Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Opinion, and the Realignment of Political Power in Post-statehood Hawai'i

by Williamson B.C. Chang*

Preface

The Richardson-led Hawaii Supreme Court (1966-82) has been characterized as "controversial," having "altered Hawaii law so that it became more reflective of the islands' uncommon cultural heritage."[1] *In contrast, the court under the direction of Herman T. Lum has been called "passive," "a care-taker rather than the player it was under William Richardson," emphasizing "efficiency."*[2]

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* Professor of Law, Wm. S. Richardson School of Law; A.B., Princeton University, 1972; J.D., Boalt Hall School of Law, 1975. The author wishes to acknowledge the editorial assistance and patience of Symposium Issue Co-editor Douglas K. Ushijima. The opinions in this article are those of the author only. The author served as a Special Deputy Attorney General for the State of Hawaii in the Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977), litigation and represented Chief Justice William S. Richardson in several proceedings before the Ninth Circuit Court of Appeals. Chief Justice Richardson was granted permission to participate in those proceedings as amicus curiae. *See infra* note 31 for a discussion of the *Robinson* saga.

[1] Carol Santoki Dodd, *The Richardson Court: Ho'oponopono*, 6 U. Haw. L. Rev. 9, 31 (1984) [hereinafter *Ho'oponopono*].

[2] *See Waihee's Court, A More Liberal, Activist Image?*, Honolulu Advertiser, Mar. 9, 1992, at A8, col. 1.; *In Islands, Power is Spelled P-O-L-I-T-I-C-S*, Honolulu Advertiser, Mar. 23, 1992, at A7, col. 1 ("[S]ome Democrats are critical of Chief Justice Herman Lum for heading 'a caretaker court,' not concerned enough with social issues . . . ."); *see also* Danielle K. Hart & Karla A. Winter, *Striking a Balance: Procedural Reforms Under the Lum Court*, 14 U. Haw. L. Rev. 221, 223 (1992) ("One of the Lum Court's primary goals has been to reduce case congestion in Hawai'i courts and ultimately to eliminate undue delay and cost in litigation. The Lum Court, therefore, implemented a variety of reforms and utilized other tools to achieve this efficiency ideal.").

Assuming these characterizations are true (or at least defensible), the larger question is "why?" Is the contrast entirely a function of the personality and political or judicial agenda of the individual justices? Or is there a larger, perhaps more subtle, historical "explanation"? Does the court no longer have a role in the post-statehood revolution?

In this essay, the Hawaii Supreme Court's use of the memorandum opinion is used as a starting point to present what some may consider to be a controversial thesis from a sociological and historical perspective analyzing why the two courts appear to be so different in terms of "judicial philosophy." It then concludes with jurisprudential observations that, despite elements of "silencing" by the powerful, the struggle for social change so evident in Hawai'i at the time of statehood still exists today, although in a subtler form; that by understanding our history, the development of a visionary, uniquely Hawaiian jurisprudence is still possible; that the visionary energy of social transformation may still be developed.

I. Introduction: Silence as a Form of Dominant Discourse.

The Hawaii Supreme Court's use of the memorandum opinion[3] has multiplied over the last decade.[4] Some express frustration with the court's use of these unpublished opinions.[5] Memorandum decisions are

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[3] Haw. R. App. P. 35 covers opinions. It reads in part:

(a) Classes of Opinions. Opinions may be rendered by a designated judge or justice, or may take the form of per curiam or memorandum opinions.

(b) Publication. Memorandum opinions shall not be published.

(c) Citation. A memorandum opinion shall not be cited in any other action or proceeding except when the opinion establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

Id.

[4] For example, in 1980, the court under Richardson issued 29 opinions. In 1989, the court under Lum issued 415. Jon C. Yoshimura, *Administering Justice or Just Administration: The Hawaii Supreme Court and the Intermediate Court of Appeals*, 14 U. Haw. L. Rev. 271, 286 n.91 (1992).

[5] Melody MacKenzie writes in this volume: "Many of the decisions issued [on Native Hawaiian Rights] are in fact memorandum opinions and have no precedential effect. These opinions . . . mark a disturbing trend by the court to issue memorandum opinions even where a published opinion could clarify or develop the existing body of law." Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. Haw. L. Rev. 377, 377 (1992). "[I]s the court, by its silence, abdicating its role to create and guide the development of our common law?" *Id.* at 394; *See also* David Kimo Frankel, *The Hawaii Supreme Court: An Overview*, 14 U. Haw. L. Rev. 5 (1992) (hereinafter *Overview*); *New Laws, Society's Problems Pile Work on the Judicial System,* Honolulu Star-

traditionally viewed as hindering access to information of a particularly powerful nature: judicial decisions which may be outcome-determinative in one's own case.[6] On the other hand, a court's use of memorandum decisions is a kind of "silence," indicative of insecurity with its own power.[7] Indeed, memorandum opinions may be symptomatic of institutional silence in general.

