A.2d 414, 419 (N.J. 1988)).

[342] *Id.*

[343] *Id.*

[344] *Id.* at 311, 978 P.2d at 749.

[345] *Id.*

[346] *Id.* (emphasis in original; citation omitted).

[347] *Id.* (quoting Gibson v. State Farm Mut. Auto. Ins. Co., 704 N.E.2d 1, 6 (Ohio App. 1997)).

> tortfeasor from all personal claims but preserves the UIM carrier's right of subrogation.[348]

The Moon Court then turned to examine the exhaustion clause, which "requires the insured [to] settle with or obtain judgment against the tortfeasor in the full amount of the tortfeasor's own liability coverage before the UIM carrier has any payment obligations at all under the UIM coverage."[349] One effect of an exhaustion clause, the court explained, is that:

> the tortfeasor's carrier, by offering to settle for a sum somewhat less than the policy limits, can force the victim to trial solely in order to protect his UIM claim. In effect[,] then, the victim is denied the perfectly reasonable choice of saving months, if not years, of delay, trial preparation expenses, and all the ensuing wear and tear by simply accepting the offer and, as a condition of proceeding with his UIM claim, foregoing the difference between the tortfeasor's policy limit and the tortfeasor's insurer's offer.[350]

In light of these deleterious consequences of enforcing the exhaustion clause, the Moon Court held that "[w]here the best settlement available is less than the defendant's liability limits, the insured should not be forced to forego the settlement and [go] to trial in order to determine the issue of damages."[351] Importantly, however, if the plaintiff "does accept less than the tortfeasor's policy limits, his recovery against his UIM carrier must nevertheless be based on a deduction of the full policy limits."[352]

Seven years later, the Moon Court had occasion to provide more guidance to UIM insurers, insureds, and insurance law practitioners in cases where the bodily injury liability carrier offers settlement in an amount less than the policy limits. In *Granger v. Government Employees Insurance Co.*, Margaret Granger

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[348] *Id.* at 311-12, 978 P.2d at 749-50.

[349] *Id.* at 313, 978 P.2d at 751.

[350] *Id.* Under Hawai'i law, a liability insurer for a tortfeasor has no duty to negotiate a settlement in good faith with a plaintiff. Simmons v. Puu, 105 Haw. 112, 121, 94 P.3d 667, 676 (2004) (quoting Long v. McAllister, 319 N.W.2d 256, 262 (Iowa 1982)). *But see* Young v. Allstate Ins. Co., 119 Haw. 403, 426, 198 P.3d 666, 689 (2008) (holding that a plaintiff in an underlying lawsuit may assert a claim of intentional infliction of emotional distress against the third-party liability insurer of the tortfeasor in the underlying lawsuit for "conduct during the litigation" that caused the plaintiff to experience severe anxiety, worry, fear, and mental and emotional distress).

[351] *Taylor*, 90 Haw. at 313, 978 P.2d at 751 (quoting Schmidt v. Clothier, 338 N.W.2d 256, 260-61 (Minn. 1983)).

[352] *Id.* (quoting Longworth v. Van Houten, 538 A.2d 414, 423 (N.J. 1988)). In a concurring opinion, Justice Paula Nakayama admonished that the result of this case, i.e., the part permitting UIM claims to be asserted where the underlying settlement requires payment of less than the full liability limits, should not be construed by liability insurers "as carte blanche to offer lower settlements without good faith justification." *Id.* at 315, 978 P.2d at 753 (Nakayama, J., concurring).

was injured in a motor vehicle accident involving Jane Chong.[353] Granger was insured under a UIM policy issued by GEICO, and Chong was insured under an auto liability policy, with a liability limit of $100,000.00, issued by USAA.[354] After Granger filed suit against Chong, the parties agreed to a settlement under which USAA, on behalf of Chong, would pay $90,000.00.[355] Before finalizing the settlement, Granger wrote to GEICO, her UIM carrier, requesting GEICO's consent to the settlement with Chong and advising GEICO that she would be pursuing a UIM claim.[356] GEICO responded that it could neither refuse to consent nor consent to waive its subrogation right at that time; instead, it requested additional information regarding Chong's asset information, potential excess liability coverage available to Chong, and identity of other UIM carriers applicable to the loss.[357]

After conducting its investigation, GEICO advised Granger that its UIM subrogation right "appears viable," that GEICO therefore cannot consent to any bodily injury liability settlement that fully releases Chong's parents from GEICO's subrogation rights, and that it was requesting additional asset information from Chong's mother.[358] Alternatively, GEICO proposed that USAA and Granger could enter into a "*Taylor* release."[359] Chong (perhaps through her liability carrier, USAA) balked at the proposal, indicating that the settlement proposal would be withdrawn if the release provides "anything less than a full release" by Granger.[360] Granger then demanded that GEICO advance her the $90,000 that Chong (through USAA) had offered in exchange for a settlement of the liability claim.[361]

The Moon Court adopted the rule of at least eighteen jurisdictions that "after the UIM insurer has a reasonable opportunity to consider the implications of a pending settlement, it must either allow the settlement to proceed or tender to its insured a payment equal to the tortfeasor's settlement offer (up to the limits

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[353] 111 Haw. 160, 162, 140 P.3d 393, 395 (2006).

[354] *Id.*

[355] *Id.* at 163, 140 P.3d at 396.

[356] *Id.*

[357] *Id.* at 162, 140 P.3d at 395.

[358] *Id.*

[359] *Id.* The term "*Taylor* release" referred to the kind of release approved by the Moon Court in *Taylor*, whereby "the victim releases the tortfeasor from all personal claims but preserves the UIM carrier's right of subrogation." Taylor v. Gov't Emps. Ins. Co., 90 Haw. 302, 312, 978 P.2d 740, 750 (1999).

[360] Granger, 111 Haw. at 162, 140 P.3d at 395. This stalemate highlighted the practical dilemma posed by the "*Taylor* release"—how does a third-party liability insurer satisfy its obligations toward its insured if it agrees to a partial release that preserves the right of a UIM carrier to pursue subrogation claims against the insured tortfeasor?

[361] *Id.*

of the insured's UIM coverage)."[362] The court then adopted the Alabama Supreme Court's procedural guidelines for UIM claimants and their insurer in the event the claimant enters into a proposed settlement with the tortfeasor's liability carrier: (1) before finalizing the settlement, the claimant should immediately notify the UIM carrier of the proposed settlement terms; (2) the claimant should notify the UIM carrier if he or she intends to assert a UIM claim in addition to the liability settlement so the UIM carrier can determine whether it will "refuse to consent to the settlement, will waive its right of subrogation against the tortfeasor, or will deny any obligation to pay [UIM] benefits;[363] and (3) the UIM carrier should immediately investigate the claim, conclude its investigation within a reasonable period of time, and notice the UIM insured of its intended action.[364] "The insured should not settle with the tort-feasor without first allowing the [UIM] insurance carrier a reasonable time within which to investigate the insured's claim and to notify its insured of its proposed action."[365] However, if the UIM carrier "*wants to protect its subrogation rights, it must, within a reasonable time,* and, in any event before the tort-feasor is released by the carrier's insured, *advance to its insured an amount equal to the tort-feasor's settlement offer*."[366]

The *Taylor* and *Granger* decisions reasonably balanced the interests of UIM insureds and insurers in situations where, for valid reasons or not, bodily injury liability carriers refuse to contribute the entire underlying liability policy limits toward a settlement. On the one hand, the insureds' interests are protected by

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[362] *Id.* at 166, 140 P.3d at 399.

[363] Lambert v. State Farm Mut. Auto. Ins. Co., 576 So. 2d 160, 167 (Ala. 1991). This step in the Alabama Supreme Court's procedure—which the *Granger* court apparently adopted—includes two elements that appear to be at odds with dicta in *Taylor*. First, the Alabama approach appears to require the UIM claimant to notify the UIM carrier about the proposed settlement even if the claimant does not intend to assert a UIM claim. *Id.* This is contrary to the statement in *Taylor* that "an insured party who does not file a claim under his or her UIM policy is under no obligation to obtain the consent of his or her UIM insurer as a precondition to a settlement with the relevant tortfeasor or tortfeasors." *Taylor*, 90 Haw. at 309 n.5, 978 P.2d at 747 n.5. Nevertheless, if the Alabama notice requirement is construed as precautionary—as claimants may later decide to assert a UIM claim provided such a claim is still timely—then the *Taylor* dicta and Alabama element are consistent.

Second, the Alabama approach seemingly allows the UIM carrier to decide to "deny any obligation to pay [UIM] benefits." *Lambert*, 576 So. 2d at 167. However, as the *Taylor* court stated, "it would not be reasonable for a UIM carrier to deny UIM benefits under a consent-to-settle provision because it believed that the plaintiff had not actually sustained damages, or because it believed that the tortfeasor was not underinsured. These are issues that may be decided by arbitration, pursuant to the provisions of the UIM policy." *Taylor*, 90 Haw. at 314 n.11, 978 P.2d at 752 n.11.

[364] *Lambert*, 576 So. 2d at 167.

[365] *Granger*, 111 Haw. at 167, 140 P.3d at 400 (quoting *Lambert*, 576 So. 2d at 167).

[366] *Id.* (quoting *Lambert*, 576 So. 2d at 167) (emphases in original).

Taylor's invalidation of the exhaustion clause. On the other hand, the UIM insurers' interests are protected by *Taylor*'s enforcement of the consent-to-settle clause in order to protect the UIM insurers' right under *Granger* to investigate and decide, within a reasonable period of time, whether to advance the proposed bodily injury liability settlement to the UIM insured and to pursue the subrogation claim against the underinsured motorist. These two cases represent a fortunate confluence of the legal and practical aspects of handling UIM claims in Hawai'i.

What followed in 2007 was the third of the trilogy of UIM cases dealing with the consent-to-settle provision and its impact on proposed bodily injury liability settlements. In *Zane v. Liberty Mutual Fire Insurance Co.*, Dawna Zane was a passenger in a Dodge Neon manufactured by DaimlerChrysler, driven by Richard Thomas, and insured under both bodily injury liability and UIM coverages by Liberty Mutual.[367] The Neon and another vehicle, operated by Sarah Kim and insured by State Farm, collided at an intersection, rendering Zane a paraplegic.[368] Zane filed suit against Thomas, Kim, and DaimlerChrysler, the latter under products liability theories.[369] Through mediation, the parties in the lawsuit reached a settlement under which DaimlerChrysler agreed to contribute $200,000,[370] Kim agreed to pay her liability limit of $100,000, and Thomas promised to pay his liability limit of $1,350,000.[371] Zane's parents' insurer, AIG Hawai'i, agreed to pay Zane $40,000.[372] Although Zane recovered a total of $1,690,000, the parties agreed that the value of her claim exceeded that compromised figure.[373]

Thereafter, Zane asserted a UIM claim under the Liberty Mutual policy.[374] The parties agreed that Liberty Mutual initially accepted coverage, but then refused to tender the UIM benefits on the ground that Kim, the underinsured motorist from Zane's perspective, was not negligent.[375] In addition, the parties agreed that Liberty Mutual "gave prior consent to the act of settling with DaimlerChrysler and its codefendants, but disagree as to whether Liberty Mutual also represented to Zane that it understood and either agreed or did not

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[367] 115 Haw. 60, 64, 165 P.3d 961, 965 (2007).

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] *Id.*

[373] *Id.* Although the court characterized this $40,000 payment by AIG Hawai'i as a bodily injury liability payment, it may have been made pursuant to a UIM policy issued to Zane's parents and under which Zane qualified as a class one insured. It does not appear that either Zane or her parents would have been liable for Zane's injuries such that liability coverage would have been triggered under the AIG Hawai'i policy. *Id.* at 64 n.3, 165 P.3d at 965 n.3.

[374] *Id.* at 65, 165 P.3d at 966.

[375] *Id.*

dispute that DaimlerChrysler's limitless self-insurance would be excluded from the calculation of the *Taylor* 'gap.'"[376]

The Moon Court ruled that there were genuine issues of material fact as to the nature of Liberty Mutual's representations to Zane's attorneys regarding the *Taylor* gap and as to whether Liberty Mutual should be estopped from arguing that gap in the lawsuit and on appeal; accordingly, the case was remanded for further proceedings.[377] The Moon Court also addressed Zane's argument that the DaimlerChrysler settlement should not be used to compute the *Taylor* gap because that gap applies only to liable parties and because DaimlerChrysler, "having settled for what the parties agree was nuisance value rather than a liquidation of 'actual' fault, was not a tortfeasor for purposes of the *Taylor* rule."[378] In rejecting Zane's argument, the Moon Court provided the following guidance:

> We believe that the choice of whether or not to settle with any particular defendant, with its consequent benefits and detriments, remains with the plaintiff even when discovery is fruitless. We disagree with Zane's implication that adjudication, arbitration, or admission of fault is a precondition of a *Taylor* offset. We agree with Liberty Mutual that, where a UIM insured has settled with an alleged tortfeasor, the UIM insurer is not barred from discounting its financial responsibility for its insured's damages merely because the insured asserts that the defendant was not liable, regardless of (1) the defendant's "negligible" settlement amount and/or (2) the UIM insurer's consent to the *mere act of settling* (holding aside the estoppel controversy).
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> . . . [W]e believe that a plaintiff/UIM insured who names a defendant and retains the defendant in the suit all the way to settlement assumes both the potential benefit of a defendant's ample insurance and the risk that the defendant's [bodily injury liability] limit may far exceed the feasible settlement value; a defendant's settlement alone does not extinguish its "tortfeasor" status for purposes of offsetting a UIM claim.[379]

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[376] *Id.*

[377] *Id.* at 73, 76, 165 P.3d at 974, 977.

[378] *Id.* at 76, 165 P.3d at 977.

[379] *Id.* at 77, 165 P.3d at 978 (emphasis in original). As the Moon Court pointed out, Zane's argument that an actual adjudication is required for "tortfeasor" status is unavailing. In both *Taylor* and *Granger*, the tortfeasors were not adjudged to be liable, yet they were deemed "tortfeasors" for UIM purposes. *Id.* The Moon Court also relied upon a third case, *Government Employees Insurance Co. v. Dizol*, 176 F. Supp. 2d 1005 (D. Haw. 2001), in which the United States District Court for the District of Hawai'i followed *Taylor* and ruled that "amounts forgone in below[-]policy[-]limits settlement with joint tortfeasors without the UIM carrier's consent are properly used to offset the [UIM] carrier's liability." *Id.* at 1033. As the Moon Court pointed out, the *Dizol* court had also deemed the settling defendant to be a "joint tortfeasor" for UIM purposes without any formal adjudication of liability. *Zane*, 115 Haw. at

Importantly, the Moon Court pointed out that Zane raised on reconsideration an argument that DaimlerChrysler "was not an owner or operator of any vehicle, let alone an underinsured one."[380] At the heart of Zane's argument is that the motor vehicle insurance law requires UIM coverage for loss resulting from bodily injury sustained by any person "legally entitled to recover damages from *owners or operators* of underinsured motor vehicles."[381] Zane argued that "inasmuch as (1) she implicated DaimlerChrysler as a defendant upon a theory of products liability, and (2) DaimlerChrysler was not an owner or operator of a motor vehicle, DaimlerChrysler's funds 'have nothing to do with motor vehicle insurance.'"[382] The Moon Court ruled that Zane raised this argument too late and that it was "waived for purposes of this appeal"; but the Court noted that Zane was "free to raise it on remand."[383]

Unfortunately for the legal and insurance communities, an appellate resolution of Zane's new argument—that the *Taylor* gap is inapplicable to joint tortfeasors who are neither owners nor operators of underinsured motor vehicles—must wait another day. On its face, however, the argument finds support in the wording of the motor vehicle insurance statute, which requires UIM coverage to apply when an insured is "legally entitled to recover damages from *owners or operators* of underinsured motor vehicles."[384]

77, 165 P.3d at 978.

[380] *Zane*, 115 Haw. at 76, 165 P.3d at 977.

[381] HAW. REV. STAT. § 431:10C-301(b)(4) (2005) (emphasis added).

[382] *Zane*, 115 Haw. at 76, 165 P.3d at 977.

[383] *Id.*

[384] HAW. REV. STAT. § 431:10C-301(b)(4) (emphasis added). Notably, the statute does not require UIM coverage only when the accident, or, put another way, all tortfeasors, are underinsured. Moreover, the wording of the UIM endorsement available for use by insurers provides in part that "[i]f we make any payment and the 'insured' *recovers from another party*, the 'insured' shall hold the proceeds in trust for us and pay us back the amount we have paid." This condition in the UIM endorsement could be construed to apply to situations where the UIM policy pays, because an underinsured motorist is deemed at fault, in advance of a settlement or judgment against other joint tortfeasors.

In *AIG Hawaii Insurance Co. v. Rutledge*, 87 Haw. 337, 955 P.2d 1069 (App. 1998), a UM (rather than a UIM) policy issued by AIG Hawai'i included a similar condition, stating: "If [AIG] make[s] a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall hold in trust for us the proceeds of the recovery and shall reimburse us to the extent of our payment." *Id.* at 339, 955 P.2d at 1071.

The ICA, in a unanimous decision written by then-Judge Acoba, held that "when an insured motorist, who has received uninsured motorist (UM) benefits from his or her insurer as a result of a motor vehicle accident with an uninsured motorist, obtains a tort recovery from the uninsured motorist or a *party jointly liable* which fully compensates the insured for damages sustained in the accident, the insurer may enforce a policy provision requiring the insured motorist to reimburse the insurer for UM benefits paid." *Id.* at 338, 955 P.2d at 1070 (emphasis added).

As the foregoing demonstrates, the Moon Court actively adjudicated issues involving the motor vehicle insurance law that, while sometimes perplexing or frustrating, ultimately provides insurance law practitioners, insurers, insureds, and claimants with a better understanding of the law. The Moon Court broadly construed the definitions of "covered person" or "insureds" under automobile insurance policies; limited emotional distress claims that are derivative in nature to the "per person" limit of insurance applicable to the "host" injured plaintiff; and provided guidance in the settlement of UIM claims when the UIM carrier seeks to preserve its subrogation rights against the underinsured motorist and/or when the bodily injury liability carrier does not settle for its policy limit.

VII. CONCLUSION

The Moon Court years were active in insurance law. Chief Justice Moon and his colleagues on the court brought extensive prior judicial and practice experience in insurance to the decisions they rendered. Although these cases resolved important issues that were previously unanswered in Hawai'i, the court more often than not broke little new ground. Instead, the decisions involved weighing approaches developed elsewhere.

In examining the choices the court made, it is difficult to characterize the body of decisions as either "pro-insured" or "pro-insurer," either by a simple tally or by examining the underlying policies it articulated. For example, in *Sentinel* and in *Best Place*, cases generally helpful to insureds, the court declined to adopt rules that would penalize insurers who make reasonable but erroneous decisions to the detriment of insureds, even in cases where the insurer seemingly gambles on an outcome at the expense of its insured. On the other hand, in areas of coverage, as in *Sentinel* in the CGL area or *Dawes* in the auto cases, it adopted a broad view that favored insureds.

One cannot minimize how valuable it is in insurance cases just to have important issues resolved, because certainty reduces transaction costs and expedites resolution of claims. Certainly, attorneys welcomed *Finley* because it answered the fundamental question: "Who do I work for?" The cost of uncertainty in insurance law takes a toll on all parties. Regardless of whether any single case was rightly or wrongly decided, having answers proves to have its own value.

"Paying Rent": The Access to Justice Movement During the Moon Years

Calvin Pang*

"C.J.'s father used to say that public service is the rent we pay for the space we occupy on earth."

Thomas Keller, Administrative Director for the Courts (ret.), explaining Chief Justice Moon's passion for public service.[1]

I. INTRODUCTION

Chief Justice Ronald Moon often told this "Paying Rent" story to preface his public remarks on the responsibility of attorneys to serve the legal needs of the poor. He told it often enough that some listeners wondered if he had forgotten his previous recountings or if he just deeply believed in the wisdom of his father. From other stories he shared about his parents during his tenure as chief justice, the latter is the likely explanation.

Although the demands of the court and the state judiciary made it difficult for him to focus on the legal needs of the poor, Chief Justice Moon was considered an ally by those who advocated for disadvantaged individuals and groups. Steadily encouraging, he opened his door to key leaders of the local Access to Justice Movement, was willing to listen, and gladly pitched in whenever a project or event needed his presence and imprimatur. Getting support from the head of the judiciary was important in a period of notable economic and social changes that exacerbated the grim access to justice picture in Hawai'i, which was never good to begin with. Although some criticized his support as short of what was needed to open the courthouse doors to all, Chief Justice Moon never let the "access" message go dead, which accounted for the periodic retellings of his "Paying Rent" story.

This article attempts to capture the challenges of the Access to Justice Movement[2] during Ronald Moon's 1993-2010 tenure as chief justice, and

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[1] Susan Pang Gochros, *Aloha, Chief Justice Moon*, HAW. B.J., Sept. 2010, at 4, 10.

[2] In this article, the "Access to Justice Movement" refers to the historical growth and evolution of access to justice efforts in the State of Hawai'i. The author acknowledges that this is a narrow construction. A broader construction would contemplate other dimensions of "movement," for example, one that might look beyond finding adequate legal assistance

the efforts to respond to the challenges. Although the journey remains steep, the Movement continues to place one foot ahead of the other in sometimes halting but always forward steps. To see the way, a light needs to be present. Many, including Chief Justice Moon, have contributed the necessary illumination.

The seventeen years during which Chief Justice Moon served at the helm of the judiciary witnessed a few vigorous strides in the Access to Justice Movement. However, as with all periods of expansion and maturation, these seventeen years also saw "growing pains." Hopefully, these difficult experiences have given the Movement new muscle to redouble its effort at achieving what Chief Justice Moon called "meaningful access" without which "the law simply becomes an unfulfilled promise."[3] Certainly, the birth and growth of the Hawai'i Access to Justice Commission in the last three years provide a recent measure of this effort. However, the story of the Movement has never been about one accomplishment or event, no matter how momentous, and its chapters continue to be written. This essay presents several glimpses of this story as it unfolded during Chief Justice Moon's tenure.

II. STEPPING THROUGH A PERIOD OF CHANGE

The year 1990 recorded not only the appointment of Ronald Moon as an associate justice to the Hawai'i Supreme Court, but also a loud "pop" as a period of economic well-being for the state suddenly stalled. The pop was in large part due to the collapse of the "bubble" of Japanese real estate investments in the islands.[4] Combined with the start of a recession in the

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for each indigent person with a legitimate legal need, and instead "ooze" toward mechanisms, even extra-legal ones, that provide individuals with a just solution. That is a topic for another article.

[3] Ronald T.Y. Moon, Chief Justice, Haw. Sup. Ct., Address at the Hawai'i Justice Foundation Annual Meeting (Nov. 4, 2004), *available at* http://www.courts.state.hi.us/news_and_reports/speeches/2004/11/november_4_2004.html.

[4] Tiffany Hill et al., *The Japanese Real Estate Bubble Pops—December 1990*, HONOLULU, Aug. 2009, at 75, *available at* http://www.honolulumagazine.com/Honolulu-Magazine/August-2009/50-Moments-of-Statehood/1990s/index.php. At the height of the Japanese investment boom in Hawai'i, Japanese investors owned 11% of the total value of real property in the state and 65% of hotel rooms. This was part of the $3.8 billion dollars Japanese citizens poured into the local economy. *Hawai'i Timeline: 1990*, HawaiianHistory.org, http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&year=1990 (last visited Feb. 5, 2011). However, as the 1990s approached, the Japanese economy plummeted, and with it, Japanese real estate investments in Hawai'i. *Hawai'i Timeline: 1989*, HawaiianHistory.org, http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&year=1989 (last visited Feb. 5, 2011).

United States, the closure of California military bases and defense plants, and the uncertainty of air travel following the 1991 Gulf War,[5] the withdrawal of Japanese investment reduced the flow of economic spigots to the state. This meant rising unemployment, less construction, and the slowing of retailing. Declines in both the American and Japanese economies caused visitor counts to stagnate, if not drop.[6] This loss of tourism dollars could no longer be offset by other major industries, specifically sugar and pineapple production, which were already in severe decline, if not altogether stopped.[7] Not surprisingly, real per capita personal income did not change through most of the 1990s.[8]

At the end of the decade, a recovery slowly developed in the state.[9] This recovery continued through summer 2001 despite a slowing U.S. economy.[10] Unfortunately, it abruptly halted with the terrorism attack of September 11, 2001, as domestic and foreign tourism declined sharply in response to air travel concerns.[11]

Predictably, the state's economic decline struck hardest those who lived at the margins, with little reserve to withstand a prolonged assault on the state's financial well-being. U.S. Census Bureau figures in 2000 reported that poverty grew in Hawai'i by an astounding thirty-eight percent between 1989 and 1999, representing an increase of over 6000 impoverished families.[12] Strikingly, the same period saw a forty-five percent boost in the

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[5] Sumner J. LaCroix, *The Economic History of Hawai'i: A Short Introduction* 13-14 (Univ. of Haw. Dep't of Econ. Working Paper No. 02-3, Jan. 2002), *available at* http://www.economics.hawaii.edu/research/workingpapers/WP_02-3.pdf.

[6] HAW. STATE DEP'T OF BUS., ECON. DEV. & TOURISM, HAWAI'I'S ECONOMY 1 (1999), *available at* http://hawaii.gov/dbedt/info/economic/data_reports/hawaii-econ/he7-99.pdf.

[7] *See* LaCroix, *supra* note 5, at 14.

[8] *Id.*

[9] Kelli Abe Trifonovitch, *Let the Good Times Roll—Again*, HAW. BUS., Aug. 2000, at 18, 18, *available at* /http://www.hawaiibusiness.com/Hawai'i-Business /August-2000/Let-The-Good-Times-Roll-Again.

[10] LaCroix, *supra* note 5, at 14.

[11] *Id.*

[12] Lynda Arakawa, *People in Poverty Increasing in Hawai'i*, HONOLULU ADVERTISER, May 14, 2002, *available at* http://the.honoluluadvertiser.com/article/2002 /May/14/ln/ln08a.html. A recent release of U.S. Census figures indicates that Hawai'i has never quite broken free from this surge. As reported by the *Honolulu Star-Advertiser* on September 17, 2010, poverty in Hawai'i now stands at its highest since 1997 with 12.5% of the population, or approximately 156,000 individuals, living at or below the federal poverty level for the state. Mary Vorsino, *Poverty in Hawai'i Highest Since '97*, HONOLULU STAR-ADVERTISER, Sept. 17, 2010, at A1. Most startling is the number of impoverished children—nineteen percent of all children in Hawai'i, up almost five percent from the year before. *Id.*

number of poor families headed by single women.[13] Some of the poverty rate increase was attributed to a sizeable influx of foreign-born nationals with limited earning capacity.[14] But most of it was attributable to the stagnant state economy.[15]

One social phenomenon festered into a painful sore through the 1990s and impacted the amount and character of legal need among financially vulnerable groups. As reported by legal and social services providers, the scourge of the methamphetamine epidemic in Hawai'i, which began in the late 1980s,[16] brought further heartache, especially among those without resources to buffer its impact.[17] The grip of ice addiction disrupted the fabric of many households, causing violent crimes, domestic violence, family dissolution, homelessness, financial distress, and other social ills to deepen.[18] At least anecdotally, this exacerbated an already crushing need

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[13] Vorsino, *supra* note 12, at A1.

[14] *Id.*

[15] This was the observation of Professor Sylvia Yuen, director of the Center on the Family at the University of Hawai'i at Mānoa. *Id.*

[16] The drug first arrived in Hawai'i in the 1980s from Taiwan and South Korea, and its use became widespread in Hawai'i by 1988. KCI: The Anti-Meth Site, *Methamphetamine FAQ*, http://www.kci.org/meth_info/faq_meth.htm (last visited Feb. 5, 2011).

[17] The National Drug Intelligence Center (NDIC) reported that methamphetamine abuse "more than doubled from 1994 through 2000." Nat'l Drug Intelligence Ctr., Hawai'i Drug Threat Assessment (2002), *available at* http://www.justice.gov/ndic/pubs07/998/meth.htm. The Center found that by 2000, Honolulu had the highest percentage of adult male arrestees who tested positive for methamphetamines among cities tracked by the Center. *Id.*

[18] These were detailed in a series of articles published in the *Honolulu Advertiser* from September 14 through September 16, 2003. Written by journalist Kevin Dayton, the series detailed the short- and long-term social, physical, psychological, and financial devastation cause by methamphetamine addiction in Hawai'i. This series is available at http://the.honoluluadvertiser.com/current/ln/childrenofice.

Describing the destructive cost of addiction upon the methamphetamine user and those around him, Charles Goodwin, special agent in charge of the Honolulu FBI Division, provided this testimony in 2002 to the U.S. House Government Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources:

> Crystal methamphetamine, commonly known as ice, is the drug of choice in Hawai'i. The sale, use and transportation of crystal methamphetamine in Hawai'i has had a devastating impact on all of Hawaiian society. As we all are acutely aware, crystal methamphetamine tears away at the inner fabric of Hawai'i. Crystal methamphetamine brings violence to our streets. Crystal methamphetamine wastes young lives and wreak[s] havoc on families. Crystal methamphetamine saps millions of dollars out of our economy every year. . . . In 2002, U.S. Attorney Ed Kubo stated that crystal methamphetamine had been associated with over 90 percent of confirmed child abuse cases.

Hearing Before the Subcomm. on Criminal Justice, Drug Policy & Human Res. of the H. Comm. on Oversight & Gov't Reform, 108th Cong. (2004) (statement of Charles L.

for legal intervention among the poor. To add insult to injury, because much of the drug was imported, its sales, estimated at over $400 million annually, meant that money drained from the state, further straining its economic health.[19]

From this mix of economic and social factors, a litany of legal problems followed. Flooding the offices of legal services providers were individuals who reported evictions, insurmountable debts and relentless debt collectors, the surrender of property including homes, family unravelings, the failure of increasingly porous and thinned government safety nets, the loss of children due to alleged parental neglect or abuse of children, and other problems.

Responding to this cry for help was daunting, but the 1990s saw a maturing of access to justice groups that were resolved to lean into the growing community need. The decade saw veteran organizations adjust their tack to changing realities, and newer groups sprout and blossom. Growing pains were inevitable, and by the end of the 1990s, palpable tensions emerged among some of the principal members of the local Access to Justice Movement. Yet, united by the common and enduring vision of equal justice to all, Movement members have always found a way to come back together and confront the unrelenting need for legal services among the poor. As noted below, legal needs assessments performed in 1993 and 2007 stated what everyone knew: the level of need was deep, maybe even overwhelming, but giving up was not an option. Throughout Ronald Moon's term as chief justice, legal services providers understood this and found new—although not always ideal—ways to stay alive and fight another day.

A. The Growth of the Legal Services Provider Community

As the 1990s began, the cadre of legal services providers whose core mission targeted the legal needs of the poor stood on ground that was freshly tilled and ripe for opportunity. In some cases, the opportunity emerged

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Goodwin, Special Agent in Charge, Honolulu Div., Fed. Bureau of Investigation), *available at* http://www.fbi.gov/news/testimony/the-poisoning-of-paradise-crystal-methamphetamine-in-hawaii.

[19] The NDIC described criminal elements from Mexico and Asia as the main source of the drug. Nat'l Drug Intelligence Ctr., *supra* note 17. Another financial dimension of methamphetamine use is the cost of treating users, which now number about 14,000. Hospitalizations (Inpatient and Ed) for Methamphetamine—Hawaii, Haw. Health Info. Corp., http://hhic.org/meth.asp (last updated Nov. 27, 2007). Relatively recent information from the Hawai'i Health Information Corporation indicate that between 2000 and 2006, the hospitalization rate per 100,000 Hawai'i residents due to methamphetamine increased forty-one percent, with much of it coming from the financially strapped Wai'anae coast. *Id.* Hospitalization and emergency room treatment cost $43 million in 2006, sixty-six percent of it from state coffers. *Id.*

from hardship. The largest and oldest of these groups, the Legal Aid Society of Hawai'i (LAS), was coming to grips with a scathing 1991 report from its principal federal funder, which characterized the public interest law firm as a "troubled grantee."[20] The report described the loss of experienced staff, the shuttering of offices and intake hours, lost grants, and generally reduced legal services to the poor.[21] Although a competing report from a trio of consultants found the firm healthier than described in the funder's report,[22] LAS continued to grapple with huge cuts. These cuts began a few years earlier when an unsympathetic federal administration slashed allocations to legal aid groups nationally and imposed restrictions that hamstrung these groups from pursuing certain activities, such as class action litigation, welfare reform lobbying, and representation of certain non-citizen individuals.[23] With the crippled state economy, LAS could not count on local government to buffer the disappearance of federal funds. The remainder of the decade would see LAS aggressively develop creative strategies to remain financially viable; however, these carried their own costs.

While LAS battled to regain solid footing, other public interest law groups established in the 1980s found their legs. Established in 1981 to complement LAS's direct legal services to the poor,[24] Hawai'i Lawyers Care (HLC) celebrated its first decade of existence as the community's formal pro bono law program with the hiring of its first full-time pro bono coordinator.[25] Its trajectory looked promising as the availability and growth of Interest on Lawyers' Trust Account (IOLTA) funds[26] soared and

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[20] LEGAL SERVS. CORP., REPORT OF THE LEGAL SERVICES CORPORATION ON THE LEGAL AID SOCIETY OF HAWAI'I: FINDINGS AND RECOMMENDATIONS 16 (1991).

[21] *Id.*

[22] *See generally* JOHN A. TULL, MARTHA BERGMARK & HARRISON MCIVER, REPORT AND RECOMMENDATIONS TO THE BOARD OF DIRECTORS OF THE LEGAL AID SOCIETY OF HAWAI'I (1991).

[23] THE SPANGENBERG GROUP, ASSESSMENT OF CIVIL LEGAL NEEDS OF LOW- AND MODERATE-INCOME PEOPLE IN HAWAI'I 13, 23 (1993) [hereinafter THE SPANGENBERG REPORT]; *see also* Alan W. Houseman & Linda E. Perle, *What You May and May Not Do Under the Legal Services Corporation Restrictions*, *in* NAT'L CTR. ON POVERTY LAW, POVERTY LAW MANUAL FOR THE NEW LAWYER 242, 243-45 (2002), *available at* http://www.povertylaw.org/poverty-law-library/research-guides/poverty-law-manual/housman-perle.pdf (last visited Feb. 5, 2011).

[24] Tammy Laurence, *Hawai'i Lawyers Care—Past, Present and Future (Part One)*, HAW. B.J., May 1992, at 29, 29.

[25] Thomas Stirling, *Report of the HSBA Standing Committee on Delivery of Legal Services to the Public*, *in* HAWAII STATE BAR ASSOCIATION 1991 ANNUAL REPORT, HAW. B. NEWS, Feb. 1992, at S-6.

[26] Tammy Laurence, *Hawai'i Lawyers Care—Past, Present and Future (Part Two)*, HAW. B.J., June 1992, at 15, 15. In 1983, the Hawai'i Bar Foundation became responsible

the Hawai'i Bar Foundation, the administrator of these funds, strategically committed its resources to groups, such as HLC, that directly delivered legal services to the poor.[27] Indeed, through the remainder of the decade, HLC regularly received the largest of the many awards granted by the Foundation.[28] Its staff, physical facilities, and programs enjoyed noteworthy growth through the decade. However, by the end of the decade, HLC's clout would become a sore point as it competed for shrinking resources to sustain its position and cultivate further growth.

The Hawai'i Bar Foundation experienced its own surge in the 1990s. Established in 1969 "to support other non-profit agencies operating in law-related fields," the Foundation assumed responsibility for administering IOLTA funds in 1983.[29] In 1991, the Hawai'i Supreme Court required all attorneys who established client trust accounts to participate in the IOLTA program.[30] Participation meant transferring the interest accrued on such accounts into the IOLTA program. This quickly and significantly enlarged the Foundation's capacity as a funding source. Indeed, IOLTA income shot from about $50,000 to over $550,000 from 1985 to 1996, peaking at $736,000 just a year after IOLTA participation became mandatory.[31] With a suddenly larger pot to draw from, the Foundation, which renamed itself the Hawai'i Justice Foundation to reflect its broadening mission,[32] was well-positioned to support and influence the growth of the Access to Justice Movement in the century's last decade. Its handprint would be everywhere from financial grants to major public interest law organizations on all islands to the establishment of a statewide legal hotline for the poor (dubbed the Information System Legal Aid Network Statewide or "ISLANS").[33]

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for administering and distributing funds. Peter S. Adler, *Lawyers and Philanthropy: The Hawai'i Justice Foundation Comes of Age*, HAW. B.J., Dec. 1996, at 9, 10, 12 [hereinafter Adler, *Lawyers and Philanthropy*]; Peter S. Adler, *What is the Hawai'i Bar Foundation?*, HAW. B.J., July 1992, at 18, 18 [hereinafter Adler, *Hawai'i Bar Foundation*].

[27] Adler, *Lawyers and Philanthropy*, *supra* note 26, at 12.

[28] *E.g.*, HAW. JUSTICE FOUND., 1996 ANNUAL REPORT 6 (1997) (showing HLC with the highest award among all grantees in 1996 with an award $110,000) [hereinafter HJF 1996 Report]; HAW. JUSTICE FOUND., 1997 ANNUAL REPORT 3 (1998) (showing HLC with the largest regular grants totaling $60,000 in 1997) [hereinafter HJF 1997 Report]. *See also infra* note 51.

[29] Adler, *Lawyers and Philanthropy*, *supra* note 26, at 10, 12; Adler, *Hawai'i Bar Foundation*, *supra* note 26, at 18.

[30] HJF 1996 Report, *supra* note 28, at 5; Adler, *Lawyers and Philanthropy*, *supra* note 26, at 12.

[31] *See id.*

[32] Adler, *Lawyers and Philanthropy*, *supra* note 26, at 10, 12; Adler, *Hawai'i Bar Foundation*, *supra* note 26, at 18.

[33] Adler, *Lawyers and Philanthropy*, *supra* note 26, at 14-16.

Smaller, equally important public interest law firms serving "niche" populations also staked their place in the community. In 1991, the Domestic Violence Clearinghouse and Legal Hotline began its work of providing legal information and advocacy for victims of domestic violence.[34] In the same year, the University of Hawai'i Elder Law Program, serving financially and socially needy older adults, opened its doors at the William S. Richardson School of Law where it remains a center of elder law activity and provides opportunities for budding lawyers to assist older adults in the community.[35] Representing impoverished immigrants, Na Loio No Na Kanaka continued to toil from its humble offices at Palama Settlement where it was founded in 1983,[36] largely in response to federal restrictions that barred local Legal Aid offices from working with immigrant populations.[37] Moving forward too was the Native Hawaiian Legal Corporation, which started as a volunteer-run referral service, but in the 1980s grew into a full-service law firm for Hawaiian individuals who needed legal assistance, especially with land-related and traditional rights issues.[38] Other fledgling legal clinics, including the Life Foundation Legal Clinic (for individuals diagnosed with HIV or AIDS)[39] and the Maximum Legal Services Disabled Rights Project (special education and conservatorships),[40] continued to

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[34] Domestic Violence Action Center, http://www.stoptheviolence.org/about-us (last visited Feb. 5, 2011); *see also* Daniel G. Heely, *Family Court Bulletin—The Domestic Violence Clearinghouse Project*, HAW. B. NEWS, Aug. 1991, at 9, 9.

[35] Univ. of Haw. Elder Law Program, http://hawaii.edu/uhelp/staff.htm (last visited Feb. 5, 2011); *see also* James H. Pietsch, *Legal Issues Concerning Medical Treatment Decisions*, HAW. B.J., Dec. 1995, at 28, 30 n.2.

[36] *See generally Non-Profits Come Together in Tough Times: Hawai'i Immigrant Center Joins the Legal Aid Society of Hawai'i*, HAW. B.J., Mar. 2010, at 26, 26; *see also* HAW. IMMIGRANT JUSTICE CTR., http://www.hijcenter.org (last visited Feb. 5, 2011).

[37] *See* Houseman & Perle, *supra* note 23, at 244-45.

[38] NATIVE HAWAIIAN LEGAL CORP., http://nhlchi.org/ (last visited Feb. 5, 2011); *see also* THE SPANGENBERG REPORT, *supra* note 23, at 170-71.

[39] THE SPANGENBERG REPORT, *supra* note 23, at 208-09; *cf.* HJF 1996 Report, *supra* note 28, at 6 (showing a $3000 grant to Life Foundation to help train lawyers and provide HIV-related legal services); HJF 1997 Report, *supra* note 28, at 3 (showing a $5000 grant to Life Foundation to train seven volunteer lawyers to assist 224 HIV clients).

[40] *See generally* MAXIMUM LEGAL SERVS. CORP., HARRY & JEANETTE WEINBERG KUKUI CTR., http://kukuicenter.org/maximum-legal-services-corporation/ (last visited Feb. 5, 2011); THE SPANGENBERG REPORT, *supra* note 23, at 210-11; HAW. JUSTICE FOUND. ET AL., ACHIEVING ACCESS TO JUSTICE FOR HAWAI'I'S PEOPLE: THE COMMUNITY WIDE ACTION PLAN: TEN ACTION STEPS TO INCREASE ACCESS TO JUSTICE IN HAWAI'I BY 2010 AND THE 2007 ASSESSMENT OF CIVIC LEGAL NEEDS AND BARRIERS OF LOW-AND MODERATE-INCOME PEOPLE IN HAWAI'I I-B (2007) [hereinafter HAWAI'I 2007 LEGAL NEEDS ASSESSMENT].

trudge forward to provide legal assistance to communities of need that were either newly identified or found new emphasis in the 1980s.[41]

B. Developing a Culture of Pro Bono Consciousness

The year Chief Justice Moon assumed the helm of the Hawai'i State Judiciary coincided with the end of the Hawai'i state bar's two-year experiment with voluntary pro bono. In 1991, the bar's Committee on the Delivery of Legal Services to the Public (DLSP) concluded a multi-year study and debate on whether mandatory pro bono should be imposed on licensed attorneys in Hawai'i.[42] Already chafing from a decision a few years before to require membership in the Hawai'i State Bar Association, some bar members strongly opposed what they viewed as further intrusion.[43]

In 1991, DLSP proposed the two-year experiment to determine if voluntary pro bono participation would be sufficiently beneficial to avoid imposing a mandatory obligation. Under the plan, each attorney was asked to perform twenty-four hours of pro bono work annually.[44] Notably, at about the same time, the William S. Richardson School of Law adopted its sixty-hour pro

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[41] THE SPANGENBERG REPORT, *supra* note 23, at 2. An additional organization, Protection and Advocacy Agency of Hawai'i, which provided a mix of legal and social advocacy for disabled individuals, continued to thrive in the 1990s. *Id.* at 211. Originally founded in the late 1970s, this agency fulfilled a federal mandate under the Developmental Disabilities Assistance and Bill of Rights Act of 1975 and subsequently assumed other responsibilities under federal laws that secure the legal, civil, and human rights of disabled individuals. HAW. DISABILITY RIGHTS CTR., http://hawaiidisabilityrights.org/Center_Mission.aspx (last visited Feb. 5, 2011). Renamed the Hawai'i Disability Rights Center in 2000, it continues to provide a legal voice for the developmentally disabled, the mentally ill, and other groups with disabilities on all major islands. *Id.*

[42] On April 18, 1991, the Directors of the Hawai'i State Bar Association adopted a Pro Bono Resolution that "[e]ncourage[d] each of its members to make an individual commitment to perform at least two (2) hours per month of pro bono legal service, and/or to have at least one pro bono matter ongoing at all times." *Pro Bono Resolution HSBA Board of Directors*, HAW. B. NEWS, June 1991, at 14, 14. This resolution followed a multi-year evaluation by the HSBA's Standing Committee on the Delivery of Legal Services to the Public of two proposals: one for mandatory pro bono, another for voluntary pro bono. Sheryl L. Nicholson, *Delivery of Legal Services to the Public*, *in* HAWAII STATE BAR ASSOCIATION 1990 ANNUAL REPORT, HAW. B. NEWS, Feb. 1991, at S-6. In the end, the latter approach prevailed. *See* Victor Geminiani, *Reinventing Pro Bono Service in Hawai'i*, HAW. B.J., Dec. 2004, at 9, 9-10.

[43] This resistance explained the position of then-incoming HSBA President Paul Alston, a strong advocate for mandatory pro bono activity, "to give[] up on mandatory pro bono for this year." Carol Muranaka, *Paul Alston: A Cheerleader, an Idealist*, HAW. B. NEWS, Jan. 1991, at 14, 17. He explained, "It's not worth fighting." *Id.*

[44] Val Tavai, *Yes, Virginia, Attorneys in Hawai'i Provide Pro Bono*, HAW. B.J., Dec. 1992, at 8, 8; Thomas L. Stirling, *supra* note 25, at S-6.

bono requirement for graduation, thus becoming one of the first law schools in the nation to do so.[45] Ironically, one of the main concerns regarding this requirement was the insufficiency of pro bono opportunities and supervision from traditional legal services providers and attorneys accepting pro bono cases.[46] This helped explain the decision to allow students to fulfill their pro bono requirement through judicial clerkships and other government placements.[47]

At the end of the two-year experiment, the bar decided not to revisit the "mandatory v. voluntary" debate.[48] Instead, it directed its attention to a newly proposed model rule for pro bono activity promulgated by the American Bar Association.[49] Now known as "Rule 6.1," the proposed rule urged attorneys to aspire to fifty hours of pro bono legal work annually.[50] Limiting pro bono work to law-related activities[51] that alleviated the legal needs of indigents, the proposed rule also allowed attorneys to make a voluntary financial contribution to law-related organizations working with financially needy groups if personal or employment circumstances made it difficult or impossible to engage in pro bono work.[52] Before the end of 1993, the bar submitted the proposal to the Moon-led Hawai'i Supreme Court for adoption, which the court quickly did. In doing so, it established Hawai'i as the first state to adopt Rule 6.1 in its Code of Professional Responsibility.[53]

The adoption of the rule did not cause a sea of change in attitudes about pro bono, but its presence helped sustain the conversation about a lawyer's

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[45] William S. Richardson Sch. of Law, Univ. of Haw. at Mānoa, *Pro Bono Program*, http://www.law.hawaii.edu/pro-bono-program (last visited Feb. 5, 2011). The requirement was adopted in 1992 and first applied to the entering class that year. *Id.*

[46] E-mail from Jim Pietsch, Professor, William S. Richardson Sch. of Law, Univ. of Haw. at Mānoa, to author (Dec. 31, 2010, 10:25 HST) (on file with author).