There can be two interpretations of institutional silence: domination or being dominated—either the entity is deliberately withholding information as a means of domination, or the entity is being silenced by domination or threat from another source. The common critique of memorandum decisions is that they are an unnecessary abuse of judicial power.[8] Such a narrow analysis, however, in reviewing the Hawai'i judiciary, would neglect elements of the court's relationship within the power structure that are unique to Hawai'i. The use of the memorandum opinion by the Hawaii Supreme Court must be analyzed from a Hawaiian historical and sociological perspective.

BULL., Feb. 21, 1992, at A4, col. 4 ("[City Prosecutor] Kaneshiro and other attorneys also question the Supreme Court's practice of issuing memorandum opinions in many cases instead of published opinions. 'Memo opinions don't provide direction; they are not establishing case law,' Kaneshiro said.").

[6] *See, e.g.*, *Lawyer Rips Real Estate Fraud Decision*, HONOLULU ADVERTISER, Mar. 19, 1992, at A3, col. 2 ("[Honolulu attorney William] McCorriston says he is bothered by not only the outcome of the appeal [upholding punitive damages for fraud] but also by the fact that the high court's response was not a decision but a 'memorandum opinion,' which cannot be cited as a legal precedent or the basis for future cases. . . . 'We expect our appellate courts to redress mistakes that are made in lower courts; we don't pay appellate judges to duck difficult decisions. If they want to establish unusual principles of law, they should do so in published decisions they have to stand by and be criticized for—and not do it through the back door of a memorandum opinion.'"); *see also* David Kimo Frankel, *No Stealth Candidates for the Hawaii Supreme Court*, HONOLULU STAR BULL., Jan. 13, 1992, at A-11, col. 2 ("Unfortunately, the court has often failed to clearly explain its decisions and the state of the law. Attorneys' most frequent criticism of the court has been its reliance on 'memo opinions' which do not amplify the existing body of law. Even the court's formal opinions occasionally fail to provide detailed analysis or explanations.").

[7] If there were negative consequences to publishing all decisions as fully citable opinions the practice would not exist.

[8] *See, e.g.*, William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1204 (1978) [hereinafter *Non-Precedential Precedent*] ("The limited publication/no-citation rules . . . leave some of the most powerful persons in the country accountable (with regard to at least part of their work) to no one—not even to themselves or to each other.").

The political history of Hawai'i over the last fifty years, where a social upheaval placed Asian-American, Hawaiians, and other disempowered groups in the judiciary,[9] also reflects elements of "silencing." After statehood, the grip of the "Big Five"[10] on both political and economic institutions was divided.[11] Given the power to vote, the non-white plurality put into power leaders from their own class of formerly dis-empowered plantation laborers.[12]

The resulting social revolution in Hawai'i embraced significant challenges to the property rights of the powerful. As a result, it is the judiciary that has come under increasing attack in the post-statehood era.[13] Hence, it is essential to consider the use of memorandum decisions as a sign of vulnerability, not invincibility.

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[9] *See generally* ROGER BELL, LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS (1984) [hereinafter LAST AMONG EQUALS]. In a recent interview Chief Justice Richardson recalled that after the appointment of former state senator Kazuhisa Abe, the Hawaii Supreme Court was the only court without a majority of Caucasians or Christians. He told of a day when Justice Abe came in to ask that "Buddha Day" be a holiday for the Supreme Court. Apparently, Justice Bernard Levinson had insisted that he be excused from his duties on Yom Kippur. The Chief Justice recalled that Abe was quite serious, but the Chief Justice did not declare "Buddha Day," celebrated as a national holiday in many Asian and South Asian countries, to be a holiday for the judiciary. At that time, the court consisted of Bernard Levinson, a Jewish-American; Kazuhisa Abe, a Japanese-American; Chief Justice Richardson, a Hawaiian-Caucasian American; Bert Kobayashi, former state Attorney General and a Japanese-American; and Thomas Ogata, a Japanese-American. Interview with Chief Justice William S. Richardson by Williamson B.C. Chang, in Honolulu, Haw. (July 15, 1989).