[47] *Id.*

[48] John Yamano, *Report of the HSBA Standing Committee on Delivery of Legal Services to the Public*, *in* HAWAII STATE BAR ASSOCIATION 1992 ANNUAL REPORT, HAW. B. NEWS, Feb. 1993, at S-6.

[49] *Id.*

[50] Coralie Chun Matayoshi, *New Year Brings New Commitment to Pro Bono*, HAW. B.J., Jan. 1994, at 7.

[51] The comments that were ultimately adopted with Rule 6.1 described "legal services" to include "a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making, and the provision of free training or mentoring of those who represent persons of limited means." HAW. R. PROF'L CONDUCT 6.1 cmt. This variety was intended to offer opportunities for attorneys, such as those employed by the government, to engage in work that did not involve the traditional attorney-client relationship.

[52] *Id.* at 6.1(b)(3).

[53] Matayoshi, *supra* note 50, at 7.

pro bono service obligations. It also provided leverage for continued growth in the pro bono sector. As stated earlier, Hawai'i Lawyers Care firmly gained its foothold by the early 1990s and was positioned to grow.[54] Its importance was underscored by the appearance of a "dues check-off" for Hawai'i Lawyers Care in the 1990 HSBA Annual Attorney Registration Form.[55] This gave every attorney in the state an opportunity to donate to the organization while completing his or her annual registration. With both Rule 6.1 and increased IOLTA funding[56] at its back, HLC leaped to prominence, moving from a small room adjacent to the state bar office to a multi-room suite located in a new building near the state circuit court in Honolulu.[57] It established a regular quarterly newsletter in the Hawai'i Bar Journal.[58] It expanded its community legal clinics where attorneys, almost all working pro bono, dispensed advice and brief service in substantive areas like family law, taxes, and non-profit organizations.[59] It also targeted special populations like homeless individuals and families, children, and domestic violence victims, creating special units and adding new hires to staff them.[60] To reflect the expansion of its mission and work, it also adopted a new name in 1999: Volunteer Legal Services Hawai'i.[61]

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[54] With the hiring of its first full-time pro bono coordinator, Val Tavai, HLC began laying down new infrastructure for lawyer pro bono activities in the state. Thomas Stirling, then-chair of the HSBA's DLSP Committee, queried whether DLSP had any more to do in light of HLC's willingness and apparent capacity to singlehandedly grab the reins of the pro bono movement in the community. *See* Stirling, *supra* note 25, at S-6.

[55] When first established in 1990, the suggested donation was $40. THE SPANGENBERG REPORT, *supra* note 23, at 216. The early years of the check-off option annually raised about $63,000 for HLC. *Id.* This dues check-off continues to this day. Over the past few years, other legal services providers have requested that the dues check-off be broadened to benefit public interest firms other than HLC, now known as Volunteer Legal Services Hawai'i. *E.g.*, Minutes of the Hawai'i State Bar Association Board of Directors 4-5 (June 19, 2003) (reporting LAS's and the Domestic Violence Clearinghouse and Legal Hotline's request to be listed in the voluntary donation check-off).

[56] Between 1983 and 1996, HLC received over $1,000,000 from the Hawai'i Justice Foundation and was acknowledged as the Foundation's biggest recipient during this period. ANN BARTSCH, FRANK CHONG & WILLIAM DODD, REPORT OF PROGRAM EVALUATION – HAWAI'I LAWYERS CARE 1, 1 (July 1996).

[57] *See Volunteer Legal Services Newsletter*, HAW. B.J., Sept. 1999, at 25, 25, 27.

[58] For many years, HLC had a regular although small presence in the Hawai'i Bar News which later became the Hawai'i Bar Journal. This evolved into an end-of-the year "focus on pro bono" issue in December of each year, starting in 1991. These issues more often than not spotlighted HLC activities. Beginning in 1997, the Journal began to publish quarterly HLC newsletters.

[59] *See* Stacy Fukuhara-Barclay, *Volunteering Made Easy*, HAW. B.J., Dec. 2004, at 14, 14-15; *cf. Volunteer Legal Services Newsletter*, HAW. B.J., Mar. 2001, at 25, 26-31.

[60] Fukuhara-Barclay, *supra* note 59, at 14. Remarkably, the staff at VLSH (formerly known as HLC) grew from less than a handful at the start of the 1990s to as many as

This momentum received an additional boost with a Honolulu Pro Bono Summit convened by Chief Justice Moon.[62] The summit assembled every Honolulu law firm with five or more attorneys and gave rise to a frank conversation on barriers to pro bono experienced by attorneys and how these barriers could be surmounted. Following this summit, each firm committed to developing or refining its Pro Bono Implementation Plan for submission to Chief Justice Moon.[63]

In sum, the first several years surrounding the start of Chief Justice Moon's tenure saw a flexing of the "pro bono arm" of the Access to Justice Movement. It clearly had energy sparked by an ascendant pro bono organization, a new professional conduct rule, willing funders, community leadership, and institutional support. Although the challenge of recruiting, retaining, training, and supporting pro bono attorneys was never easy, a sense of hope pervaded the 1990s and into the twenty-first century that attorneys would respond to what should be among the profession's core responsibilities: alleviating the legal needs of those unable to afford legal services, thereby extending the opportunity for justice to all.

C. Documenting Need: The Spangenberg Report of 1993

In the same year that then-Associate Justice Moon became Chief Justice of the Hawai'i Supreme Court, a report entitled "Assessment of Civil Needs of Low and Moderate Income People in Hawaii" was completed and submitted by The Spangenberg Group, a legal research firm based in Massachusetts. Commissioned in 1991 by a consortium of law-related organizations, including the Hawai'i Justice Foundation, the Hawai'i State Bar Association, the Legal Aid Society of Hawai'i, and Hawai'i Lawyers Care, the Report stated what everyone suspected but could never articulate with specificity: that poor people rarely get their civil legal needs met and that many people who work and regularly earn a paycheck cannot purchase legal services and thus go without.[64]

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twenty-two. *Cf.* Minutes of the Hawai'i State Bar Association Board of Directors 2 (Oct. 22, 2009) (reporting the presentation of VLSH Executive Director Moya Gray, who described how the VLSH staff had been halved from twenty-two to eleven members).

[61] *Volunteer Legal Services Newsletter*, *supra* note 57, at 25.

[62] Judy Sobin, *Executive Director's Report (Hawai'i Lawyers Care Volunteer Legal Services)*, HAW. B.J., DEC. 1997, at 17, 17 [hereinafter Sobin, *1997 Report*]; Judy Sobin, *Executive Director's Report (Hawai'i Lawyers Care Volunteer Legal Services)*, HAW. B.J., June 1998, at 25, 27-28, 31.

[63] Alan Van Etten, *Perspectives*, HAW. B.J., Dec. 1997, at 4, 4.

[64] THE SPANGENBERG REPORT, *supra* note 23, at 4, 12.

More specifically, the Report found that "only 9.6% of the low-income families in Hawai'i receive legal assistance for their civil legal problems."[65] The Report noted that this was lower than figures culled from phone surveys in other states.[66] In addition, it determined that "gap group respondents"[67] received legal assistance only 23.6% of the time when a legal problem arose."[68]

The Report documented the inability of existing legal resources to stem this crush of need. It recounted the significant funding reductions that caused the Legal Aid Society of Hawai'i to enter a period of steep retrenchment, attorney departures, and diminished services.[69] It pointed to the wait lists that met many who appeared at the door of legal services providers across the community; in some cases, the size of waiting lists discouraged many prospective clients from taking a place in the line.[70] Moreover, it observed that when indigent individuals managed to see a legal professional, they often received only brief services or advice instead of full representation.[71] The Report also described the perception of judges that the surge of pro bono energy had not translated into a notable increase in pro bono representation, as evidenced by the large number of parties appearing unrepresented because of high legal fees.[72]

The Report observed that the neighbor islands and outlying O'ahu communities were particularly disadvantaged,[73] and that significant barriers to access to justice existed: transportation, language and cultural

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[65] *Id.* at 12.

[66] *Id.* Prior to its study of Hawai'i's civil legal needs, The Spangenberg Group had completed civil legal needs studies for New York, Massachusetts, and Illinois. *See* Robert L. Spangenberg—Biography, THE SPANGENBERG GROUP, http://dnewhouse.com/TSG/rls_bio.html (last visited Feb. 5, 2011).

[67] THE SPANGENBERG REPORT, *supra* note 23, at 132.

[68] The Report used this term to refer to "[i]ndividuals whose incomes fall between 125% and 250% of the federal poverty level." *Id.* at 117. Referred to as the "near-poor," these individuals had incomes "high enough to disqualify them from most federal and state poverty programs . . . yet are too low to enable them to afford . . . private legal representation." *Id.*

[69] *Id.* at ii, 167-70.

[70] *Id.* at 167.

[71] *Id.* at 167-68. The Report noted that Hawai'i was not unique in the limitations placed on services provided. *See id.*

[72] *Id.* at 216-17.

[73] *See* THE SPANGENBERG REPORT, *supra* note 23, at 22 (finding that LAS did not have enough neighborhood or outreach offices conveniently located for low-income families and individuals); *see id.* at 217 (noting that on the neighbor islands, pro bono representation seemed non-existent); *but see id.* (describing another study in 1991, which found that neighbor island attorneys participated in pro bono civil legal representation more often than O'ahu attorneys did).

differences, and lack of knowledge about legal rights, the legal system, and available legal resources.[74] Remarkably, only 13.5% of low-income individuals knew that free civil legal services existed in their community.[75]

From these findings, the Report made several recommendations: (1) form an implementation committee to develop a comprehensive plan for improving the delivery of legal services to the poor; (2) obtain more funds to improve the delivery of legal services to low-income and gap groups; (3) aim to provide more comprehensive services to clients; (4) develop a plan to perform outreach, thus removing unnecessary barriers to services; and (5) redouble efforts to raise pro bono activities among private attorneys.[76]

Although criticized by some,[77] the Report made an impact. For many years after its completion, its findings and conclusions punctuated many articles and appeals for finding workable solutions to enhance access to justice.[78] No longer was the problem of access to justice premised on anecdotal information only. Advocates were now armed with empirical information with which to request more resources in the name of achieving the national ideal of "equal justice for all." It provided a baseline for measuring progress, and its key recommendations ultimately produced or supported several tangible results: salaries for Legal Aid attorneys increased,[79] private efforts to augment resources for legal services were

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[74] *Id.* at 213-15.

[75] *Id.* at 215.

[76] *Id.* at 17-21.

[77] In its acknowledgement in the inside cover of its report, the Spangenberg Group noted that at least $90,000 had been paid by the Hawai'i Bar Foundation, the Hawai'i State Bar Association, and the Legal Aid Society of Hawai'i, with the Foundation being by far the largest contributor at $63,500. Some thought that the price was too high for findings that matched what many suspected, if not already knew. Others pointed out how the most frequently experienced legal problem—issues relating to household utilities—as experienced and identified by respondents did not match what legal services providers commonly saw in their offices. This finding may have arisen from when the fact-finding part of the study occurred: during the wake of the destructive Hurricane Iniki, which passed through the islands on September 11, 1992.

[78] *See, e.g.*, Sherry Broder, *Bar President's Report: Meeting Hawai'i's Unmet Legal Needs*, HAW. B.J., Nov. 1993, at 4, 4; Bill Hoshijo, *Public Interest Law—What Is It We Are Fighting For?*, HAW. B.J., May 1995, at 4, 4; Ellen Godbey Carson, *What We Can Do About the Legal Services Crisis*, HAW. B.J., Apr. 1996, at 4, 4; *The Gap Group Program: A Collaboration That Works*, HAW. B.J., Sept. 1997, at 27, 27; Sobin, *1997 Report*, supra note 62, at 17; Gabrielle Hammond, *A Vision for Justice*, HAW. B.J., May 1999, at 24, 24; David Forman, *Unbundled Legal Services*, HAW. B.J., Aug. 2001, at 20, 23; Adler, *Lawyers and Philanthropy*, *supra* note 26, at 12, 16; HAWAI'I 2007 LEGAL NEEDS ASSESSMENT, *supra* note 40, at II-13.

[79] The author began his career as a Legal Aid attorney in Wai'anae. As a managing attorney in 1985, he received an annual salary of about $17,000. Today, full-time staff attorneys at Legal Aid start in the $40,000 per year range. HAWAI'I 2007 LEGAL NEEDS

buoyed by the Report,[80] outreach efforts were launched,[81] better planning was undertaken by legal services providers individually and sometimes collectively,[82] and efforts to reduce barriers to access to justice received a boost. Until 2007, when a new needs assessment report was completed, the Spangenberg Report remained an important part of the conversation on access to justice and helped to fuel an Access to Justice Movement already gaining traction in the 1990s.

D. The Hawai'i Citizens Justice Conference: A Call for Proactive Reform

With the twenty-first century just around the corner, Chief Justice Moon partnered with the Hawai'i State Bar Association to convene a one-day Citizens Justice Conference late in 1996.[83] Working for several months prior to the conference date, the steering committee developed five task forces to think about, debate, and decide on realistic and concrete actions to improve Hawai'i's justice system. Each task force focused on one of the following: (1) economic access, (2) appropriate dispute resolution, (3) fairness and equality, (4) user-friendly justice, and (5) life without a justice system.[84]

ASSESSMENT, *supra* note 40, at II-37 (stating that attorneys with legal services programs receive on average $40,000 to $42,000 annually).

[80] For example, the Hawai'i State Bar Association annually holds a gala dinner to benefit an Access to Justice partner. Over the years, beneficiaries of these efforts included the Hawai'i Justice Foundation, the HSBA Public Services Fund, Legal Aid Society of Hawai'i, Volunteer Legal Services of Hawai'i, the Domestic Violence Action Center (formerly known as Domestic Violence Clearinghouse and Legal Hotline), Na Loio No Na Kanaka, the Children's Advocacy Center of O'ahu, and others. Private attorneys often spearhead capital campaigns for these organizations to great effect.

[81] The growth of community-based clinics, culturally relevant educational outreach, regularly scheduled telephone hotlines, and pro se manuals, pamphlets, and court forms were accelerated during this period. *See, e.g.*, *HSBA Mission Statement*, HAW. B.J., Feb. 1995, at 40, 44-45. Following the Report, the development of an informational center at the flagship Legal Aid office, *see generally* Hammond, *supra* note 78, at 24, and the establishment of self-help centers at the Honolulu district and circuit courts, *see Court-Based Assistance Program*, *infra* note 86, also occurred.

[82] *Cf.* Victor Geminiani, *We Can Do Better*, HAW. B.J., Dec. 1997, at 9, 10 (describing both "unnecessary walls that have impeded communications, effectiveness and collaboration [among legal services providers]" and the incremental but specific progress in achieving "[i]nterdependence . . . along with more sophisticated and connected delivery systems which build upon each program's strengths and central mission").

[83] *See* Ellen Godbey Carson & Alan Van Etten, *Hawai'i Citizens Justice Conference—A Call for Proactive Reforms*, HAW. B.J., Mar. 1997, at 6, 8.

[84] *Id.* at 7.

After sifting through hundreds of ideas, the participants, consisting of more than 300 individuals assigned to one of the five task forces, settled on six specific action items: (1) educating youth on alternative dispute resolution (ADR), (2) creating a self-help center, (3) expanding the use of ADR, (4) simplifying court forms and procedures, (5) creating a multi-media educational campaign, and (6) creating a court interpreter program.[85]

Although none specifically targeted impoverished communities or individuals, each action item championed a judicial system that reached out to the community and supported all who sought its assistance. Some ideas—like developing user-friendly court forms, simplifying court procedures, and creating a self-help center—helped unrepresented individuals navigate through an otherwise complex and intimidating system. Others, like the promotion of ADR, made justice easier and less expensive to attain by promoting vehicles of dispute resolution that generally cost less yet hold the promise of healing and empowerment. Still others contemplated the packaging and dissemination of information in ways that effectively touched current or prospective court users who would otherwise remain uninformed or unengaged, often to their peril.

The impact of this conference was evident in the concrete actions that ultimately occurred. The years that followed witnessed the creation of self-help assistance facilities,[86] the implementation of a certification program for court interpreters,[87] changes in court rules and practices regarding the mandated use of alternative dispute resolution techniques,[88]

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[85] *Id.* at 10-11.

[86] *See Judiciary Launches Comprehensive Court-Based Assistance Program*, HAW. B.J., Sept. 2000, at 16, 16 [hereinafter *Court-Based Assistance Program*] (announcing the start of the Ho'okele Court Navigation Project which featured four court-based assistance stations in Honolulu). According to Chief Justice Moon, this pilot project offered to court users "problem identification assistance at the courthouse door[,] . . . opportunities for self help and self learning, and . . . personalized assistance when needed." *Id.*

[87] Even before the Citizens Justice Conference, planning was underway to create a court interpreters certification program. *See* Daniel Heely, *Equal Access to the Courts*, HAW. B.J., Apr. 1995, at 18, 18 (highlighting the appointment of the Supreme Court Committee on the Certification of Court Interpreters). The efforts of this Committee, staffed by the Judiciary's Office on Access and Equality to the Courts, ultimately resulted in the adoption of a Court Interpreters Certification Program which seeks to ensure professional competence and ethical conduct among individuals who provide interpretation services in Hawai'i's court. *See* Becoming a Registered Court Interpreter, HAW. STATE JUDICIARY, http://www.courts.state.hi.us/services/court_interpreting/becoming_a_court_interpreter.html (last visited Feb. 5, 2011).

[88] *See* James Kawachika, *ADR Pilot Project Begins*, HAW. B.J., Mar. 1998, at 4 (describing the variety of ADR-related responses that bar members could undertake to fulfill the ADR recommendations from the Citizens Justice Conference); Elizabeth Kent & Lou Chang, *ADR in Hawai'i's Courts*, HAW. B.J., Nov. 2008, at 6; *cf.* Coralie Chun Matayoshi,

the many school-based projects to teach peaceable dispute resolution,[89] and the sometimes vexing efforts to provide simplified court forms.[90] Although the six action items were intended to benefit everyone and not just the poor, their strong underlying "access" emphasis complemented, if not enhanced, the Access to Justice Movement. Indeed, many in the legal services provider community were called to contribute, if not lead, the efforts to plan and implement some of the action items. They were, of course, supportive.[91] Access for all meant access to their clients, and in fact, some had already created effective prototypes originally developed for their clients,[92] which could be adjusted for the larger community. Because all of these action items entailed little or no cost to court users, they were particularly useful to individuals of limited means and, by extension, those who represented them.

Although almost all of these efforts continue to require monitoring, refinement, and even re-creation, their emergence during Chief Justice Moon's tenure introduced important pieces to the access to justice puzzle. Some, like alternative dispute resolution awareness, have become so institutionalized that new generations of legal professionals consider them normative. Others, like the breaking down of language and cultural barriers to access to justice, remain works-in-progress that still need community

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March is ADR Month, HAW. B.J., Mar. 2001, at 4, 4-5 (pointing out that "half of the recommendations emanating from our 1996 Hawai'i Citizens Justice Conference involved ADR").

[89] *E.g.*, Van Etten, *supra* note 63, at 4 (describing efforts of the Judiciary's Center for ADR and the Neighborhood Justice Center to "develop a phenomenally successful program" in which attorney volunteers taught students at twenty-five elementary, intermediate, and high schools about how to resolve disputes peacefully); Matayoshi, *supra* note 88, at 4 (announcing the 2001 Statewide Peer Mediation Conference, which was designed and conducted by middle and high school student mediators); *see generally* Alan Van Etten, *Lights, Camera, Action! ADR Campaign Rolls Out*, HAW. B.J., Oct. 1997, at 4, 4 (describing both the School Mediator-Mentor Program and Peer Mediation Youth Conference).

[90] *See, e.g.*, *Court Briefs: Family Court Pro Se Packets*, HAW. B.J., Nov. 1998, at 20.

[91] *E.g.*, Hammond, *supra* note 78, at 26 (explaining how after the Citizens Civil Justice Conference, LAS and HLC staff partnered with the state judiciary and the private bar to create simplified family court and district court forms).

[92] For example, Legal Aid Society of Hawai'i already developed a complement of informational brochures for areas of the law that affected their clients. *See History of Legal Aid*, LEGAL AID SOC'Y OF HAW., http://www.legalaidhawaii.org/HISTORY.htm (last visited Feb. 5, 2011) (stating that in 1991, the Legal Aid Society of Hawai'i "began developing educational brochures on common legal issues facing the poverty community including AFDC, bankruptcy, divorce, fair hearings, food stamps, living wills, Medicaid, etc."). Because financially needy individuals often experience the same legal problems encountered by the community at large, it was not a stretch to adjust these materials to assist a broader audience.

awareness, acceptance, and support.[93] Yet, each piece required a heroic though often unheralded undertaking of effort, time, and resources to launch and develop. These accomplishments invariably required collaboration, networking, and assembled energy to leverage the resources of different groups and individuals to ensure that these projects, big or small, got done. The landscape of the Access to Justice Movement was and remains defined not only by the organizations and completed projects that dot it; it is creviced by the personal and professional relationships that swirl into being when people and groups come from different parts of the community to contribute toward shaping ideas into tangible results. Sometimes these relationships have unexpectedly emerged from conflict as seen in the section below.

III. GROWING PAINS LEAD TO GROWTH

As described above, the 1990s witnessed a period of energy, momentum, and maturity for the Access to Justice Movement. However, growth meant greater consumption, and without a concomitant expansion of resources, competition for existing funds was certain to follow. Managing the competition became an obvious challenge for Hawai'i's legal services providers even before the decade ended. When competition turned to open conflict, Hawai'i's maturing Access to Justice Movement threatened to stall. The most public clash occurred between the burgeoning Volunteer Legal Services of Hawai'i (formerly known as HLC and hereinafter VLSH) and a reinvigorated Legal Aid Society of Hawai'i (LAS).

The trajectories of VLSH and LAS made a collision predictable. VLSH was poised to vault from its modest beginnings to lead a growing pro bono charge. The hiring of an energetic and entrepreneurial executive director in 1993 primed the pump for its growth.[94] Although originally conceived to recruit pro bono attorneys to represent individual clients whom LAS could

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[93] For example, this particular barrier remains the focus of the Access to Justice Commission Committee on Overcoming Barriers to Access to Justice. To leverage the resources of all law-related entities that work on language and cultural access, the Committee convened a "roundtable" of these groups to work collaboratively toward reducing barriers experienced by individuals with limited English proficiency or who otherwise find the courts culturally distant. Martin Luna, *Roundtable Meeting on Linguistic and Cultural Access to Justice*, HAW. B.J., June 2010, at 24. One recent result of the roundtable's effort is an ongoing series of tips for attorneys working with non-English speakers. *Gobbledygook and Gaffes: Tips on Working with Non-English Speakers*, HAW. B.J., Dec. 2010, at 28.

[94] Val Tavai, *Hawai'i Lawyers Care: HLC Names New Executive Director*, HAW. B.J., Apr. 1993, at 32, 32.

no longer serve due to dwindling resources,[95] VLSH was prepared to grow beyond the traditional one-on-one matching of client and attorney and to identify other pro bono opportunities that appealed to what attorneys wanted and could do.

Part of this expanded vision was to identify limited direct legal service gaps in the community and fill them through the use of volunteer attorneys and paid staff.[96] At the outset, this took the form of legal outreach clinics where pro bono attorneys provided advice and counsel and performed brief services for financially eligible individuals. To implement this and other similar projects, VLSH competed for grants that were not from its traditional sources but nevertheless supported its new vision. It succeeded for several years as evidenced by an expanded paid staff, the 1999 opening of a newly built suite of offices, and a presence throughout the state.[97] By year 2000, it had a new name to better brand what it did.

At the same time, LAS sought to right its course after several difficult years during which its survival seemed tenuous. To accomplish this, it hired an executive director whose national reputation among legal services providers reflected his experience, abilities, vision, and past successes.[98] Under his leadership, LAS underwent a change in its funding, departing from its heavy reliance on state and federal government sources and pursuing smaller but available amounts of public and private funds.[99] The

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[95] At the time of HLC's founding, LAS's capacity to serve clients had dropped by fifty clients per month. The intent was for a pro bono referral service to identify attorneys willing to accept some of these clients, thereby lessening the adverse impact of LAS's financial travails. The original name of the project was "Hawai'i Pro Bono Legal Referral Project." David Frank, *Free Legal Referral Wins ABA Praise*, HONOLULU ADVERTISER, July 11, 1981, at A4.

[96] BARTSCH, CHONG & DODD, *supra* note 56, at 1.

[97] *See* Judy Sobin, *Volunteer Legal Services Hawai'i: Executive Director's Report: We Have a New Name and Soon, a New Office*, HAW. B.J., Sept. 1999, at 25, 25-26.

[98] *See The Staff of Lawyers for Equal Justice*, LAWYERS FOR EQUAL JUSTICE, http://www.lejhawaii.org/staff/victor.html (last visited Feb. 5, 2011) (listing Victor Geminiani's long and distinguished record of service and leadership across the country). Geminiani ultimately left the Legal Aid Society of Hawai'i to direct the Legal Aid Foundation of Los Angeles before returning to Hawai'i to head Lawyers for Equal Justice, a small public interest law firm which has garnered its share of impressive accomplishments in its short history. *See generally* LAWYERS FOR EQUAL JUSTICE, http://lejhawaii.org/index.html (last visited Apr. 4, 2011).

[99] *See History of Legal Aid*, LEGAL AID SOC'Y OF HAW., http://www.legalaidhawaii.org/HISTORY.htm (last visited Feb. 5, 2011) (describing the GA-SSI program with the Hawai'i Department of Human Services and the state funding that came with it, the creation of LAS's Affordable Lawyers Program which continues to provide legal services to "gap group" individuals who pay a reduced fee, the Domestic Violence Legal Services Project which was funded with Maui County monies, the arrival of

influx of new monies reinvigorated LAS and enabled it to think about new directions and initiatives, all in the name of bringing justice to the poor.[100] Like VLSH, it moved into new facilities that it boldly purchased and refurbished, significantly bolstered its staff, and undertook new ventures like the creation of its Center for Equal Justice.[101] It understood that direct services to the poor meant far more than assigning a staff attorney to represent each eligible client with a meritorious claim. "More" meant empowering those who could help themselves through effective triage accompanied by a mix of informational materials, individualized advice and counsel, and brief services.[102]

By staking its growth on new funding sources, both organizations began to look vaguely alike even though their institutional foci—direct services for LAS and pro bono for VLSH—were different. An independent evolution of VLSH's operations noted the overlap between the two organizations as early as 1996.[103] In 1998, the obvious overlap prompted the Hawai'i Justice Foundation (HJF) to convene with the leaders from VLSH and LAS, who were asked to explain how their "approaches do or don't overlap."[104]

The perception was understandable. As LAS eased away from traditional litigation work into activities that required fewer resources per case, its work began to bear some similarities to the counsel and brief service clinics that VLSH was establishing in neighborhoods. Prompted in part by the Citizens Justice Conference and the Spangenberg Report, both performed community outreach and developed educational components to their services. This morphing became even more pronounced as VLSH entered into direct client services[105] and LAS added a pro bono component to its firm.[106]

AmeriCorps volunteers funded by the Corporation for National and Community Services, and the founding of the Medicare Advocacy Project based on a grant from the Keauhou Rehabilitation and Health Care Advocacy Council).

[100] *See id.*

[101] *See id.* (describing Legal Aid's move to the Friend Building in downtown Honolulu in February of 1999); *see generally* Hammond, *supra* note 78, at 25-27 (describing the Center for Equal Justice housed at the Honolulu Legal Aid office to offer a variety of user-friendly services that help unrepresented court users to identify and explore their legal options).

[102] Geminiani, *supra* note 82, at 10-13.

[103] BARTSCH, CHONG & DODD, *supra* note 56, at 4 (noting the start of an overlap between HLC and other legal services providers).

[104] Letter from Peter S. Adler, Exec. Dir., Haw. Justice Found., to Victor Geminiani, Exec. Dir., Legal Aid Soc'y of Haw., and Judy Sobin, Exec. Dir., Haw. Lawyers Care (Mar. 13, 1998) (on file with author).

[105] For example, VLSH created its Na Keiki Law Center which provided direct representation of minor children in a variety of cases involving their legal needs and rights. *See generally* Judy Sobin & Annabel Murray, *Protecting and Supporting Children: The*

Soon "overlap" turned into open competition, and dismayed third parties tried to intervene. In her quarterly newsletter published in the Hawai'i Bar Journal, the executive director for VLSH candidly described the antagonism between the two major public interest law organizations in the state:

> For those of you who may not know it, over the past year or two, as the economy of Hawaii worsened, so did the relationship between HLC and LASH. With revenues in short supply, antagonisms frequently flared whenever discussions arose about who was entitled to the limited dollars available to support operations.[107]

She went on to point out that the HJF threatened to withdraw its funding from both organizations "unless the two organizations began working together."[108] With this "push" by HJF leadership and the help of a facilitator, VLSH and LAS developed a Memorandum of Understanding to keep communication lines open and respect agreed-upon zones of responsibility and expertise.[109] Although this understanding was not consistently followed and disagreements ensued, the Memorandum served as a visible and much needed reminder of the call to clients' needs that has always tied the two organizations at the hip. While this tie has sometimes tensed over the years as one organization pulls against the other, a residue of common cause always manages to settle them, returning each to the hard work they do best when partnering as they should.

Sometimes, an outside threat galvanizes estranged partners and forges the effective collaboration for which they seem destined. Such a threat occurred in late 2005 when the state bar proposed an amendment to Rule 6.1 of the Hawai'i Rules of Professional Conduct. The proposed amendment would establish the mandatory annual reporting of pro bono hours by each actively licensed attorney.[110] In addition, it envisioned replacing the aspirational fifty hours of pro bono work per year with an indeterminate

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Na Keiki Law Center, HAW. B.J., Mar. 1999, at 26, 26-27. Also, through the use of AmeriCorps and other grants, VLSH embarked on an ambitious program to address domestic violence through the use of attorney and non-attorney advocates. *See* Volunteer Legal Servs. Haw., *Come Work With Us*, HAW. B.J., Mar. 2000, at 26, 26-27 (describing VLSH's AmeriCorps Center to End Violence and Community Legal Centers).

[106] Developing a model of pro bono delivery premised on having its legal staff support the work of volunteers, LAS embarked on its Partnership in Pro Bono program in 2004. Geminiani, *supra* note 42, at 11-12.

[107] Judy Sobin, *Executive Director's Report*, HAW. B.J., Mar. 1999, at 25, 25.

[108] *Id.*

[109] *Id.*

[110] *HSBA Happenings: Call For Member Comments*, HAW. B.J., Apr. 2005, at 16, 17; *see also* Jeff Portnoy, *Perspectives: President's Message*, HAW. B.J., Aug. 2007, at 14, 14 (briefly recounting the 2005 effort to adopt a mandatory reporting of pro bono hours while expanding the definition of pro bono activities).

obligation that was "reasonable."[111] Further, it would expand the activities that qualified as an attorney's pro bono work. Under this proposal, community and non-profit services, whether related to law or not, could be reported as satisfying one's pro bono obligation.[112] In a nutshell, the bar was willing to offer mandatory reporting for a price: eliminating the fifty hour per year aspirational goal and diluting the expectation that pro bono work should tap an attorney's legal skills and expertise.

Quickly, the leadership of both VLSH and LAS, in consultation with other public interest law firms, mobilized to defeat the measure. They submitted pointed written arguments to the state bar and, in January 2006, met with all five justices of the Hawai'i Supreme Court to express their strong and unified reservations.[113] Together, they created a firestorm that stalled the bar directors' decision on the proposal and ultimately persuaded the justices to signal their displeasure with it. As a result, the proposed amendment to Rule 6.1 quietly faded.[114]

The goodwill and success of this effort generated more conversation about possible collaborations, and in the days surrounding the Hawai'i Supreme Court's rejection of the proposed Rule 6.1 amendments, an idea emerged to have the two groups spearhead an effort to update the legal needs assessment performed by the Spangenberg Group thirteen years before.[115] This assessment would lay the groundwork for a Community-Wide Action Plan to increase access to justice.[116] By the year's end, the nascent dialogue

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[111] *See* E-mail from Richard Turbin, President, Haw. State Bar Ass'n, to Members of the HSBA (Nov. 9, 2005, 14:49 HST) (on file with author) (explaining proposed changes to Rule 6.1 and 17(d) of the Hawai'i Rules of Professional Conduct).

[112] *Id.*

[113] *See* E-Mail from David J. Reber, LAS Bd. President, to Members of the LAS Bd. (Dec. 27, 2005, 16:44 HST) (on file with author) (describing meetings with VLSH leadership and pending January 12, 2006 conference with the five justices); E-mail from David J. Reber, LAS Bd. President, to George Zweibel, LAS Bd. Dir., Nalani Fujimori, LAS Interim Exec. Dir., and author, LAS Bd. Dir. (Jan. 12, 2006, 17:09 HST) (on file with author) (describing "good airing of views" with the justices).

[114] *See* E-mail from David J. Reber, LAS Bd. President, to Nalani Fujimori, LAS Interim Exec. Dir., author, LAS Bd. Dir., George Zweibel, LAS Bd. Dir. (Feb. 3, 2006, 17:40 HST) (on file with author) (informing recipients of the Supreme Court's decision not to adopt mandatory reporting or change Rule 6.1). The opportunity could not have come at a better time. The executive directors for both organizations hired in the 1990s had departed, and new leadership was either in place or being hired. It was a time for starting anew.

[115] E-mail from George Zweibel, LAS Bd. Dir., to author, LAS Bd. Dir., David J. Reber, LAS Bd. President, and Nalani Fujimori, LAS Interim Exec. Dir. (Feb. 1, 2006, 13:27 HST) (on file with author) (discussing, as part of a larger conversation, projects and ideas that LAS and VLSH could work on together).

[116] Letter from David J. Reber, LAS Bd. President, Jay Kimura, VLSH Bd. President, M. Nalani Fujimori, LAS Interim Exec. Dir., Moya Gray, VLSH Exec. Dir., Wayne Parsons,

between the two organizations spread into the formation of an Access to Justice Hui[117] consisting of leaders from the state's major public interest law firms, the judiciary, the bar, the law school, and the Hawai'i Justice Foundation.[118] With funds from the Foundation and the Hawai'i State Bar Association, the Hui proceeded to steer the project[119] to completion. By November 2007, Hawai'i had a new Legal Needs Assessment, which, in turn, guided the creation of an action plan for improving access to justice in the state. This plan emerged with the tacit approval of Chief Justice Moon, who periodically met with the Hui leadership for updates and stood ready to publicly support the Hui's work.[120]

HSBA President, and Lyn Flanigan, HSBA Exec. Dir., to Robert LeClair, Exec. Dir., Haw. Justice Found. (May 1, 2006) (on file with author). This letter, which sought funding from the HJF, was the product of many informal conversations on joining forces to create the assessment and action plan. Before finalizing the letter, LAS and VLSH invited the Hawai'i State Bar Association to become an active partner. Thankfully, it agreed.

[117] Jo Kim, *Access to Justice Hui: Who, What, & Why*, HAW. B.J., Aug. 2007, at 24, 24; HAWAI'I 2007 LEGAL NEEDS ASSESSMENT, *supra* note 40, at II-11. The name was coined by long-time access to justice advocate Jo Kim, who was then co-chair of the HSBA Committee on Delivery of Legal Services to the Public.

[118] *Id.*

[119] No huge project, like the one undertaken by the Hui, can be accomplished without at least one person to advance the work and sustain the project's vision. In this case, Nalani Fujimori, then Deputy Director for LAS, was that person, and in 2008, she received the HSBA's prestigious C. Frederick Schutte Award to celebrate her exemplary leadership of the Hui. *HSBA 2008 Award Winners*, HAW. B.J., Nov. 2008, at 22, 22.

[120] Concerned about the tensions between LAS and VLSH, Chief Justice Moon agreed to meet their leadership and encourage dialogue and collaboration in the early days surrounding the Hawai'i Supreme Court's rejection of the proposed Rule 6.1 amendments. E-mail from David J. Reber, *supra* note 114 (describing a lunch meeting between the chief justice and the board presidents of both LAS and VLSH). Chief Justice Moon later met with the Hui leadership on November 3, 2006 to receive an update at the offices of Goodsill Anderson Quinn & Stifel. E-mail from Nalani Fujimori, LAS Interim Exec. Dir., to George Zweibel, LAS Bd. Dir., Jo Kim, Co-Chair of HSBA Comm. on Delivery of Legal Servs. to the Public, Lyn Flanigan, HSBA Exec. Dir. (Oct. 12, 2006, 10:16 HST) (on file with author). After the first draft of the Legal Needs Assessment was completed, a two-day meeting was scheduled to discuss the draft and decide on the steps to be taken to appropriately respond to the assessment. This meeting, scheduled at the law school on October 19-20, 2007, was to be keynoted by the Chief Justice. E-mail from Nalani Fujimori, LAS Deputy Dir., to Members of the Access to Justice Hui (Sept. 12, 2007, 17:08 HST) (on file with author). However, a sudden change in travel plans required him to have Justice Steven Levinson speak in his place. *Id.* E-mail from Nalani Fujimori, LAS Deputy Dir., to Members of the Access to Justice Hui (Sept. 13, 2007, 11:00 HST) (on file with author).

IV. THE COMMUNITY-WIDE ACTION PLAN AND THE BIRTH OF THE HAWAI'I STATE COMMISSION ON ACCESS TO JUSTICE

The 2007 Assessment of Civil Needs and Barriers of Low and Moderate Income People in Hawai'i (Hawai'i 2007 Legal Needs Assessment) provided no surprises, but like its predecessor, the Spangenberg Report, it showed how elusive the "equal justice for all" ideal remained. In 2007, fourteen years after the Spangenberg Report, only about twenty-three percent of low- or moderate-income individuals had their civil legal needs met.[121] This percentage was only marginally better than what the Spangenberg Group found in 1993. The top areas of civil legal needs remained similar: family law including domestic violence, housing, and consumer problems.[122] Of these, consumer debt represented the area where legal resources were least available.[123]

The Hawai'i 2007 Legal Needs Assessment highlighted several details that underscored the depth of the unmet legal needs in Hawai'i: (1) approximately one in four people in Hawai'i lived below 200% of the federal poverty level, representing a 23.6% increase from 1989;[124] (2) the population of those under 125% of the federal poverty level grew 28.16% since 1989;[125] (3) legal services providers turned away approximately 67% of those who contacted them for help;[126] (4) Hawai'i's ratio of attorneys to general population was 1 to 361;[127] and (5) in stark comparison, the ratio of legal services attorneys to individuals living on low to moderate incomes was a stunning 1 to 4,402.[128] Sharpening the glare were news reports, following the release of the 2007 report, that described how state funding for the Legal Aid Society of Hawai'i dropped from $1.47 million in 1992 to

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[121] HAWAI'I 2007 LEGAL NEEDS ASSESSMENT, *supra* note 40, at II-25.

[122] *Id.* at II-26.

[123] *Id.* at II-8, II-25 to II-26. Although housing and family law-related issues represented the larger areas of unmet need, problems related to consumer debt was where legal services providers most often did not provide assistance.

[124] *Id.* at II-7, II-17. Two hundred percent of poverty is the cut-off point for eligibility under VLSH guidelines.

[125] *Id.* at II-17. One hundred twenty-five percent of poverty is the cut-off point for eligibility under LAS guidelines.

[126] *Id.* at II-8.

[127] *Id.* at II-32.

[128] *Id.*

$810,000 in 2008, a 45% decrease.[129] Moreover, since 1980, federal funding for Legal Aid dropped by one-half when adjusted for inflation.[130]

Clearly much work remained to be done, but the Hui was ready to roll up its sleeves. It was always the Hui's intent to use the Hawai'i 2007 Legal Needs Assessment as a springboard to action, and at a two-day meeting at the William S. Richardson School of Law in October 2007, Hui members and others evaluated the Assessment's findings and formulated an agenda for action in response.[131] After a period of collective brainstorming, the Hui members formulated ten suggestions:[132]

1. Create an Access to Justice Commission;[133]
2. Increase Funding to Support Delivery of Services;[134]
3. Develop a Culture that Values Pro Bono;[135]
4. Establish Recognition of Right to Counsel in Certain Civil Cases;[136]

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[129] Susan Essoyan, *Family Needs Legal Help to Save Home*, HONOLULU STAR-BULLETIN, Apr. 20, 2008, at A10, *available at* http://archives.starbulletin.com/2008/04/20/news/story02.html.

[130] *Id.*

[131] *See* E-mail from Nalani Fujimori, Access to Justice Hui Coordinator, to Members of the Access to Justice Hui (Oct. 18, 2007, 15:35 HST) (on file with author) (setting forth agenda and logistics).

[132] The Hui members agreed that 2010 would be the target year for undertaking all action items, which set off a battle cry of "Ten in 2010."

[133] HAWAI'I 2007 LEGAL NEEDS ASSESSMENT, *supra* note 40, at I-3. This action item envisioned having the Hawai'i Supreme Court establish a commission charged with leading and overseeing efforts to increase funding and improve the delivery of legal services to the poor. It would provide an institutional presence to ensure that momentum, generated first by the Hui, would continue into the future. *Id.* at B-3 to B-6.

[134] *Id.* at I-4. This action item reflected the never-ending struggle not only to adequately fund legal services programs but to find ways to ensure the stability of funding so that better planning and decision-making could occur. It would discourage the damaging competition among organizations that needed to constantly position themselves for funding. Under this action item, participants also discussed how to get financial institutions to provide the best interest rates on IOLTA funds; this was in the wake of severe cuts in general interest rates, which turned Hawai'i's IOLTA funding into a shadow of what it had been in the 1990s. Discussants also strategized on lobbying the Legislature for higher court filing fee surcharges which would be funneled into the Judiciary's Indigent Legal Assistance Fund (ILAF), which since 1996 was distributed to organizations serving the legal needs of the poor. *Id.* at B-6 to B-9.

[135] *Id.* at I-5. Like funding, this action item affirmed the continuing need to fight the good fight. Finding ways to keeping "pro bono" as a core value among all legal professionals was deemed fundamental. The specific action items were hardly new, but for good reason. As in other states, melting the resistance of attorneys to legal pro bono work is a long distance run, which requires persistence and patience. At the meeting, no one doubted the need to "keep at it" because the alternative—cutting back or giving up—was unacceptable. *Id.* at B-9 to B-12.

[136] *Id.* at I-6. Across the country, discussions on establishing a "Civil Gideon"

5. Enable Individuals to Effectively Help Themselves;[137]
6. Maximize the Use of Available Resources;[138]
7. Overcome Barriers to Access to Justice;[139]
8. Expand the Law School's Role in Access to Justice;[140]
9. Increase Access in Other Ways;[141] and
10. Form a Broad Coalition to Address Ways to Alleviate Poverty in Hawaii.[142]

Most of these action items were not novel. Many had been imperatives for years and remained so. The underlying message was to persevere, and,

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rule—requiring legal counsel in civil cases where a basic human right is at stake—have circulated. If some form of the rule were adopted either legislatively or through court decision, resources to provide counsel would have to be provided as they are now in criminal cases. *Id.* at B-12 to B-13.

[137] *Id.* at I-6. Facing the reality that not every party can obtain or will want legal representation, the participants understood that efforts needed to continue to empower individuals to help themselves in appropriate circumstances. This action item reflected the ongoing efforts, which received a boost after the 1996 Citizens Justice Conference, to make the judicial system more inviting and user-friendly. *Id.* at B-13 to B-14.

[138] *Id.* at I-6. This action item focused on two things: (1) sustaining the discussion on identifying the right conditions for allowing paralegals to help alleviate the legal need of underserved individuals, and (2) ensuring that legal services providers affirm their commitment to smartly work together to eliminate duplication, make accurate referrals, and find more efficient delivery models including those that effectively use new technology. *Id.* at B-14 to B-15.

[139] *Id.* at I-7 to I-8. This also continued a theme that came out of the 1996 Citizens Justice Conference: that certain barriers, apart from financial ones, prevent some in Hawai'i from ever participating effectively in the justice system. This action item affirmed the need to perform targeted outreach, augment the judicial system's capacity to address linguistic and cultural barriers, and develop service delivery practices, such as adjusted office hours, that answer the needs of low and moderate income populations. *Id.* at B-16 to B-17.

[140] *Id.* at I-8. With the William S. Richardson School of Law as the venue for the meeting, it became obvious that the law school was an essential piece of the puzzle. To the extent that lawyer socialization begins in law school, participants agreed to support ongoing efforts and prompt new initiatives by the law school to engender and sustain the core professional responsibility of lawyers to ensure access to justice to all, including the poor. *Id.* at B-18 to B-19.

[141] *Id.* at I-8 to I-9. This was a catch-all provision that included such ideas as supporting student loan repayment assistance for law graduates who engage in public interest law work, allowing licensed attorneys from outside Hawai'i to work for a limited time with providers of legal services to the poor, and adopting rules to permit the "unbundling" of legal services so that pro bono attorneys may engage in less than full representation of clients. *Id.* at B-19 to B-22.

[142] Understanding that legal representation of the poor is only a slice of what could help poor individuals and communities, the participants agreed that some effort should be undertaken to work with others in addressing the larger issues of poverty in this state. *Id.* at I-9, B-22.

where possible, to redouble ongoing efforts to close the still-yawning chasm of legal needs. Of the ten action items, participants quickly targeted one—the creation of a state commission for Access to Justice—because it proved useful to other states in providing overarching direction, coordination, vision, and impetus in efforts to increase access to justice.[143] It was hoped that such a commission would mobilize all necessary sectors—the judiciary, the bar, the legislature, social services providers, legal services providers, and the community—and lead a collaborative endeavor to make access real.[144] The Hui was a prototype of what could happen when well-intentioned people pulled together to advance a shared vision, and its example inspired hope that a commission could achieve even bigger things.

Indeed, it was a subcommittee of the Hui that undertook the work of creating an access to justice commission. After evaluating models from other states, the subcommittee delivered its proposal to the Hawai'i Supreme Court less than two months after the Community-Wide Action Plan was adopted.[145] With the help of Associate Justice Simeon Acoba, whom Chief Justice Moon assigned as the court's liaison to the Hui, the proposal saw quick action, and by April 2008, the Hawai'i Supreme Court announced an amendment to its Court Rules to create a statewide Access to Justice Commission effective May 1, 2008.[146] Justice Acoba, the first chair of the Commission, convened the Commission's inaugural meeting on June 30, 2008.[147]

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[143] George J. Zweibel, *A Hawai'i Access to Justice Commission: An Idea Whose Time Has Come*, HAW. B.J., Apr. 2008, at 19, 19.