[10] The "Big Five" is used throughout this article to refer to the major businesses of pre-statehood Hawai'i. Cooper and Daws explain:

> Republican politics in Hawaii was little else but the politics of business, big business. In fact it was true enough to say that government in Hawaii in the Republican years functioned avowedly as an arm of local big business, more particularly as an arm of the so-called "Big Five"—Castle & Cooke, Alexander & Baldwin, American Factors, Theo H. Davies, C. Brewer—plus a sixth, the Dillingham interests. . . .
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> In those decades, big business in Hawaii meant plantation agriculture—sugar and pineapple grown on land owned by the Big Five or leased either from government or from the great private estates.

GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII 3 (1985).

[11] *See generally* LAWRENCE H. FUCHS, HAWAII PONO (1961).

[12] For a history of the Revolution of 1954, see DANIEL K. INOUYE, JOURNEY TO WASHINGTON (1967); TOM COFFMAN, CATCH A WAVE: HAWAII'S NEW POLITICS (1973); SANFORD ZALBURG, A SPARK IS STRUCK: JACK HALL AND THE ILWU IN HAWAII (1979); DENNIS M. OGAWA, KODOMO NO TAME NI: FOR THE SAKE OF THE CHILDREN (1978).

[13] Criticism of the Judiciary has surfaced as to a number of different issues. The

Various disciplines within the social sciences have focused on silence as a powerful instrument for the promulgation of pow-

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activist nature of the post-statehood court in returning to the public rights of use to resources came under severe challenge and criticism in federal courts, *see infra* notes 24 and 31, as well as from the local bar, *see infra* note 54. The controversial public resource decisions include, McBryde Sugar Co. Ltd. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973) (adjudicating water rights of the Hanapepe river); In re Ashford, 50 Haw. 314, 440 P.2d 76 (1968); County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973); In re Sanborn, 57 Haw. 585, 562 P.2d 771 (1977); State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) (*Ashford, Sotomura, Sanborn* and *Zimring* extended public rights to the shoreline and accreted land). In 1983, Richardson responded to some of the criticism:

> I should point out this [protection of Hawai'i's natural resources] is not a radical concept thought up by five old men in black muumuus. Our state constitution specifically provides for the conservation and development of our natural resources. . . . The constitution also imposes upon the State the obligation to protect and regulate our natural resources for the benefit of the people.
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> Some of my comments today will probably reinforce the view held by some people that I am somewhat of a judicial activist. Well, I have news for you: I *am* somewhat of a judicial activist. But if "activism" means progress and growth and a looking forward to the future with hope and high expectations, then I guess I don't mind being called an activist.

Chief Justice William S. Richardson, Remarks to the Legal Concerns Discussion Group (Mar. 10, 1983) (manuscript available from author).

During the 1980s the media gave a great deal of attention to the problems of the judiciary. A ticket-fixing scandal in the judiciary received sustained coverage, despite testimony that the sheriff was continuing a practice that had dated back to territorial days. Vocal critics of the judiciary, particularly prosecutor Charles Marsland and others were able to use the press to vilify and malign particular judges for particular decisions. Finally, the newly established law school at the University of Hawaii, associated with Governor Burns and Chief Justice Richardson, also received intense scrutiny on issues of accreditation and the bar passage rate of its graduates. A voter registration scandal involving law school students and alleged improprieties in the admissions process received continuing front page coverage. *See infra* notes 25 and 26.

The thesis of this article is that the former oligopoly, through the two daily newspapers, with close ties to the former "Big Five" (The Thurston Family has always had a substantial stake in the *Advertiser*. Lorrin Thurston was the ambassador for annexation on behalf of the rebels who overthrew the Hawaiian Queen.) has applied a much higher standard of scrutiny to the present judiciary than was ever the case prior to statehood.

While this form of expose journalism has the appearance of progressive "muckraking," its deeper motivations seem to be in publicly embarrassing the judiciary—a means of diminishing the political power of those who usurped the Big Five.

If one examines the attitude of the local press towards the courts, particularly the light treatment of disparate treatment of whites and non-whites prior to statehood, it seems apparent that the press has applied a double standard to the pre-statehood, white,

er.[14] There is growing recognition that the dominant discourse of law

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Republican judiciary, and the post-statehood, largely non-white, Democratic judiciary.