[144] *Id.*

[145] *See* E-mail from George Zweibel, Esq., to Members of the Access to Justice Hui (Dec. 11, 2008, 12:47 HST) (on file with author) (sharing cover letter and the draft proposal for an Access to Justice Commission sent the day before to the Hawai'i Supreme Court).

[146] *See* E-mail from George Zweibel, Esq., to Members of the Access to Justice Hui (Apr. 25, 2008 16:13 HST) (on file with author) (attaching the Hawai'i Supreme Court's Order dated April 24, 2008). Hawai'i is now among twenty-one states with an Access to Justice Commission. *See* ABA Standing Committee on Legal Aid & Indigent Defendants –Resource Center for Access to Justice, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html (last visited Nov. 14, 2010). The rules governing the Commission are found in Rule 21 of the Hawai'i Supreme Court Rules.

[147] Hawai'i Supreme Court Rule (HSCR) 21 provides a procedure for the appointment of twenty-two commissioners. To achieve balance and diversity of membership, the rule requires appointments that represent different communities and stakeholders. Five appointments are reserved for the Chief Justice of the Hawai'i Supreme Court, and four for the Hawai'i State Bar Association. HAW. SUP. CT. R. 21(c)(3)(i)-(ii). In addition, one appointment each is designated by the Governor, Attorney General, Senate President, and Speaker of the House. *Id.* at (c)(3)(vii). The Hawai'i Justice Foundation, the Hawai'i

Hawai'i Supreme Court Rule 21 enumerates the objectives of the Commission. Among its tasks, the Commission is to provide ongoing leadership to oversee efforts to expand and improve delivery of high-quality legal services to low-income people in Hawai'i; develop and implement initiatives designed to expand access to civil justice; develop a strategic, integrated plan for statewide delivery of civil legal services; cultivate and stabilize long-term public and private funding for legal services; encourage improved collaboration and coordination among civil legal services providers; increase pro bono work by members of the state bar; reduce barriers to the civil justice system; and create awareness among government leaders and the public of the severity of the unmet legal needs and the necessity for a concerted response.[148]

To facilitate its work, the Commission created ten committees[149] and appointed members to each. Although the committees are "advisory" to

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Paralegal Association, and the dean of William S. Richardson School of Law also submit one appointment each. *Id.* at (c)(3)(iv)-(vi). In addition, a consortium of legal services providers appoints six members. This consortium consists of civil legal service offices and organizations that provide legal services to the poor. *Id.* at (c)(3)(iii).

The initial roster of commissioners included Chief Justice Moon's appointments: Associate Justice Simeon Acoba (chair), Intermediate Court of Appeals Judge Daniel Foley, Circuit Court Judge Greg Nakamura, and District Court Judges Simone Polak and Calvin Murashige; the HSBA appointments: Jill Hasegawa (vice-chair), Rai Saint Chu, Martin Luna, and Shannon Wack; the Legal Service Providers Consortium appointments: Moya Gray, Charles Greenfield, Mahealani Wendt, Nanci Kriedman, Patti Lyons, and Puanani Burgess; and the Honorable Richard Guy (appointed by the Hawai'i Justice Foundation), Dean Avi Soifer (appointed by the William S. Richardson School of Law), R. Elton Johnson III (appointed by the Hawai'i Paralegal Association), Lillian Koller (appointed by the Governor), Mary Anne Magnier (appointed by the Attorney General), Senator Mike Gabbard (appointed by the Senate President), and Representative Blake Oshiro (appointed by the Speaker of the House). Simeon R. Acoba, *Pro Bono Celebration: The Access to Justice Commission*, HAW. B.J., Dec. 2008, at 5, 7 nn.1-10.

[148] HAW. ACCESS TO JUSTICE COMM'N, 2008-2009 ANNUAL REPORT 7-8 [hereinafter ATJ COMM'N 2008-2009 ANNUAL REPORT].

[149] These include the following committees: Committee on Funding of Civil Legal Services, Committee on Increasing Pro Bono Legal Services, Committee on the Right to Counsel in Certain Civil Proceedings, Committee on Self Representation and Unbundling, Committee on Maximizing Use of Available Resources, Committee on Overcoming Barriers to Access to Justice, Committee on Initiatives to Entrance Civil Justice, Committee on Education, Communications and Conference Planning, Committee on Alleviating Poverty in Hawai'i, and the Law School Liaison Committee. *Id.* at 19. At this writing, the Committee on Alleviating Poverty disbanded after concluding that its subject matter was the overarching theme of the Commission and would be addressed through the collective work of the Commission and the remaining committees. Letter from Mary Anne Magnier to Justice Simeon Acoba, Chair, Haw. Access To Justice Comm'n (undated but attached to the November 16, 2009 Meeting Agenda of the Access To Justice Commission) (on file with author).

the Commission,[150] they bear the responsibility of evaluating and developing projects and new ideas referred to them by the Commission. The committees are also free to cultivate their own ideas for consideration by the Commission. Each committee is comprised of individuals who express interest, expertise, or both on a particular subject area and request appointment to a committee.

In the first three years of its existence, the Commission has provided a unifying presence for those interested in access to justice issues.[151] Convening regular meetings and two Access to Justice "summits"[152] to date, it has provided a source of forward energy. Still in its formative years, the Commission has attempted or accomplished several things that offer a glimpse of its potential and challenges. For example, from the outset, it joined its access to justice partners to secure and increase legislative funding for legal services providers.[153] As part of this effort, it lobbied to increase

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[150] HAW. SUP. CT. R. 21(f).

[151] On July 21, 2011, the Hawai'i Supreme Court filed its three-year evaluation of the Commission. Much of what appears in this subsection is summarized in the court's evaluation, which noted the Commission's "impressive and real progress in providing practical solutions to the ongoing challenge of improving access to the civil justice system for low-income individuals in Hawaii." In the Matter of the Hawaii Access to Justice Commission—Three Year Evaluation, No. SCMF-11-0000432 (Haw. July 21, 2011).

[152] On June 24, 2009 and June 25, 2010, the Commission convened its first two annual Access to Justice Summits at the William S. Richardson School of Law. The Summits provided the community with an opportunity to reflect on the pressing need for access to justice and engage others in moving toward viable solutions. The first summit, which featured national "access" advocate, the Honorable John Broderick of the New Hampshire Supreme Court, as its keynote speaker, focused on unmet needs and creative, even novel ways of addressing them. The second summit posed a somewhat more cautious question: "Access to Justice—Is It a Promise We Can Keep?" During the second summit, presentations about daunting challenges were balanced with ones featuring momentum-sustaining forward steps, including reports from Commission committees and workshops by "in-the-trenches" advocates. Each summit drew well over 200 people. For summaries of the first summit, see R. Elton Johnson III, *Crisis and Promise: The 2009 Hawai'i Access to Justice Conference*, HAW. B.J., Sept. 2009, at 18, 18-21. For summaries of the second summit, see Carol K. Muranaka, *Is This a Promise We Can Keep?*, HAW. B.J., Dec. 2010, at 24, 24-27. A third annual conference, entitled "Access to Justice: Pursuing a Noble and Necessary Purpose" occurred at the law school on June 24, 2011. Responding to feedback from the previous two meetings, planners increased the number of workshops designed to provide participants with working knowledge and skills to effectively engage in the access to justice effort. *See 2011 Access to Justice Conference: June 24*, HAW. B.J., June 2011, at 24, 24 (promising "a helpful and provocative discussion about seeking justice for the underserved, including excellent opportunities for audience participation").

[153] *See Grant-in-Aid Applications for 2009: Hearing Before the S. Comm. on Ways & Means and the H. Comm. on Finance*, 2009 Leg., Reg. Sess. (Haw. 2009) (statement of Jill Hasegawa, Vice Chair, Haw. Access to Justice Comm'n), *reprinted in* ATJ COMM'N 2008-2009 ANNUAL REPORT, *supra* note 148, at A-61.

court fees to bolster the Indigent Legal Assistance Fund, a financial resource drawn from court user fees to assist legal services providers serving the poor.[154] While these efforts did not immediately yield the desired increases in funding, they allowed the Commission to test, for the first time, its influence on the legislative branch. Providing a unified representative voice for the major stakeholders in the Access to Justice Movement, the Commission is expected to cultivate its muscle, political and otherwise, to narrow the gap on justice resources. Its initial appearances before a cash-strapped and resistant legislature demonstrated a willingness to do this.

While it continues to nurture its capacity in the legislative arena, the Commission has already shown its mettle in two sectors: the state bar and the state judiciary. With guidance from its Committee on Increasing Pro Bono Legal Services, the Commission developed model pro bono policies for private firms[155] and government lawyers,[156] and "traveled the circuit" to

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[154] *See HB 625—Relating to Surcharge for Indigent Legal Services: Hearing Before the H. Comm. on Finance*, 2009 Leg., Reg. Sess. (Haw. 2009) (statement of Jill Hasegawa, Vice Chair, Haw. Access to Justice Comm'n), *reprinted in* ATJ COMM'N 2008-2009 ANNUAL REPORT, *supra* note 148, at A-63. A telling reminder that success can follow patient and persistent efforts, the 2011 Hawai'i state legislative session saw the passage of Senate Bill 1073, which expanded the Indigent Legal Assistance Fund after several years of stalled attempts. E-mail from Nalani Fujimori, LAS Exec. Dir., to Members of the Legal Aid Society Board of Directors (May 2, 2011, 14:36 HST) (on file with author).

[155] Developed by the Commission's Committee on Increasing Pro Bono Legal Services, this model policy provides benchmarks for firms to follow. *Model Pro Bono Policy for Hawai'i's Law Firms*, HAW. B.J., Nov. 2009, at 12, 12. It begins by reaffirming Hawai'i Rules of Professional Conduct 6.1, which sets an aspirational goal of at least fifty hours per year of pro bono work and generally limits "countable" work to legal services to the poor. *Id.* It urges a firm to credit its attorneys' pro bono work toward billable hour expectations and to consider pro bono activities during performance evaluations and compensation decisions. *Id.* at 12, 14. Moreover, it recommends that a firm talk about pro bono expectations during hiring interviews. *Id.* at 14. It also encourages firms to appoint either a coordinator or a coordinating committee to administer a firm's policy and practices regarding pro bono work. *Id.* The law firm of Ayabe Chong Nishimoto Sia and Nakamura was the first to announce its adoption of this policy. *Id.* at 12.

[156] For well over a decade, efforts have been undertaken to lower barriers that make it difficult for government attorneys to participate in traditional pro bono legal work. *See, e.g.*, Calvin Pang, *Report of the Delivery of Legal Services to the Public*, HAW. B.J., Feb. 1995, at 22, 22 (describing the bar's efforts to exempt government lawyers from having to pay $50 per year to engage in pro bono legal activities). The Commission weighed in by developing a model pro bono policy for government attorneys. The policy lists a variety of approved activities to include working in legal clinics, providing research or advice to legal services providers for the poor, becoming a board member for such provider organizations, assisting in bar projects that improve the delivery of pro bono legal services, and contributing funds. Other activities, including individual representation, are possible with supervisor approval. The policy sets out procedures for obtaining clearance from supervisory personnel, avoiding conflicts of interest, restricting the use of government

secure pro bono commitments consistent with these policies from private law firms and government law offices. Moreover, it promulgated a policy to enable and encourage judges to pursue pro bono activities commensurate with a judge's ethical duties.[157] It also lobbied the Hawai'i Supreme Court to amend Rule 2.2 of the Hawai'i Revised Code of Judicial Conduct to permit judges "to sanction a lawyer by ordering the lawyer to perform pro bono legal services to persons or organizations . . . or to make a monetary contribution to such organizations."[158]

The Commission also furthered the cause of pro bono participation by lawyers and judges through the appointment of a task force, chaired by Intermediate Court of Appeals Judge Katherine Leonard, to study Rule 6.1[159] of the Hawai'i Rules of Professional Conduct. Specifically, the task force evaluated a possible amendment "to allow . . . substitution of an appropriate monetary contribution in lieu of the recommended minimum of 50 hours of pro bono service hours per year (or for a part thereof)."[160] After receiving input from local stakeholders and reviewing the experiences of other states, the task force recommended adopting an amendment to allow

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resources, and procuring malpractice insurance. Haw. Access to Justice Comm'n, *Model Policy for Government Attorneys Performing Pro Bono Work* (July 20, 2009), http://www.hawaiijustice.org/downloads/Model%20pro%20bono%20policy%20for%20government%20attorneys.pdf; *see also* Jill M. Hasegawa, *Commission Update: Government Pro Bono Policy*, HAW. B.J., May 2009, at 4, 4 (describing the potential pool of pro bono interest and expertise among government lawyers and the traditional concerns that have kept them from easily doing pro bono work).

[157] On February 11, 2010, the Hawai'i Supreme Court issued an order to amend Rule 3.7(a) to permit judges to "participat[e] in pro bono activities to improve the law, the legal system or the legal profession or that promote public understanding of and confidence in the justice system and that are not prohibited by this code or other law." Hawai'i Supreme Court Order Amending Rule 3.7(a) of the Hawai'i Revised Code of Judicial Conduct (Feb. 11, 2010).

The Commission compiled and organized the provisions in the Hawai'i Judicial Code relating to pro bono activities by judges for ease of use by judges. *See* Haw. Access to Justice Comm'n, *Hawai'i Judicial Pro Bono Policy* (2009), http://www.hawaiijustice.org/downloads/Hawaii%20judiciary%20pro%20bono%20policy.pdf; *see also Commission Update: Hawai'i Judicial Pro Bono Policy*, HAW. B.J., Aug. 2009, at 21, 21.

[158] On July 15, 2010, the Hawai'i Supreme Court added a comment to Rule 2.2 of the Hawai'i Revised Code of Judicial Conduct. Designated as Comment [5], the comment authorizes judges to sanction an attorney by permitting him or her "to provide pro bono legal services to persons or organizations of the lawyer's choosing that are described in Rule 6.1(a) of the Hawai'i Rules of Professional Conduct or to make a monetary contribution to such organizations." HAW. JUD. COND. R. 2.2 (LexisNexis 2010).

[159] *See supra* text accompanying notes 50-53.

[160] Letter from Judge Katherine G. Leonard, Chair, Rule 6.1 Task Force, to the Haw. Access to Justice Comm'n (Dec. 11, 2009) (on file with author).

"[a] lawyer [to] discharge his or her responsibility to provide pro bono services by contributing $500 each year to the Rule 6.1 Fund."[161] The Commission approved and forwarded the recommendation to the Hawai'i Supreme Court, which accepted the recommendation and is presently receiving public comment on it.

Along with the Rule 6.1 amendment, the Commission persuaded the Hawai'i Supreme Court to invite comment on a proposed adoption of Rule 6.5 of the Hawai'i Rules of Professional Conduct.[162] This proposed new rule, put forth by the Commission's Committee on Self Representation and Unbundling, would provide "that lawyers working with a non-profit organization or the court—to provide limited legal services such as advice over a hotline or through a clinic to a client without the expectation of the creation of an attorney-client relationship—are 'exempt' from HPRC 1.7 and 1.9(a) so long as the lawyer does not know of any conflict of interest."[163]

In a nutshell, this new rule would generally exempt pro bono lawyers from doing a traditional conflict check or agreeing to become counsel of record when assisting individuals on a short-term limited legal service, like a legal hotline or "advice only" clinics.[164] The intent of the rule is to facilitate the participation of pro bono attorneys in these limited but very helpful activities.

The Commission also influenced the development of Hawai'i's mandatory continuing professional education rule that became effective at the start of 2010. Requiring each attorney to earn and report three hours of professionalism training each year, the rule counts "access to justice" as a qualified topic.[165] This resulted from advocacy by the Commission which

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[161] *Id.* at 5. For ease and clarity, the Task Force adopted a set contribution of $500 rather than a formula that accounted for an attorney's income and other variables. *Id.* at 6. It determined that the Hawai'i Justice Foundation, long the administrator of IOLTA funds, would be the logical repository and administrative agency of the collected funds. *Id.*

[162] As with the proposed Rule 6.1 amendment, the Hawai'i Supreme Court is receiving public comment on changes to Rule 6.5. The deadline for comments was October 31, 2011. Haw. State Judiciary, *Re: Proposed Amendments to Rule 6.1 and 6.5 of the Hawaii Rules of Professional Conduct* (Sept. 21, 2010), http://www.courts.state.hi.us/legal_references/rules/proposed_rule_changes/proposedRuleChanges.html.

[163] Letter from Judge Trudy K. Senda, Chair, Comm. on Self-Representation and Unbundling, Haw. Access to Justice Comm'n, to Judge Daniel R. Foley, Chair, Haw. Access to Justice Comm'n (July 14, 2010) (on file with author).

[164] *Id.* at 3.

[165] ATJ COMM'N 2008-2009 ANNUAL REPORT, *supra* note 148, at 8; *see* HAW. JUD. COND. R. 2.2 (LexisNexis 2010); *see also* Kristen Yamamoto & Lynda Arakawa, *CLE Rule Brings New Focus on Access to Justice*, HAW. B.J., Dec. 2009, at 10, 10.

also persuaded the Hawai'i Supreme Court to allow three hours of pro bono work to count as voluntary continuing legal education.[166]

In response to the foreclosure crisis which arrived late in Hawai'i but now has the state in its grip,[167] the Commission proposed a Foreclosure Mediation Pilot Project in the hope of helping borrower-occupants of residential properties stave off a foreclosure action. The Hawai'i Supreme Court formally instituted this project in late 2009.[168] By proposing this project to the Hawai'i Supreme Court, the Commission displayed a capacity to respond to current and specific problems in the community. It also affirmed that its "access" tool box included promoting alternative dispute resolution methods as a means of reducing reliance on resource-intensive court-based adjudications.[169]

These accomplishments suggest several things about the Commission as an institution to date. First, as a creation of *court* rules, the Commission bears an indelible judicial mark, whether warranted or not. The strong representation of judges on the Commission, including its chair, adds to the effect. Although all Commission members are equal peers when convened for Commission business, the normal respect for and even deference to judges is to be expected, especially among attorneys who accept the vertical relationship between the bench and the bar; this adds to the judicial texture of the Commission. It is thus not surprising that the Commission has been most successful with two constituencies: courts and attorneys. These are the same groups with which the judiciary wields a high degree of governance and influence. In contrast, the Commission has not achieved similar success in the Legislature. Given the fund-seeking nature of its

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[166] *Id.*

[167] The *Honolulu Star-Advertiser* reported that in August 2010, foreclosures surged to a total of 1629 statewide, placing Hawai'i's rate of one filing per 315 households at the tenth highest in the nation. Andrew Gomes, *Foreclosures Hit All-Time High*, HONOLULU STAR-ADVERTISER, Sept. 16, 2010, at A1, *available at* http://www.staradvertiser.com/news/20100916_Foreclosures_hit_all-time_high.html.

[168] The Hawai'i Supreme Court issued its order establishing the pilot project on September 29, 2009. Hawai'i Supreme Court Order Establishing Foreclosure Mediation Pilot Project in the Third Circuit Court of the State of Hawai'i (Sept. 29, 2009), *available at* http://www.hawaiijustice.org/downloads/order%20re%20foreclosure%20mediation%20pilot%20project.pdf. The project was limited to the Third Circuit on the Big Island where a disproportionately high number of foreclosure cases continue to occur, and was to run from November 1, 2009 to October 31, 2010. A report on the project was due at the end of 2010. *See also* Laura H.E. Ka'akua, *Commission Update: Hawai'i Revised Judicial Code and Foreclosure Mediation Proposals*, HAW. B.J., July 2009, at 12, 12.

[169] *Cf.* Tracey S. Wiltgen, *Access to Justice Through Mediation*, HAW. B.J., Mar. 2009, at 22, 22 (describing the use of mediation as a creative, less expensive, and quick approach to resolving housing, family-related, and consumer legal problems that often affect the poor and low-income communities).

initial forays into the legislative arena, success was unlikely in any case. However, it must continue to cultivate an influential presence at the Legislature and other institutions. In doing so, it must straddle the dual nature of its character, leveraging the weight it carries as a judicial proxy, albeit an informal one, while finding its young institutional voice as the amalgam of several major justice system stakeholders, of which the judiciary is only one.

Second, the Commission needs the stability, continuity, and productivity of paid staff. Its accomplishments in its first two years serve as testament for what can happen when committed volunteers come together to tackle a vexatious challenge like securing access to justice for all. However, running the Commission entirely with volunteers poses serious problems once the initial spark of activity and enthusiasm fade. The highly accomplished and motivated volunteers who sit on the Commission and its committees are uniformly busy with their professional endeavors and personal lives. How to keep the reservoir of human fuel from becoming a receptacle of fumes is something the Commission must address for itself and the integrity of its mission. Already, the Commission has seen the resignation of several members, and a few of its committees have been reduced to a small but committed core of appointees. Whether these are the initial symptoms of institutional malaise remains to be seen, but the hiring of committed staff to provide stability, continuity, coordination, and follow-through is a necessary action step. Although this entails the procurement of funds, the Commission must have enough belief in its mission and the importance of its survival to pursue the resources required to hire effective staff. In the short term, this may mean diverting funds that could be applied to direct legal services; however, the long-term benefit of a thriving and productive Commission would justify the investment.

This long-term benefit gives rise to a third observation. One reason the Commission must remain viable over time is its uniting effect upon the Access to Justice community. A unity in effort and purpose gave rise to the visible accomplishments of the Commission's first few years as it rode the momentum generated by its creation. The astonishing speed by which the Commission came into being speaks of the significance and hope that "access" stakeholders placed in its formation. By its institutional presence, the Commission legitimates the Movement and carries a powerful symbolic importance apart from the pragmatic. It remains a hub of ongoing activity, bringing together diverse elements of the Access to Justice Movement to work together with eyes on the common goal. Moreover, the Commission provides a bully pulpit for bringing into line the unhealthy competition that has dotted the history of the Movement. It can referee, it can chastise, it can counsel, all in the spirit of preserving unity within the Movement.

V. CONCLUDING THOUGHTS

On October 26, 2007, the *Pacific Business News* published a supplement on Access to Justice[170] which followed on the heels of the two-day meeting during which the Hawai'i Legal Needs Assessment of 2007 was evaluated and a Community-Wide Action Plan was developed.[171] Spotlighting the eleven members of the Access to Justice Hui, the supplement placed an exclamation point on the excitement that surrounded the work of the Hui, which spearheaded the 2007 Legal Needs Assessment and its concomitant action plan.

The cover of the supplement showed a green Hawai'i interstate freeway sign symbolizing a directional guide for gaining access to justice. Although the Hui received the supplement cover with some celebratory giddiness, its members understood that the "access" on-ramp was not short, straight, paved, or free. Indeed, each knew that the ramp remained far from complete, its end sticking in mid-air.

This metaphor of an unfinished pathway was also used in a recent white paper on Access to Justice by Deborah Rhode and Dmitry Bam of the Stanford Center on the Legal Profession. Entitled *A Roadmap to Justice*, the study "explores the *gap* between principle and practice concerning access to justice in America."[172] Rhode and Bam suggest that the roadway is buildable and offer a blueprint for completing it. Yet, even they acknowledge that "access to justice initiatives have been a hard sell, both physically and economically."[173]

Professor Laurence Tribe, until recently President Obama's senior counselor on Access to Justice, told an audience of state supreme court chief justices how the size of this gap "tempts one to reach for sweeping solutions in some unifying vision of 'access to justice' writ large."[174] He observed that it "resists reduction to any grand and fully coherent theme conveniently captured in a simple slogan[,]" and counseled that "[o]nce one recognizes the perils of rigidly idealistic thinking . . . one comes to a recognition that what is perhaps needed [is] more than an inspiring but abstract and utopian

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[170] *Access to Justice—Special Advertising Section*, PAC. BUS. NEWS, Oct. 26, 2007, at 1.

[171] *See supra* text accompanying note 131.

[172] DEBORAH L. RHODE & DMITRY BAM, A ROADMAP TO JUSTICE (2010), http://blogs.law.stanford.edu/roadmaptojustice/files/2010/03/RTJ-White-Paper1.pdf (emphasis added).

[173] *Id.* at 27.

[174] Laurence H. Tribe, Senior Counselor for Access to Justice, U.S. Dep't of Justice, Keynote Remarks at the Annual Conference of Chief Justices 12 (Vail, Colo., July 26, 2010), *available at* http://ccj.ncsc.dni.us (follow link to "Keynote Remarks at the Annual Conference of Chief Justices by Laurence H. Tribe").

call for a thousand-fold increase in funding."[175] Instead, he suggested identifying a series of "tangible, achievable reforms."[176]

One of the reforms Professor Tribe prescribed was the creation of a state Access to Justice Commission. Hawai'i has done that. But the core of Professor Tribe's recommendation is to keep *leaning* into accomplishing specific, attainable goals identified by a particular community. To its credit, Hawai'i has done that too. During Chief Justice Moon's tenure, this constant, sometimes trudging, forward push accounts for the motion that *is* the Access to Justice Movement. This Movement is a trajectory formed by "little arrow[s] bent to a particular degree."[177] We have seen many little arrows during Chief Justice Moon's tenure: the reinvigoration of the Legal Aid Society of Hawai'i, the blossoming of Volunteer Legal Services of Hawai'i and the growth of pro bono consciousness among attorneys, the adoption of court rules to reduce barriers to pro bono, the willingness and wisdom of legal services providers to band together because it felt right though not always comfortable, the emergence of the Hawai'i Justice Foundation as a source of leadership, advocacy, and financial support, the numerous contributions of the private bar and the judiciary, the law school's modeling of a pro bono requirement, the embracing of alternative dispute resolution and the vision of justice it offers, outreach efforts to parts of the community that would otherwise lack awareness of rights and services, incremental advances in addressing language and cultural barriers, improving support systems including the use of technology for those who choose to or must represent themselves, and the founding of first the Access to Justice Hui and then the Hawai'i Access to Justice Commission, which required and ultimately embodied successful collaborations. And this is just an abridged list.

Yet so many "little arrows" remain in the bow unfired or in the quiver unused. Indeed, among the ten action points of the Community-Wide Action Plan of 2007,[178] only the creation of our Access to Justice Commission can be fully checked off. Everything else remains a work-in-progress, requiring patient and persevering work. The second

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[175] *Id.*

[176] *Id.* Professor Tribe had his ideas on what these reforms should be: effective representation in juvenile justice cases, *id.* at 18, removing artificial and often "enormously counterproductive obstacles to pro bono representation[,]" *id.* at 23, and the creation of an Access to Justice Commission. *Id.* at 27.

[177] This comes from Professor Tribe's closing thought about how the goal of access to justice is not to be gained by a single leap, but by realizing it step by step. He referred to Richard Feynman's description of a trajectory of the photon, "each little arrow bent to a particular degree becom[ing] in the aggregate a ray at the speed of light, lighting everything in its path." *Id.* at 31.

[178] *See supra* notes 132-42 and accompanying text.

action point, adequate funding, remains particularly vexing. As Rhode and Bam wrote, "[m]oney may not be the root of all evils in our legal aid system, but it is surely responsible for many."[179] Needless to say, the fiscal picture in Hawai'i remains grim as basic judicial services continue to suffer its share of financial cuts. Recently, Chief Justice Mark Recktenwald announced that in the last two years, the Hawai'i State Judiciary saw a reduction of $19.7 million—13.1% of its overall budget—at a time when the need for judicial services has increased.[180] In this climate, just sustaining the current level of "access to justice" appropriations will be challenging.

Increasing state court filing fee surcharges that fund the Indigent Legal Assistance Fund is one way to keep the funding spigot on.[181] So too is the pending amendment to Rule 6.1 of the Hawai'i Rules of Professional Conduct, which would permit attorneys to fulfill their pro bono obligation through a $500 donation to a legal services provider organization that serves the poor. While these offer hope and must be pursued, neither will singlehandedly or even together provide an adequate response.[182]

While waiting for financial resources to stabilize, efforts must continue to educate legislators and policy makers about the disproportionate effect of inadequate legal services on the poor. Rhode and Bam correctly point out that "[p]art of the problem is the lack of recognition that there *is* a significant problem."[183] Thus, this requires "more effective political and communication strategies,"[184] something that the Hawai'i Access to Justice Commission could roll up its sleeves and help with. The example of more established Commissions provide a glimpse of what is possible. As reported by Laurence Tribe in 2010, California's Commission secured an

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[179] RHODE & BAM, *supra* note 172, at 8.

[180] Mark E. Recktenwald, *A Message from Chief Justice Mark Recktenwald*, *in* JUSTICE IN JEOPARDY: THE IMPACT OF BUDGET CUTS AND FURLOUGHS ON THE JUDICIARY, STATE OF HAWAI'I 1, 1 (2010), *available at* http://www.state.hi.us/jud/pdf/judiciary_budget_impact_report.pdf.

[181] *See supra* note 155. The measure received the Governor's approval. As of this writing, the benefits of this law will more likely be to offset continuing reductions in government and other funding than to augment existing budgets and allow legal services providers to provide more services to more people.

[182] One recent success on the financial front is the amendment of Rule 23 of the Hawai'i Rules of Civil Procedure to allow courts to direct unclaimed residual funds from class action lawsuits to legal services providers. Coined the "cy pres" amendment, this provision permits parties to agree on the recipient(s), "including nonprofit tax exempt organizations[,] eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 or the Hawai'i Justice Foundation." Hawai'i Supreme Court Order Amending Rule 23 of the Hawai'i Rules of Civil Procedure (Jan. 27, 2011). Although these funds are not always readily available, they offer a boon to the recipient when awarded.

[183] RHODE & BAM, *supra* note 172, at 27.

[184] *Id.*

annual $10 million appropriation from its legislature despite the well-documented woes of the California state fisc.[185] Washington's Commission managed to nearly double state appropriations from $6.6 million to $11 million between 2006 and 2008.[186] An effort should at least be undertaken to glean lessons from the past success of these commissions in tackling what is likely the hardest of their tasks.

Apart from funding, other pieces of the access to justice puzzle require attention. Examples include the use of legal assistants to provide certain legal services, the amendment of the student practice rule to allow law students and not-yet-licensed lawyers to undertake certain tasks, the simplifying of court processes and materials, the full removal of language and cultural barriers, the expansion of effective self-help support facilities,[187] the adoption of a civil *Gideon* rule which would require the provision of free legal representation for certain civil cases where basic human rights are at stake, the institutionalizing of unbundled legal services, more engagement by the law school, and loan forgiveness legislation to encourage law graduates to engage in public interest law work without undue concern about unpaid student loans. This too is an abridged list.

As it leans into improving the delivery of legal services to achieve just outcomes for all, the Access to Justice Movement must embrace collaboration. This will entail trust and humility—virtues that have not always prevailed in all sectors of the Movement. A recent example of when these qualities clearly prevailed was in the efficient, calm, and successful merger of the Hawai'i Immigrant Justice Center (formerly known as Na Loio No Na Kanaka) with the Legal Aid Society of Hawai'i.[188] The merger rescued the state's only public interest law firm serving immigrants while giving the Legal Aid Society of Hawai'i an in-house immigration law capacity, as well as the language and cultural access capabilities which the Hawai'i Immigrant Justice Center had developed over time. Although it helped that both groups historically viewed each other as complementary

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[185] Tribe, *supra* note 174, at 28.

[186] *Id.*

[187] Although much had been invested in creating the Ho'okele Project in the early 2000s, *supra* note 86, the project fell victim to reduced resources in later years. In late 2010, the state bar's Standing Committee on the Delivery of Legal Services to the Poor convened an all-day meeting of stakeholders from all the major islands to reinvigorate the idea of creating a statewide, community-based network of self-help centers. *Save the Date—Self Help Center Conference: November 18, 2010*, HAW. B.J., Nov. 2010, at 28, 28. Through concerted and combined efforts, the first Self-Help Center has launched on Kaua'i. Susan Essoyan, *Self Help Center Gives the Needy a Legal Leg Up*, HONOLULU STAR-ADVERTISER, Oct. 15, 2011, at A1, A6.

[188] *Non-Profits Come Together in Tough Times: Hawai'i Immigrant Justice Center Joins the Legal Aid Society of Hawai'i*, HAW. B.J., Mar. 2010, at 26, 26.

and generally non-competitive, the organizations set aside independence, institutional comfort, and protected positions to pursue their shared interest of serving the community's legal needs. After over a year of serving together, both groups have enhanced each other's productivity.

This past year also saw LAS and VLSH renew their commitment to work together and maintain constructive communications to ensure that their vital services are complementary and most efficiently delivered to the community. This has also required trust and a willingness to step away from stubborn claims of position and turf. At a time when the resource pie continues to shrink, these examples of collaboration reflect heady decisions to leverage available resources to maximize benefits to the client community.

Embracing collaboration will also mean probing for and inviting the expertise, perspectives, and contributions of non-legal professionals,[189] as well as community members and client groups. This will open opportunities for holistic and relevant approaches that can be therapeutic or preventive while reducing the need for traditional legal resources.[190]

Chief Justice Moon once wrote: "For our justice system to be truly accessible to all, the enforcement of our laws—which governs everything from economic relationships to the most personal and family matters—must be within the grasp of every citizen, not just the wealthy."[191] He also noted that our unfortunate rationing of legal services is "the cumulative net effect

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[189] The Honorable Richard P. Guy, retired Chief Justice of the Washington Supreme Court and a member of the Hawai'i Access to Justice Commission, noted another way in which non-lawyer allies must be called on for help. He wrote: "We need to ask leaders in organizations outside the bar and bench to speak to the legislators about how legal services are important to them. That includes labor, business, police, doctors and hospitals, service and charitable organizations. The case for access needs is apparent to business and community groups based on what they have seen from people they serve and with whom they work." E-mail from Richard P. Guy, Chief Justice (ret.), Wash. Sup. Ct., to author (Dec. 21, 2010, 09:21 HST) (on file with author).

[190] An example of this is the recent outreach effort of the HSBA's Standing Committee on Diversity, Equality and the Law, in collaboration with the Judiciary's Office on Equality and Access to the Courts, the Hawai'i Supreme Court's Committee on Equality and Access to the Courts, and Hawai'i Women Lawyers, to work with underrepresented immigrant groups at the Kōkua Kalihi Valley Health Center. This process began with a listening session in which the client group, a community of Samoan women, shared what it wanted to hear from the legal community. No action was undertaken until the listening ended. When it did, the provider team learned that these women wanted a culturally sensitive and language-accessible way of getting information about domestic violence and how the legal system and other resources could help. Molded to the sensitivities and filters of the client group, the presentation predictably received high praise. E-mail from Jennifer Rose, Chair, HSBA Comm. on Diversity, Equality & the Law, to author (Apr. 5, 2011, 10:54 HST) (on file with author).

[191] Moon, *supra* note 3.

of having a legal and judicial system that is over-burdened and under-funded."[192] He acknowledged that the chance of reversing this "is slim in light of our still fragile economy and the competing interests of many other types of service programs."[193]

Despite the darkly realistic assessment, it would not have been like Chief Justice Moon to retreat, and he never did. It was said of the Chief Justice when he retired that "[h]e has clearly honored his father's commitment to public service and set an example for all of us to follow."[194] Like the Chief Justice who carried on for seventeen years, unrelenting in his drive to advance the best interest of the judiciary and its many parts, including access and equality in the courts, we have no choice but to stand unfazed by the daunting complexity of the access to justice puzzle. Instead, as the Chief Justice was committed to honoring his father's call, so too must we stay committed to achieving the "access" vision, one puzzle piece at a time. It is, after all, how we "pay our rent."

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[192] *Id.*

[193] *Id.*

[194] Gochros, *supra* note 1, at 15.

The Development of Hawai'i's Appellate Courts: An Organizational Perspective

Edmund M.Y. Leong* and Peter Van Name Esser**

I. INTRODUCTION

In addition to the jurist role, the Chief Justice (CJ) of the Hawai'i Supreme Court serves as the administrative head or leader of the Hawai'i State Judiciary.[1] As such, a candidate's administrative experience and background is a critical factor taken into account in the decision-making process when selecting an individual as CJ. And, as part of this administrative function, the CJ is responsible for planning and directing the overall growth and development of the Hawai'i State Judiciary's organizational structure, work processes, and resources to effectively meet its changing operational needs over time.[2]

As one of the three branches of government, the Hawai'i State Judiciary is organizationally composed of two major, interactive legal sub-systems that are referred to herein as the trial and appellate divisions. In turn, each division is composed of its own respective sub-systems. Presently, the trial division is composed of the district court and circuit court branches. The appellate division is composed of the intermediate court and supreme court branches. At present, there is a single court in the supreme court branch, known as the Hawai'i Supreme Court, and a single court in the intermediate court branch, known as the Hawai'i Intermediate Court of Appeals (ICA).

The Hawai'i State Judiciary's primary governmental function is to resolve, through legal methods and mechanisms, disputes arising within society that may be brought by the parties involved. Disputes are converted into court cases and initially processed by the trial division. Parties unsatisfied with a case

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[1] HAW. REV. STAT. § 601-2(a) (1993).

[2] This administrative function also involves organizational reform in the nature of downsizing, rather than expansion, due to governmental fiscal and budget difficulties even as caseloads increase. *See, e.g.*, John T. Broderick, Jr. & Daniel J. Hall, *What Is Reengineering and Why Is It Necessary?*, *in* NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 25 (Carol M. Flango et al. eds., 2010).

result as processed by this division's judges may then further litigate the dispute with the appellate division. The decisions rendered by appellate judges are, however, judicially final in nature.

The focus of this article is on the heretofore fitful growth and development of the Hawai'i State Judiciary's appellate division (hereinafter Appellate Division) in the statehood era to date, and the actions and decisions of the four CJs in their administrative roles, from the start of the statehood era in 1959 to the retirement of Ronald Moon in 2010, in this development. Part II provides a general discussion of the organizational structure of appellate divisions in American judiciaries and an overview of the development of the Appellate Division's organizational structure. Part III focuses on the first fundamental change made to the Appellate Division's organizational structure with the initial establishment of the ICA. Part IV focuses on the second fundamental structural change involving the transformation of the jurisdictional framework of the appellate courts that occurred during the tenure of CJ Moon. Part V briefly discusses the Appellate Division's possible path of development in the near future with the retirement of Moon and the recent appointment of Mark Recktenwald as the fifth CJ of the Hawai'i Supreme Court.

II. DEVELOPMENTAL OVERVIEW

As an organization's workload grows over time, it must periodically make changes to its structure, how it is organized into operational units to function, work processes, and/or level of resources (physical infrastructure, labor, technology, etc.) once that growth has perdurably expanded to the extent whereby the organization's current production capacity is permanently overwhelmed and performance is detrimentally affected. This pattern of organizational growth and development to improve organizational performance is clearly evident with the legislative and executive branches of state government in Hawai'i, as their respective governmental workloads have continuously grown since the beginning of the statehood era, and has been for the most part viewed positively and as having transpired successfully by the public. It is also evident with the Hawai'i State Judiciary's trial division. The number of courts (general and special jurisdiction), courthouses, judges, and the level and quality of other resources have grown and developed to improve case processing concomitant with the expanded trial division workload, and these changes in structure, work process, and/or resource have also been mostly positive and successful.

Although this basic pattern of organizational growth and development has also taken place with the Appellate Division, it has generally been perceived as being more negative and tumultuous in effect and nature, and having yielded

little improvement in organizational performance.[3] Due to the persistent growth in the annual number of appeals needing to be processed from the start of the statehood era onward, the ICA was established to coexist with the Hawai'i Supreme Court in 1978. Since the ICA began its operations in 1980, appellate work processes have been periodically modified and the number of ICA judges has been increased from three to the current six. But throughout most of the period from the early statehood era to the present, the Appellate Division's organizational performance has mostly been considered, by the general public and the legal community in particular, to be ineffective at best, or dysfunctional at worst.[4] Organizational performance, for purposes herein, refers to the physical processing of appeals as measured by factors such as the timeliness of processing and the workload and work methods—not effort—of appellate judges. It does not involve and is unrelated to evaluating performance in terms of the nature or quality of the decisions rendered by the appellate courts or judges.

This differential organizational performance, actual or perceived, between the Hawai'i State Judiciary's trial and appellate divisions is not primarily due to the administrative abilities of the four CJs in managing growth and development. Improvement in trial division performance and either lack of or insufficient improvement in Appellate Division performance are found during the tenure of each of the CJs and over the tenures of the CJs taken as a group. Two other factors may better explain why the CJs were less successful in making positively perceived changes to the structure, work processes, and/or level of resources—particularly to the first two areas—of the Appellate Division.

One, differences in the nature of trial and appellate courts impact the nature of organizational growth and development between trial and appellate divisions. A major difference is that trial division cases are processed on a one-judge-one-case basis and appellate division cases are processed on a multiple-

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[3] *See* Ken Kobayashi, *Hawaii's Supreme Court and the Lum Years*, HONOLULU ADVERTISER, July 5, 1992, at A1; Ken Kobayashi, *Lum Court Gets Mixed Marks from the Legal Experts*, HONOLULU ADVERTISER, July 5, 1992, at A6; Ken Kobayashi, *Richardson: Lum Court Less Activist*, HONOLULU ADVERTISER, July 6, 1992, at A6; Lynda Arakawa, *Supreme Court Struggles as Cases, Criticism Pile Up*, HONOLULU ADVERTISER, Nov. 23, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/Nov/23/ln/ln05a.html; Lynda Arakawa, *Appeals Courts Failing Their Mission, Panel Says*, HONOLULU ADVERTISER, Dec. 20, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/Dec/20/ln/ln01a.html [hereinafter Arakawa, *Appeals Courts Failing*]; Lynda Arakawa, *Speedier Rulings Sought for State Supreme Court*, HONOLULU ADVERTISER, Feb. 2, 2004, *available at* http://the.honoluluadvertiser.com/article/2004/Feb/02/ln/ln12a.html [hereinafter Arakawa, *Speedier Rulings*].

[4] *See* Richard Borreca, *Lingle Says High Court is in Disarray*, HONOLULU STAR-BULLETIN, Apr. 12, 2003, *available at* http://archives.starbulletin.com/2003/04/12/news/index4.html.

judge-one-case basis. That is, an appellate case utilizes collective decision-making by a group of judges. Thus, if workload growth reaches the point where the level of judicial resources requires expansion to improve organizational performance, the appellate division tends to require a multi-judge increase per expansion incident. For the trial division, a one-judge expansion incident is more likely. If the monetary costs of judicial resource expansion per incident tend to be significantly greater with the appellate division, there may be less frequent judicial resource expansions, and deteriorating organizational performance may be more persistent for this division. In general, these differences result in organizational growth and development being a relatively more complex process for the appellate division compared to the trial division.

Two, differences in the nature of the two types of appellate courts impact organizational growth and development for these two appellate courts. The appellate court that is typically known as the "supreme court" in most American judiciaries is normally perceived to function as the court of last resort within the judiciary. As such, the supreme court is normally granted the status of highest-ranking court in the judiciary. Along with this perception and status, the stature of the supreme court normally provides it with the freedom to select appellate cases for resolution and concentrate on those cases that raise more serious policy issues and questions of imperative or fundamental public importance. These features differentiate the supreme court from other courts and confers on it special standing in the public's mind.

This special standing constrains the supreme court's ability to engage in organizational change, even if substantial workload increases hamper organizational performance. Fundamental structural changes—such as establishing additional supreme courts or increasing the supreme court's membership size—and changes in work processes—such as the nonuse (or even heavily restricted use) of oral argument or substitution of published opinions articulating the reasoning of the justices in reaching their decisions with more perfunctory pronouncements of decisions—are more exceptional than normal. The supreme court tends to be stable both in structure and work processes.

Thus, most American judiciaries have established an intermediate court branch with flexibility in structure and work processes as the means for improving organizational performance of the appellate division should backlogs and delays in case processing become problematic. The appellate court that is typically known as the "intermediate court" normally functions as the workhorse of the appellate division, processing the bulk of cases which usually present routine or clear-cut issues and require simple error correction. Structural and work process flexibility allows for expansion in either the number of intermediate courts or their judges and the optional use of collective

decision-making by panel or en banc. The intermediate court is lower-ranking, lacks the degree of freedom to select appellate cases for its resolution, and does not hold the type of special standing the supreme court does in the public's mind. These features differentiate the intermediate court from the supreme court.

The trial division also tends to possess flexibility in structure and work processes. If the trial division's workload expands sufficiently, the judiciary can seek legislative approval for additional courts and/or judges to maintain effective processing of cases. In this respect, intermediate appellate courts are similar to trial courts while supreme courts are dissimilar from both intermediate appellate courts and trial courts.

An organization's administrator can look to other similarly-situated organizations to serve as models in formulating a plan and strategy for change to this organization's structure and/or work processes to improve organizational performance. In this case, the Hawai'i State Judiciary can look to other American judiciaries. There are currently three different appellate division structural models found in American federal and state judiciaries.

Eleven state judiciaries have the first model: an appellate division composed only of a supreme court branch to process appeals.[5] This will be hereinafter referred to as the supreme court-only model.[6] Thirty-nine state judiciaries and the federal judiciary follow a second model: an appellate division composed of both intermediate court and supreme court branches. Of these, thirty-six states utilize the general framework of (1) having appeals initially filed and processed by the intermediate court branch, (2) providing the supreme court with discretionary authority to accept or reject for further litigation appeals filed with this branch subsequent to disposition by the intermediate court, and (3) also providing the supreme court with either discretionary or mandatory authority to accept appeals directly, bypassing the intermediate court branch, under certain conditions provided by the state's jurisdictional statute or constitution. This will be hereinafter referred to as the majority model. The remaining three states follow a third model that differs with a framework of (1) having appeals initially filed with the supreme court branch, which it then discretionarily assigns for processing by the intermediate court branch or itself, and (2) providing the supreme court with discretionary authority to accept or reject for

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[5] All of the figures provided herein are from the Federal-State Court Directory, published by the Congressional Quarterly Press. *See* CQ PRESS, FEDERAL-STATE COURT DIRECTORY 2010 EDITION 145-97 (2009).

[6] The authors were not able to identify any studies on whether and how the attitude toward supreme court special standing differs in these states' communities and judiciaries compared to the other states' communities and judiciaries, or how these supreme court-only states address appellate backlog and delay problems.

further litigation appeals subsequent to disposition by the intermediate court branch.[7] This will be hereinafter referred to as the minority model.

The group of states using the supreme court-only model differs from the two groups of states with intermediate courts in that the supreme court can be considered to be non-differentiated in the former and differentiated in the latter. Non-differentiated means that the one supreme court possesses features of both supreme and intermediate courts, i.e., the supreme and intermediate courts are in effect combined into one. Thus, in the supreme court-only model, the supreme court functions as an all-purpose or non-specialized appellate court. Differentiated refers to the specialization of the supreme court in accordance with the features discussed above. In states with the majority model, the supreme court functions as the most fully specialized or restricted-purpose appellate court—it serves as the court of last resort (in the sense that an appeal cannot be made to a higher-level court) and restricts its workload to cases raising more serious policy issues and questions of imperative or fundamental public importance. In the minority model, the supreme court may function with a lesser degree of specialization in terms of a less limiting or restrictive workload, i.e., the workload encompasses more than cases raising more serious policy issues and questions of imperative or fundamental public importance. In contrast, the intermediate court functions as a limited-purpose appellate court in the minority model and a general-purpose appellate court in the majority model.

The majority and minority model states can also be distinguished on the basis of how they screen or review appeals to determine which cases are proper for the supreme court to address, i.e., those which raise more serious policy issues and questions of imperative or fundamental public importance. For the group of states with majority models (initial filing with the intermediate court), the appellants themselves do the preliminary screening by deciding whether to bypass the intermediate court and seek direct resolution of a case with the supreme court. For the group of states with minority models (initial filing with the supreme court), it is the supreme court that performs the screening by deciding whether to assign a case to itself or to the intermediate court.

If every appellant seeks to bypass the intermediate court in the majority model, this shifts the screening burden to the supreme court. If the supreme court assigns every case to the intermediate court in the minority model, this shifts the screening burden to the appellants if they are then authorized to request reassignment of cases back to the supreme court. However, should appellants in the majority model and the supreme court in the minority model

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[7] These states, with the number of justices and judges in their respective supreme and intermediate courts in parentheses, are Idaho (5, 3), Iowa (7, 9), and Mississippi (9, 10). *See* CQ PRESS, *supra* note 5, at 158, 161, 170. There are also two states, Oklahoma and South Carolina, with a mixed system where only certain appeals are assigned. *See id.* at 182, 187.

respectively act in good faith, which is likely, the screening burden remains on that model's intended actor.

The state judiciaries can then be fully categorized as follows. First, those states with supreme court-only models can be categorized as having non-differentiated or all-purpose supreme courts and no need for preliminary screening of cases to determine whether they are cases that are proper for the supreme court to address. Second, those states with intermediate courts and majority models can be categorized as having fully differentiated or most restricted-purpose (limited jurisdiction) supreme courts and preliminary screening of cases by appellants to determine whether cases are proper for the supreme court to address directly. Third, those states with minority models can be categorized as having partially differentiated or less restricted-purpose (concurrent jurisdiction) supreme courts and preliminary screening of cases by the supreme court to determine whether cases are proper for the supreme court to address directly.

The Hawai'i State Judiciary, the youngest of American judiciaries, has presently adopted the majority model.[8] But during its five decades or so of existence since the granting of statehood, the Hawai'i State Judiciary has adopted and employed all three models for its Appellate Division, each being in place at different points in time. However, each of the three models is independent, and they are not, as a group, evolutionary in relationship to one another. That is, although historically one or another model has become dominant in adoption, appellate systems do not necessarily nor naturally develop from one model (initial) to another (intermediate) and then to another (final). Although only three models have existed for a considerable length of time, this set is also not necessarily exhaustive and a new model could potentially be conceived in the future.

A general pattern of change can be identified, however, in the development of appellate systems over time.[9] All American judiciaries have an appellate division with a supreme court branch at the start of the judiciary's existence. An intermediate court branch may or may not also be established at this time. If not, and the judiciary's appellate division does change organizationally later, the structural transformation was most often the addition of an intermediate court branch and the adoption of the majority model. To a lesser extent, those judiciaries that added an intermediate court adopted the minority model. However, some judiciaries have not changed, and their supreme court-only models have endured for a considerable length of time.[10]

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[8] *See* G. Richard Morry, *New Day Dawns for Hawai'i's Appellate Courts*, HAW. B.J., May 2006, at 4.

[9] *See* Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978).

[10] The authors were not able to identify any studies on the lack of change in these

The pattern of change in the Appellate Division has followed the general pattern in that it started its existence with only a supreme court branch. It has deviated from the general pattern in that it added an intermediate branch, but first adopted the minority model and later switched to the majority model.[11] Each change occurred within a relatively short time period between them. The addition of the intermediate court branch occurred a little over two decades after the granting of statehood. The switch to the majority model occurred about two and a half decades after the adoption of the minority model. The changes have also appeared to be more experimental than progressive in nature, in the sense of moving from an inferior to a superior model in terms of organizational performance. And each model change has necessitated its respective re-conceptualization of the supreme court's function from being an all-purpose appellate court to an increasingly restricted-purpose appellate court, and re-conceptualization of the intermediate court from being a limited-purpose to a general-purpose appellate court.

III. THE ESTABLISHMENT OF THE ICA

The discussion will now examine the Appellate Division's growth and development in greater detail and the actions and decisions of the CJs in the experimentation that has taken place to date. This part focuses on the emergence of the first appellate work overload crisis experienced by the Appellate Division and the first fundamental change in organizational structure within the Appellate Division. This involves the initial establishment of the ICA with the adoption of the minority model, concomitant with the increase in the number of appellate judges, in response to this crisis.

The Hawai'i State Judiciary's basic organizational structure is mandated by the Hawai'i State Constitution.[12] When the constitution was drafted initially in 1950, in anticipation of the granting of statehood which came in 1959, it mandated the establishment of both trial and appellate divisions. But the actual organizational units comprising the trial division, the district and circuit courts, were to be statutorily determined. The 1950 Constitution, however, explicitly called for an appellate division comprised only of a supreme court composed of a chief justice and four associate justices.[13] Although the concept of an appellate division comprised of both intermediate and supreme courts was well-established in American judiciaries in the mid-twentieth century, there was no indication that the delegates drafting the 1950 Constitution had considered such

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judiciaries.

[11] The authors were not able to identify any studies on judiciaries replacing the minority model with the majority model.

[12] *See* HAW. CONST. art. VI, § 1.

[13] HAW. CONST. art. V, § 2 (1950).

a multi-tiered structure for the Hawai'i State Judiciary. At the time, the Hawai'i Territorial Judiciary only had a supreme court composed of three justices, and this supreme court-only model was carried over into statehood, although the Hawai'i State Judiciary would be composed of five justices.[14]

Wilfred Tsukiyama, the first CJ of the post-statehood Hawai'i Supreme Court, may have supported a supreme court-only model, as he neither spoke of nor took any action publicly to establish an intermediate court within the Appellate Division during his tenure from 1959 to 1965. Appellate workload increased steadily during this time, and case processing backlogs and delays were appearing.[15] But CJ Tsukiyama apparently considered the growing appellate workload to be effectively manageable and did not propose any organizational change for the Appellate Division.

William S. Richardson, the second CJ of the Hawai'i Supreme Court, may have also supported a supreme court-only model during his first term in office, from 1966 to 1973, as he also neither spoke of nor took any action publicly to establish an intermediate court during this time. Appellate workload at that time was increasing annually at more rapid rates but case processing backlogs and delays had not yet reached crisis proportions.[16] That is, the growth of the appellate workload overwhelming the judicial capacity of the Hawai'i Supreme Court was still not considered an issue.

CJ Richardson first broached the idea of establishing an intermediate court in the early part of his second term, in a speech before the Hawai'i State Bar Association (HSBA) in November 1976.[17] The legal community in Hawai'i responded to the matter of ineffectual appellate case processing shortly thereafter. The legal community strongly opposed establishment of a second appellate court and thought this development to be unnecessary due to Hawai'i's small population (which would apparently limit the volume and growth in the number of appeals).[18] To resolve the Appellate Division's operational difficulties, this community proposed retaining the supreme court-only model and altering both the structure of the supreme court and its work processes. Specifically, the supreme court's membership would expand from five to seven justices, with the optional use of three-justice panels in conducting the supreme court's case processing.[19] Presumably, any recurring

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[14] *Compare* Hawai'i Organic Act of 1900, ch. 339, § 82, 31 Stat. 141, *with* HAW. CONST. art. V, § 2 (1950).

[15] *See* Edmund M.Y. Leong, *The Changing Role of Hawai'i's Intermediate Appellate Court*, HAW. B.J., May 2006, at 6.

[16] *See id.*

[17] CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982, at 113-16 (1985).

[18] Leong, *supra* note 15, at 8 (citing Peter J. Levinson, *Appellate Caseload in Hawaii*, 13 HAW. B.J. 3 (1977)).

[19] *Id.* at 9. Whether the legal community consulted with or studied other judiciaries with

operational problems of this type would be resolved similarly in the future. That is, the number of supreme court justices could be increased again in future rounds of judicial resource expansion or other work process reforms could be devised.

As the administrative head of the Hawai'i State Judiciary, CJ Richardson advocated for an amendment to the constitution in 1978 to mandate an appellate division comprised of both supreme court and intermediate court branches.[20] This constitutional amendment garnered strong public support and was ratified in that year's general election.[21] In the 1979 legislative session, Richardson then sought legislation to enable the establishment of the intermediate court and funding for sufficient judicial resources for this court to permit adoption of the majority model.[22] Recognizing the legal community's argument that an intermediate court was perhaps unnecessary, the skeptical Legislature authorized the establishment of the intermediate court but provided initial funding for only the absolute minimum judicial resources—one panel of three judges—for this new court. This funding decision meant that the majority model would be effectively inoperable in practice, as the intermediate court under this model would be expected to process with judicial finality the bulk of appeals filed with the Appellate Division. Then, based on public testimony from a former jurist colleague, retired Associate Justice Bert T. Kobayashi, who was acting as a member of the general public and not as an official representative of either the legal community or the judiciary, the Legislature enacted legislation[23] that essentially selected and adopted the minority model for the Hawai'i State Judiciary contrary to CJ Richardson's proposal.[24] This decision suggests the Legislature believed the minority model would then result in the supreme court handling the bulk of appeals and the intermediate court having less significance in the appellate process.

The three competing conceptions of the type of growth and development needed to improve the Appellate Division's operational performance at this time were similar in one respect. They all called for an increase in the level of appellate judicial resources, i.e., the total number of judges or justices. They differed in the type of structure and work procedures—i.e., the manner in which to deploy and utilize the larger number of judges or justices—considered preferable and effective in improving operational performance. The legal

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supreme court-only models to learn how appellate overloads were dealt with prior to announcing their proposed structural reform measures is not known.

[20] Lee Gomes, *Two Con Con Amendments Concern Judiciary*, HONOLULU STAR-BULLETIN, Oct. 19, 1978, at A2.

[21] *See The Con Con Vote Totals*, HONOLULU STAR-BULLETIN, Nov. 8, 1978, at C3.

[22] *See* Leong, *supra* note 15, at 9.

[23] *See* HAW. REV. STAT. ch. 602 (Supp. 1979).

[24] Whether Richardson was alerted to and aware of this testimony beforehand is not known.

community's conception would retain a one-court appellate division but provide the supreme court with structural flexibility to expand in size as necessary with respect to workload. The supreme court would remain non-differentiated, possessing features of both supreme and intermediate courts. CJ Richardson's conception would create a multi-tiered appellate division comprised of a structurally unchanged, higher-ranked supreme court, functioning as the court of last resort, and a lower-ranked intermediate court with the structural flexibility that the legal community had sought for the supreme court. This is the dominant conception among American judiciaries, where both the supreme court and intermediate court are differentiated. The Legislature reluctantly acceded to the multi-tiered appellate division, but, in disagreement with the CJ as to the intermediate court's role in the appellate process, it sought to preserve the primacy of the supreme court in the appellate process by minimizing the size of the intermediate court and creating an appellate case assignment function for the supreme court. In this conception, both the supreme court and intermediate court are partially differentiated and have concurrent jurisdiction.

External organizations, such as the HSBA and the Legislature, and individuals played a major role in determining the outcome in this first phase of growth and development of the Hawai'i State Judiciary's Appellate Division—the initial establishment of a multi-tiered appellate division and an intermediate court. External organizations did not, however, have significant influence in shaping the outcome of the succeeding second phase, which involved the implementation of this new multi-tiered appellate division. The focus here is on the CJ's administrative role in directing and managing the Hawai'i Supreme Court's new assignment function. The assignment function would come to have serious, consequential impact on the Appellate Division's organizational performance because it affected the distribution of the appellate workload, i.e., the volume and type of cases handled by the respective appellate courts.

Initial filing of appellate cases was made with the Hawai'i Supreme Court.[25] The Hawai'i Supreme Court would then review the cases to determine which ones would be assigned for processing by itself or by the ICA. The criteria used to determine assignment were statutorily established.[26] The Hawai'i Supreme Court did not, however, adopt any appellate rules on the assignment decision-making process. Whether the Hawai'i Supreme Court justice responsible for making assignments unilaterally made them or conferred or consulted with the other justices prior to making the assignment is not known.

Beginning operations in 1980 under the Legislature-imposed framework, the Hawai'i Supreme Court assigned the large majority of appellate cases for

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[25] HAW. REV. STAT. § 602-5(8) (Supp. 1979).

[26] *See id.* § 602-6.

processing by the ICA.[27] This continued for the final two years of Richardson's tenure as CJ. Richardson retired from that office in 1982. From 1980 to 1982, the ICA produced a larger volume of published opinions than did the supreme court, and this gave the new appellate court a good degree of public attention and prominence.[28]

It was CJ Richardson's original assessment that a relatively expansive intermediate court and adoption of the majority model would be either the only or the most effective solution to the appellate workload problem of growing backlogs and processing delays. But the Legislature's skepticism over the actual need for the establishment of a second appellate court resulted in funding for minimum judicial resources to operate the new intermediate court and the adoption of the minority model. Richardson countered by utilizing the case assignment function to give the ICA a major, significant role in the appellate process and, perhaps, operate a de facto majority model.

But the insufficient level of judicial resources provided to the ICA, permitting it to operate only one panel, was a major constraint. CJ Richardson's implementation of the case assignment function created a disproportionate workload burden on each ICA judge in comparison to the workload burden of each Hawai'i Supreme Court justice, due to the ICA's smaller membership (three judges) relative to the Hawai'i Supreme Court's membership (five justices). This condition could not be sustained over the long term.

Herman Lum, the third CJ of the Hawai'i Supreme Court, served a single term from 1983 to his retirement in 1993. During his tenure, and as the Hawai'i State Judiciary's administrative head, he did not publicly articulate any positions with regard to the fundamental issues concerning the new two-tiered appellate division.[29] He indicated no preference or objection to the minority model and its Hawai'i Supreme Court case assignment function. In 1992, however, he secured legislative approval to expand the number of judges on the ICA from three to four.[30]

Shortly after his appointment as CJ, Lum altered the case assignment pattern so as to equalize the work burden per appellate judge.[31] With the Hawai'i

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[27] *See* Leong, *supra* note 15, at 6.

[28] ICA opinions were published in a separate reporter during this time. *See* 1 Haw. App. through 10 Haw. App.

[29] However, CJ Lum stated in an interview in 1991 that "it may come to pass someday when the number increases that we will follow the pure cert route. . . . [W]e may have to . . . conform with what is generally the practice with other states that have I.C.A. courts and a supreme court and use a pure cert route." Jon C. Yoshimura, *Administering Justice or Just Administration: The Hawaii Supreme Court and the Intermediate Court of Appeals*, 14 U. HAW. L. REV. 271, 309 (1992).

[30] *See* Act of June 18, 1992, No. 253, § 2, 1992 Haw. Sess. Laws 661, 661-62.

[31] *See* Leong, *supra* note 15, at 6. Whether Lum sought the advice or consent from either

Supreme Court's larger membership, this now resulted in the Hawai'i Supreme Court assigning more appellate cases for processing to itself than the ICA. The Hawai'i Supreme Court began producing a larger volume of published opinions than the ICA and regained the more significant place in the appellate system. The ICA's presence and purpose began to fade in the public memory.[32]

In redefining the working relationship between the Hawai'i Supreme Court and ICA through the case assignment function, CJ Lum may have created, in effect, a de facto supreme court-only model by making the ICA conduct itself more like a second panel of the Hawai'i Supreme Court. This outcome is reminiscent of the legal community's 1978 proposal for organizational performance improvement—expansion of, and use of panels by, the supreme court. It may have also helped to sustain the lingering belief that the intermediate court was perhaps unnecessary.

Equalizing the work burden per appellate judge may have had another important effect. To help reduce backlogs and length of delays, concomitant with work burden equalization, a higher proportion of the total appeals were disposed of without published opinions. There was increasing use of perfunctory memorandum opinions and summary disposition orders to dispose of appellate cases.[33] This Appellate Division work product change was viewed negatively and had a serious detrimental impact on the legal community's perception of fairness in the appeals process.[34]

IV. THE TRANSFORMATION OF APPELLATE JURISDICTION: THE MOON ERA

This part focuses on the events occurring during the tenure of Ronald Moon as CJ, from 1993 to 2010. It discusses the second appellate work overload crisis experienced by the Hawai'i State Judiciary and the third phase of growth and development for the Appellate Division. As the Hawai'i State Judiciary's administrative leader, CJ Moon was able to advance growth and development by removing the 1979 Legislature-imposed limitations on the multi-tiered appellate division.[35] The number of intermediate court judges increased for the second time since the court was established two decades earlier, and the second

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other members of the Hawai'i Supreme Court or the ICA before taking this action is not known.

[32] The separate ICA Reporter also ceased to be published after September 1994. *Cf.* 10 Haw. App.

[33] Ken Kobayashi, *Lum's Court One of 'Memorandum' Rulings*, HONOLULU ADVERTISER, July 6, 1992, at A2.

[34] *See* Yoshimura, *supra* note 29.

[35] In 1997, Moon was also instrumental in the suspension of the Hawai'i Supreme Court's longstanding, extrajudicial duty of selecting trustees for the charitable trust then known as the Bishop Estate and converting the trustee selection function to a judicial responsibility of the State Probate Court. *See* EDMUND M.Y. LEONG, THE HAWAII SUPREME COURT'S ROLE IN PUBLIC POLICY-MAKING 155 (2002).

fundamental change in organizational structure occurred through amendment of the statutes to provide for the adoption of the majority model in place of the minority model.

Ronald Moon, the fourth CJ of the Hawai'i Supreme Court, was initially appointed to the Hawai'i Supreme Court as an associate justice in 1990. With his presence on the Hawai'i Supreme Court during CJ Lum's tenure, he gained first-hand knowledge of the workings of the case assignment function and its impact on the Appellate Division's operational performance prior to his elevation to CJ in 1993.[36] And during his first term as CJ, Moon continued the assignment practices he had inherited.

After an initial improvement in the Appellate Division's organizational performance due to the establishment of the ICA and its judicial resources, deterioration in performance recurred, persisted and, likely, worsened in subsequent years. To counter the deteriorating performance, the Hawai'i State Judiciary sought to increase the ICA's judicial resources. CJ Lum secured legislative approval for one additional ICA judgeship in 1992, as his tenure was coming to an end. In 2001, as Moon's first term as CJ was coming to an end, he then secured legislative approval for another two ICA judgeships.[37] These two increases together resulted in a doubling of the size of the ICA from its initial three judgeships. Whether the Legislature had now indicated acceptance of the need for a second appellate court in approving the expansion of judicial resources is not clear. But it did indicate acknowledgment of the publicly criticized deterioration in the appellate division's organizational performance in 1992 as arising, at least in part, by an insufficient level of judicial resources.

Because of the practice of collective decision-making in appellate courts, expansion of judicial resources in the appellate division tends to require a multi-judge increase per expansion incident to be most effective in improving organizational performance in these courts. And, because the monetary costs of such expansions are likely to be significant, there tends to be less frequent judicial resource expansions for improving organizational performance in appellate courts. Therefore, once performance deterioration begins to occur, the deterioration may persist for a long duration and grow in severity over this duration. Thus, it took two decades before a CJ was able to secure legislative approval for a meaningful expansion in judicial resources for the ICA, even as the Appellate Division's operational performance was steadily deteriorating for the greater part of this time period.

Shortly after Moon secured reappointment to a second term as CJ in March 2003, and two years after he had gained a major expansion in judicial resources

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[36] Moon may have also gained some earlier knowledge of the minority model as he received his law degree from the University of Iowa.

[37] Act of June 18, 2001, No. 248, § 1, 2001 Haw. Sess. Laws 646, 646.

for the ICA, then-Governor Linda Lingle criticized the Hawai'i Supreme Court as being dysfunctional in a speech before the Federal District Court Conference in April 2003.[38] In response to Lingle's recommendation that it was the responsibility of the legal community to resolve the Appellate Division's operational performance problems, the HSBA formed a special committee to examine the matter and submit its report to the HSBA Board of Directors.[39] But before the report was completed and released to the public, this appellate overload crisis emerged to public attention in a newspaper exposé in November 2003.[40] As a possible indication of how public awareness of the ICA's presence and purpose had faded during its more than two decades of existence, the media's primary focus was on the Hawai'i Supreme Court. The legal community's proposals for reform as presented in this exposé focused on the Appellate Division's work processes and work product. Criticism was expressed over the increasing lack of oral argument in appellate hearings and excessive use of memorandum opinions and summary disposition orders to dispose of appeals.[41] The legal community proposed establishing standards regarding the length of time permitted to decide cases, quotas for the minimum number of full opinions a justice or judge must write, and page limits to reduce the length of such opinions.[42]

The expansion of judicial resources could have by itself begun to reverse the deterioration in the Appellate Division's work processes, product, and productivity, and allow CJ Moon to reject the legal community's proposed reforms. But this improvement in organizational performance could also be short-term and eventually suffer the same fate as with the initial round of judicial resource expansion in 1980. After an initial improvement in organizational performance, i.e., an immediate reduction in the backlog and length of delays in case processing due to the increase in judicial resources, improvement turned to deteriorating performance as appellate workload continued to grow in subsequent years. If appellate workload also continued to grow after this new round of expansion, the currently adequate level of judicial resources would again become insufficient. And should another round of

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[38] *See* Borreca, *supra* note 4.

[39] Arakawa, *Appeals Courts Failing*, *supra* note 3.

[40] Lynda Arakawa, *Justices Must Juggle Reviews, Administrative Tasks*, HONOLULU ADVERTISER, Nov. 23, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/Nov/23/ln/ln07a.html.

[41] For example, in *State v. Tran*, No. 21118, 90 Haw. 472, 979 P.2d 68 (Oct. 6, 1998), an appeal of a criminal case resulting in the conviction of the defendant on a charge of attempted first-degree murder and sentencing to life without parole was summarily affirmed by the Hawai'i Supreme Court without oral argument in a summary disposition order. *See also* Lynda Arakawa, *High Court Keeps Low Profile*, HONOLULU ADVERTISER, Nov. 25, 2003, *available at* http://the.honoluluadvertiser.com/article/2003/Nov/25/ln/ln03a.html.

[42] Arakawa, *Speedier Rulings*, *supra* note 3.

expansion not occur for another two decades, eventual weakening of appellate work processes, product, and productivity would recur.

CJ Moon was ostensibly not satisfied with only an expansion in judicial resources to produce short-term performance improvement. To produce longer-term improvement, he sought to revamp or reorganize the appellate system. In response to the opportunity presented by the public exposé of the second appellate overload crisis, Moon unexpectedly proposed legislation in 2004 to amend the statutory appellate jurisdiction framework so as to replace the minority model with the majority model. Moon had not publicly mentioned this sentiment or this particular course of action before the exposé. But this proposal to expand the role of the intermediate court was less controversial than the 1979 proposal to create an intermediate court and generated limited opposition.

The proposed revamping was opposed by the Office of the Public Defender and an informed private attorney, who stated that it would decrease the efficiency of the appellate courts by shifting original appeals from disposition by nine (five Hawai'i Supreme Court justices and four ICA judges) to six (six ICA judges) appellate judges.[43] The State Department of the Attorney General did not oppose the proposed change and provided comments and amendment suggestions.[44] The Legislature was skeptical of, and perhaps perplexed by, the need to amend the statutes as proposed to achieve desired improvement in Appellate Division organizational performance. But CJ Moon was successful in securing legislative approval even though the legislation would not take effect until July 2006.[45] The Legislature also created a task force to review the proposed revamping and make recommendations for its implementation to the 2006 Legislature.[46]

The Legislature remained skeptical and added a sunset provision to the 2004 legislation in the 2006 legislative session.[47] Although the legislation to revamp the appellate system was to shortly take effect, the new system would end in 2010 should the change not yield positive results during these four years. After mandatory review of the effects of the new appellate jurisdictional framework in the 2010 legislative session,[48] CJ Moon secured legislative repeal of the

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[43] *H.B. 2301, Relating to Appellate Jurisdiction: Hearing on H.B. 2301 Before the H. Comm. on Judiciary*, 2004 Leg., Reg. Sess. 1-3 (Haw. 2004) (testimony of the Office of the Public Defender; testimony of James Bickerton).

[44] *H.B. 2301, Relating to Appellate Jurisdiction: Hearing on H.B. 2301 Before the H. Comm. on Judiciary*, 2004 Leg., Reg. Sess. 1-3 (Haw. 2004) (testimony of Mark J. Bennett, Att'y Gen., State of Haw.).

[45] Act of July 10, 2004, No. 202, § 85, 2004 Haw. Sess. Laws 919, 948.

[46] *See* ACT 202 TASK FORCE, FINAL REPORT OF THE APPELLATE REVIEW TASK FORCE 1-25 (2006).

[47] *See* Act of May 11, 2006, No. 94, § 1, 2006 Haw. Sess. Laws 268, 268.

[48] *S.B. 2150, Relating to Appellate Jurisdiction: Hearing on S.B. 2150 Before the H.*

sunset provision.[49] With the majority model permanently adopted, Moon left the Hawai'i Supreme Court and the Hawai'i State Judiciary due to mandatory retirement later in 2010.

The conflict with the Legislature in 1979 involved two primary issues. First, was there an actual need for a second appellate court in Hawai'i? Second, if a second court was established, should it play a limited or expansive role in the appellate system? Political compromise led to the establishment of the intermediate court, but with a limited size and role. In the 2004 conflict, there was no issue about the need for a second court. But had the second court not been established in the 1970s, perhaps this would have been Moon's proposal now. The national trend since the 1970s had been for more states to establish an intermediate court in their judiciaries.[50]

The issue in 2004 concerned the expansion of the role of the ICA and limitation of the role of the Hawai'i Supreme Court. If the limited role of the ICA under the concurrent jurisdiction framework had been effective by helping to improve the overall Appellate Division operational performance, there would have been no need for the ICA's expanded role proposed by Moon. But the fundamental question of the impact of the concurrent jurisdiction framework on the Appellate Division's organizational performance had not been raised. The Legislature imposed the minority model upon the Hawai'i State Judiciary in 1979 by providing the absolute minimum level of judicial resources (one panel of three judges) to the ICA, making it incapable of assuming its proposed role as the Appellate Division's workhorse. The minority model was not adopted in 1979 because it was considered to be the better appellate jurisdiction framework. It was adopted because it provided for an expedient political compromise and outcome at that time.

In 2004, the ICA became more capable of assuming the workhorse role with the expansion of judicial resources CJ Moon had secured. But as shown by CJ Richardson's actions in the early 1980s, the minority model did not necessarily preclude the ICA from serving as the workhorse because the Hawai'i Supreme Court could just assign more cases to the ICA rather than itself for disposal. Rather than work within the existing minority model, CJ Moon sought to revamp the appellate system by replacing the minority model with the majority model to achieve this direction of change in appellate workload distribution. The advantage was that this change in workload distribution would be by design with the majority model and would not require the CJ to administratively impose the change as required by the minority model. That is,

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Comm. on Judiciary, 2010 Leg., Reg. Sess. (Haw. 2010) (testimony of James Branham, Staff Att'y, Haw. Sup. Ct.).

[49] Act of May 14, 2010, No. 109, § 1, 2010 Haw. Sess. Laws 200, 200-01.

[50] LYNN LANGTON & THOMAS COHEN, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1987-2004, at 1-4 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sco8704.pdf.

with this change, the CJ did not have to seek the consensus of the ICA judges to take on an increase in their workload relative to the Hawai'i Supreme Court justices' workload.

The majority model was the one CJ Richardson had preferred for initial adoption in 1979.[51] It may have been CJ Moon's assessment, like CJ Richardson's, that the majority model would provide either the only or the most effective solution to resolve the Appellate Division's backlog and delay problems in the long run. A structurally flexible intermediate court as the workhorse, coexisting with a structurally stable supreme court as the court of last resort, could expand the Appellate Division's judicial resources to improve organizational performance as appellate workload grew over time. But CJ Moon may have wanted to revamp the entire appellate system more for purposes of eliminating the deficient minority model than to advance the majority model.

As operated in Hawai'i, the minority model may have had three major deficiencies. One, the Hawai'i Supreme Court's assignment function, an atypical function performed by very few other courts of last resort in American state judiciaries, diverted Hawai'i Supreme Court judicial resources to an off-bench activity that determined the distribution of the appellate workload between the two appellate courts. Hawai'i Supreme Court justices were required to spend considerable time and effort to review each and every appeal filed with the Appellate Division and assign each case to itself or to the ICA. That time and effort may have been more effectively utilized in processing appeals, especially appeals that would properly command the attention of the court of last resort, and in proper fashion, i.e., with oral argument and published opinions articulating the reasoning of the justices in reaching their decisions. The revamped appellate system eliminates the need for either appellate court to divert its judicial resources to conduct preliminary review of each and every case for the purpose of assignment.

Two, the CJ bore the administrative task of managing and directing this assignment function for the Appellate Division. As practiced by the Hawai'i State Judiciary, the CJ had administrative responsibility for seeking both efficiency and fairness in the work burdens of appellate judges and the working relationship between Hawai'i Supreme Court justices and ICA judges. In fulfilling this responsibility, the CJ may, at times, have caused the Hawai'i Supreme Court to assign appeals more appropriate for processing by the ICA to itself because the level of judicial resources at the ICA was insufficient to permit timely processing of all the ICA-appropriate cases. This workload distribution may then have resulted in the Hawai'i Supreme Court having to apply more perfunctory means of processing these types of appeals in order to

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[51] *See* Leong, *supra* note 15, at 6.

expend more time and effort in processing those appeals that would command the attention of the court of last resort in proper fashion. Under the revamped appellate system, the CJ is relieved of this administrative task and the Hawai'i Supreme Court has, by design of the majority model, the ability to control its work burden and limit its cases to those more appropriate for the court of last resort.

Three, in the minority model as operated in Hawai'i, the Hawai'i Supreme Court was intended to be the primary appellate court, with the expectation that it would process most of the appeals. The ICA was intended to play a more limited, subsidiary role and process the overflow of appeals when the Hawai'i Supreme Court workload became excessive. However, the ICA was also designed to be a structurally flexible appellate court where an expansion of judicial resources would be deployed should overall appellate workload grow to the point of permanently overwhelming current judicial capacity. This creates an awkward logic for the CJ in justifying to the Legislature a request for more judicial resources, because the CJ would be seeking to expand the size of the appellate court that is supposed to play a limited, subsidiary role in the appellate system. With the revamped appellate system, the ICA is now intended to be the primary appellate court in the sense that it is expected to process most of the appeals. An expansion of its judicial resources due to an increased workload is now more readily justifiable.

Critics of CJ Moon's proposal to revamp the appellate system did not argue that the minority model was effective or appropriate. They were more concerned with the effects the change to the majority model might have on the respective workloads of the Hawai'i Supreme Court and the ICA.[52] Instead of an ICA limited in size and role relative to the Hawai'i Supreme Court, there would now be a Hawai'i Supreme Court limited in size and role relative to the ICA. In effect, CJ Moon's position was that, under the concurrent jurisdiction framework, the Hawai'i Supreme Court was being overutilized and the ICA was being underutilized. This workload pattern was not effective or appropriate for the Appellate Division as a whole, and was primarily due to the minority model itself. Opponents were concerned that, under the proposed limited jurisdiction (of the supreme court) framework, the Hawai'i Supreme Court would or could be underutilized and the ICA would or could be overutilized.

Under the limited jurisdiction framework, appeals are initially filed with the ICA.[53] After initial filing, appellants may apply for transfer of their appeals for

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[52] *H.B. 2301, Relating to Appellate Jurisdiction: Hearing on H.B. 2301 Before the H. Comm. on Judiciary*, 2004 Leg., Reg. Sess. 1-3 (Haw. 2004) (testimony of the Office of the Public Defender; testimony of James Bickerton).

[53] HAW. REV. STAT. § 602-57 (Supp. 2010).

direct disposition by the Hawai'i Supreme Court, subject to the Hawai'i Supreme Court's mandatory or discretionary decision to accept or reject such transfer.[54] Cases not transferred are processed by the ICA. After their disposition by the ICA, appellants may seek review of the ICA's decision by application to the Hawai'i Supreme Court for a writ of certiorari, subject to the Hawai'i Supreme Court's discretionary decision to accept or reject such a review.[55] Cases not accepted for further review are thus resolved by the ICA with judicial finality.

The transfer of appeals initially filed with the ICA for direct resolution by the Hawai'i Supreme Court under the current system is analogous to the Hawai'i Supreme Court's assignment of appeals to itself for direct resolution in the previous system. Statutorily established in both instances, the criteria for transfer[56] differs significantly from the criteria for case assignment[57] to the Hawai'i Supreme Court. For the former, the criteria are articulated more explicitly, the articulated set of criteria is exhaustive, and the criteria are differentiated with respect to mandatory or discretionary transfer. For the latter, the criteria are more equivocally articulated, the articulated set of criteria is not exhaustive, and the criteria are applied for strictly discretionary assignment. In addition, the transfer decision is a collective decision of the entire Hawai'i Supreme Court membership. It is unclear whether the assignment decision was a unilateral decision of the Hawai'i Supreme Court justice responsible for making assignments or a collective decision of the Hawai'i Supreme Court membership. Given these differences in criteria and decision-making, it is uncertain whether the change in methodology from assignment to transfer will have any significant impact on the Hawai'i Supreme Court's work burden.

Double appeals—supreme court review of intermediate court decisions—are provided for under both appellate jurisdiction frameworks. The statutorily established criteria for certiorari are unchanged.[58] Thus, the set of cases with double appeals is likely to be similar, if not identical, given the same set of total appeals filed initially with either the Hawai'i Supreme Court or the ICA. This change in the locus of initial filing is unlikely to have any significant impact on the incidence of double appeals and, in turn, the Hawai'i Supreme Court's work burden.

Perhaps the main impact on the Hawai'i Supreme Court's work burden due to the change to the limited jurisdiction framework may be the elimination of the Hawai'i Supreme Court's need to assign to itself a portion of appeals more

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[54] *Id.* § 602-58.

[55] *Id.* § 602-59.

[56] *Id.* § 602-58.

[57] *Id.* § 602-6 (repealed 2004).

[58] *Compare* HAW. REV. STAT. § 602-59 (1993) *with* HAW. REV. STAT. § 602-59 (Supp. 2010).

appropriate for processing by the ICA, which it previously did because of the inability of the ICA to timely process those appeals on account of an insufficient level of judicial resources. This reduction in work burden arising from the Hawai'i Supreme Court's ability to restrict itself to appeals more properly commanding the attention of the court of last resort may be considered a positive impact. The court of last resort is not properly utilized by functioning as an overflow appellate court to help resolve Appellate Division backlogs and delays. But if the limited-jurisdiction Hawai'i Supreme Court becomes persistently underutilized, restructuring by reducing its membership to three justices could be a substitute for expanding its jurisdiction by amending the transfer or double appeals criteria to increase its workload.[59]

Unlike the uncertain impact on the Hawai'i Supreme Court work burden, the ICA's work burden clearly increases with the change in appellate jurisdiction framework. It is now the appellate court where the bulk of appeals will begin and end. It will be the only appellate court most appellants will participate in. With this role as the workhorse of the appellate system, appellate backlog and delay issues will arise mainly from and be primarily associated with the ICA. The ICA could become overutilized. But with its more significant role in the appellate system, it would be easier to justify and secure legislative approval for an expansion of judicial resources.[60]

Judicial resource expansion is, however, more difficult to secure at the appellate level as it tends to call for the addition of multiple judges to produce the most effective improvement in organizational performance.[61] Thus, expansion may not occur quickly or frequently enough to prevent any performance deterioration from persisting for considerable duration. Perhaps,

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[59] Retired Associate Justice Levinson stated that "the transition has . . . resulted in a substantial underutilization of the Hawai'i Supreme Court's dispute resolution function, which is its primary reason for existing. . . . I do not believe that the Supreme Court has enough work to keep it busy now. . . . One solution would be to modify the transfer statute to provide that certain enumerated classes of appeals be assigned directly to the Supreme Court." Interview by Peter Esser with Steven Levinson, Assoc. Justice (ret.), Haw. Sup. Ct., in Honolulu, Haw. (Feb. 17, 2011).

[60] Retired Associate Justice Levinson stated that "the ICA's significance . . . has significantly increased by virtue of its assumption of the Judiciary's primary, front-line appellate function. . . . The ICA now conducts the only substantive appellate review that the great bulk of adjudicated disputes are going to receive. . . . I believe that it is critical . . . that the ICA be increased to a nine-judge court, so that it can, at any one time, sit in three panels of three judges each . . . . Such an increase in the judicial roster, in theory, would result in a corresponding fifty percent increase in the ICA's disposition rate." *Id.*

[61] In addition to judicial resources, legal support staff could be increased. ICA Associate Judge Alexa Fujise stated that "the Legislature funded five new ICA staff attorney positions after the 2006 transition, for tasks formerly performed by the Supreme Court." Interview by Peter Esser with Alexa Fujise, Assoc. Judge, Haw. Intermediate Ct. of Appeals, in Honolulu, Haw. (Feb. 17, 2011).

as an alternative to judicial resource expansion, there could be a change in work procedures, such as making the use of panels optional for the ICA, to improve organizational performance. The more routine appellate cases could be processed on a one-judge-one-case rather than a multi-judge-one-case basis. Appellants could request collective decision-making by a panel for more relatively complex cases.

V. FUTURE DEVELOPMENT

The current and continuing implementation of the expanded and revamped Appellate Division can be considered the fourth phase of growth and development. This part discusses possible trends in growth and development that may transpire in the near future. These trends concern both the Hawai'i Supreme Court and the ICA.

The Hawai'i Supreme Court can proceed to repair any reputational damage from operating under the minority model and having to function as the primary appellate court from 1980 to 2006. Without the more administrative burden of the case assignment function, the Hawai'i Supreme Court will fully focus on its juristic function as the court of last resort and judicial public policy maker. With the ability to better control its workload, limiting its jurisdiction to the smaller number of cases presenting more complex and serious issues or policy questions of imperative and fundamental public importance, the Hawai'i Supreme Court can improve its work processes and resolve those appeals that properly command the attention of the court of last resort in proper fashion. There will be more extensive use of oral argument and published opinions for the cases handled by the Hawai'i Supreme Court.[62] This performance improvement can take place while avoiding or minimizing significant backlogs and delays in its appellate processing. Although backlogs and delays may not be fully eliminated, their effects on appellants should be diminished.

At the same time, public awareness and knowledge of the ICA's presence and purpose in the appellate system will grow as it assumes its expanded role in the appellate process. To more fully and firmly institutionalize the ICA within the judicial branch of government, as its significance and stature as a judicial institution are enhanced, other actions should be taken to provide it with permanent headquarters and courtrooms. A name change to the Court of Appeals may also be secured, bringing it into conformity with nomenclature used by most other American judiciaries.[63] The ICA will also gain functional

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[62] *S.B. No. 2150, Relating to Appellate Jurisdiction: Hearing on S.B. 2150 Before the H. Comm. on Judiciary*, 2010 Leg., Reg. Sess. (Haw. 2010) (testimony of James Branham, Staff Att'y, Haw. Sup. Ct.).

[63] ACT 202 TASK FORCE, *supra* note 46, at 19.

independence from and be perceived as functioning more independently of the Hawai'i Supreme Court as the more interdependent or interrelated working relationship imposed by the case assignment schema will have been dissolved. The chief judge will gain in public prominence in assumption of that office's expanded responsibilities as the administrative head of the Appellate Division's intermediate court branch. And, as the ICA raises its public profile, there will be a concomitant growing public interest in the selection of ICA judges.

Appellate backlog and delay issues will become primarily associated with the ICA. Thus, requests to expand appellate judicial resources can and will only emanate from the ICA. Backlogs and delays and expansion of judicial resources may be both affected by one factor, the relationship between appellate organizational performance and the decision of litigants to pursue appeals. If the ICA processes appeals more effectively, i.e., in timely and proper fashion, this could encourage litigants to pursue appeals, and vice versa.

If such a relationship exists, then the more effectively the ICA processes appeals, the greater the appellate case volume will be. With a given level of judicial resources, the greater the case volume, the greater the likelihood of an onset of backlog and delay problems. Thus, the more effectively the ICA processes appeals (with the current level of judicial resources), the greater the likelihood of an onset of backlog and delay problems. If backlog and delay problems lead to an eventual expansion of judicial resources, then the more effectively the ICA processes appeals, the greater the likelihood of an eventual expansion of judicial resources.

If the relationship does not exist, organizational performance is independent of and has no impact on the level of case volume growth. With the current level of judicial resources and a given case volume, the more (or less) effectively the ICA processes appeals, the less (or more) likely an onset of backlog and delay problems. If backlog and delay problems lead to an eventual expansion of judicial resources, then the more (or less) effectively the ICA processes appeals (with the current level of judicial resources), the smaller (or greater) the likelihood of an eventual expansion of judicial resources.

VI. CONCLUSION

An organization's performance ultimately depends on that organization's structure, work processes, and level and quality of resources. The talents and skills of the organization's administrative leader and the quality of its managerial staff are two of the more important elements included in the quality of resources. But even the most competent of administrators will be constrained by that organization's structure and work processes in the task of producing efficient or effective organizational performance. An otherwise

effective administrator can be sufficiently hampered by an inefficient structure to prevent ineffective performance.

As one of the three branches of state government, the Hawai'i State Judiciary is a political institution or organization. As such, both its overall and subunits' organizational structures are subject to political determination. External organizations and private individuals with a stake in the outcome compete with and influence the determination of the Hawai'i State Judiciary's organizational structures as much as its administrative leader, the CJ.

The fitful pattern of growth and development for Hawai'i's state appellate courts to date is a product of the conflict or dispute between the Hawai'i State Judiciary and its CJs and various external organizations, including the HSBA and the Legislature, and other interested individuals with a stake in the determination of the Appellate Division's organizational structure. The specific point of controversy, from the Hawai'i State Judiciary's perspective, is that an externally-imposed inefficient or otherwise deficient structure long hindered the ability of the CJs to utilize Appellate Division judicial resources in a manner needed to produce effective juristic work performances. The fitful growth and development and contemporaneous less-than-desired organizational performance of the Appellate Division and its organizational units could be due more to the politics of judicial organizational structure than to the abilities and motivations of the CJs, Hawai'i Supreme Court justices, and ICA judges.

The politics of appellate division organizational structure in Hawai'i involves two central issues. The first issue, which was more fundamental and more ardently disputed, was whether a second appellate court, in addition to the Hawai'i Supreme Court, was needed in Hawai'i. In the late 1970s, CJ Richardson proposed the establishment of an intermediate court and multi-tiered appellate division structure as the preferred means of improving the then-emerging but quickly escalating deterioration in the ability of the Hawai'i Supreme Court to process appeals in timely fashion, resulting in growing backlogs and delays in processing an ever-expanding appellate workload. Opponents at that time preferred retention and reform of the extant supreme court-only structure that had been carried over from the territorial era to the statehood era.

The long-term trend among American state judiciaries had been for establishment of multi-tiered appellate divisions as appellate caseloads grew in volume and complexity. As the youngest of American state judiciaries, was it better for the Hawai'i State Judiciary to follow the trend at that time, some other time in the future, or perhaps never? Although appellate workload was expanding rapidly then, Hawai'i's relatively small demographic and economic size would eventually limit that growth. At that limit, the workload may be insufficient to fiscally justify the more elaborate multi-tiered structure. Many states with demographic and economic sizes similar to Hawai'i had maintained,

and some still do to this date, a supreme court-only structure for considerable lengths of time.

The second issue, which was more corollary and less hotly disputed, was what the size and role of a second appellate court, if established, should be in a multi-tiered appellate division. Prevailing on the first issue, CJ Richardson preferred an expansive size and role for the ICA, as it was to be the primary appellate court in the sense that it would be processing the bulk of appeals. The Hawai'i Supreme Court would retain its extant size and limit its appellate role to that of a court of last resort and public policy maker. The large majority of American state judiciaries, then and presently, have adopted this multi-tiered appellate structure. Opponents preferred an ICA of limited size and role, giving the Hawai'i Supreme Court primacy in size and maintaining an enlarged role for the Hawai'i Supreme Court in the appellate system. Very few state judiciaries, even fewer than the number of states preferring not to establish a second court, have adopted this alternative multi-tiered appellate structure. Political compromise in the late 1970s resulted in opponents prevailing on the second issue.

The Hawai'i State Judiciary revisited this issue in 2004. CJ Moon regarded the externally-imposed multi-tiered appellate structure that the Hawai'i State Judiciary was saddled with as deficient in helping to resolve the Appellate Division's performance problems, which had extended beyond processing backlogs and delays (timeliness) to deterioration in work procedures (e.g., lack of oral argument) and work product (e.g., increasing use of memorandum opinions and summary disposition orders). CJ Moon proposed to reorganize the Appellate Division and replace that multi-tiered appellate structure with the one the Hawai'i State Judiciary had long preferred. Opponents were not so much supporters of the existing structure, but were more concerned with whether the Hawai'i State Judiciary's preferred structure would be as effective in resolving the operational performance problems as claimed. A skeptical Legislature gave temporary approval for the proposed changeover, but the Hawai'i State Judiciary would later provide data to support its performance improvement claims to the Legislature in 2010. Gaining final approval, the Hawai'i State Judiciary ultimately prevailed on the second issue.

With the preferred organizational structure for the Appellate Division now in place, future political conflict or disputes may arise over adjustments to the basic structure. The specific issue may involve the question of how expansive or limited the size and role of both the ICA and the Hawai'i Supreme Court should be. These disputes could in turn implicate the other elements—work processes and level and quality of resources—that impact organizational performance. With respect to judicial resources, the qualifications of individuals selected to be Hawai'i Supreme Court justices and ICA judges

could become an issue. The politics of judicial selection[64] will then be entangled with the politics of judicial organizational structure.

[64] *See* Edmund M.Y. Leong, *Politics, Merit and the Selection of Judges*, 10 HAW. B.J. 61 (2007).

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