The lack of media attention to the judiciary at all prior to statehood makes comparisons somewhat difficult. A bit of Hawaiian history, however, is illustrative: two prominent pre-statehood cases, the execution of Myles Fukunaga and the Massie Case [the pardon of Lt. Massie] provide some evidence indicating that reporting on the judiciary was biased against non-whites. "Hate" crimes against non-whites, as in the Massie case, where one of the defendants, Horace Ida was abducted and beaten by sailors, received back-page attention, while the rape of Mrs. Massie generated front page coverage biased against the non-white defendants who clearly were framed.

In her article on the Massie case, reporter Lois Taylor notes the different press treatment of the acquittal of the non-white defendants which created an "uproar" and the backpage treatment of the abduction and beating of Horace Ida, one of the defendants:

> After 97 ballots over 100 hours, the jury was hopelessly deadlocked and was discharged. The defendants [non-whites accused of the rape] were dismissed. . . .
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> The decision created an uproar. Admiral George Pettingill telegraphed Washington that Honolulu was not a safe place for the wives and families of the fleet to visit. The shore patrol was trebled "to protect the homes of naval personnel while they are away on maneuvers."
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> On Dec. 14, a small item announced that Horace Ida, one of the five defendants in the rape trial had been abducted, beaten with leather belts and left at the foot of the Pali by a group of men Ida identified as sailors. The Navy denied this, but canceled all shore leaves. . . .
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> By Jan. 7, 1932, the follow-up stories [of the Ida beating] had been relegated to the back of the newspapers, and were mainly reports of the bad publicity given to the Islands by the recent events.

LINDA MENTON & EILEEN TAMURA, A HISTORY OF HAWAI'I 234 (1989) [hereinafter A HISTORY OF HAWAI'I] (citing Lois Taylor, *Something Terrible Has Happened, The Massie Travesty Retold*, HONOLULU STAR BULL. (1981))

Indeed, the Hawai'i press parroted the biases and prejudices of the twenty-odd mainland papers that sent reporters to Hawai'i to cover the trial. Almost without exception, the trial of the non-white defendants was cast in stereotypical racist metaphors of the "pure" white woman and the "animal," "lust" of non-white defendants. A HISTORY OF HAWAI'I, *supra*, at 237.

Moreover, when Lt. Massie and others received clemency from the Governor despite their conviction for manslaughter, the two daily papers did not express outrage at the nullification of the jury's verdict by the Governor, an act based solely on considerations of race and power. *Id.*

The present fixation of the two daily papers in uncovering any impropriety in the judiciary must be contrasted with the pre-statehood laxity in coverage. Whereas now a public figure, such as Charles Marsland, receives immediate coverage when critiquing, in the most unprofessional fashion, a judicial decision, the press paid little attention to suspect judicial proceedings during territorial period.

Many in Hawai'i remember the rush to judgment in the conviction and execution of Myles Fukunaga. Clearly he should have been able to raise a claim of lack of the proper mental state. The execution of Fukunaga, despite the injustice, received little press

has disempowered and silenced women[15] and people of color.[16] Moreover, the legislative "silence" accompanying open-textured terms[17] or

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coverage. On the other hand, injustices committed against whites, such as the alleged rape of Thalia Massie, were fodder for whipping up an atmosphere of hate against the non-white local population.

In particular the local press did not call to task Governor Judd who had refused executive clemency to Myles Fukunaga, a 20-year old Japanese man who had killed the son of a prominent haole family. Judd's decision to grant clemency to Lt. Massie was clearly based on pressure from the Navy and stemmed Judd's ability, as a governor appointed by the United States President, to exercise his power in racially biased fashion.

As to the media, the press did not pay any attention to the obviously biased nature of the jury in the Fukunaga case. On the other hand, in the trial of the defendants accused of the Massie case, the press made much of the fact that the jury was primarily non-white—asserting that a trial of white men before such a jury could never be fair. *See* GAVAN DAWS, SHOAL OF TIME 328 (1968) ("For local people the lesson was not a new one, and it was all the more galling for that: there was still one law for the favored few and another for the rest, and white men would always have the best of the bargain. . . . [Governor Judd] could only follow his best judgment, and his judgment told him that if Massie and the others went to jail it might mean the end of Hawai'i as a territory of the United States."); *see also* DENNIS M. OGAWA, JAN KEN PO 145 (1973) ("The suspicions and double standard of justice, exposed in the Fukunaga case, represent the same type of darker, and more prejudicial undercurrents of the Hawaiian social system which the Japanese had to encounter . . . .").

[14] Feminist scholars have challenged the exclusion of a feminist voice in "virtually every discipline—from anthropology to literary criticism, from religion to hard science." Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 44 (1987) (citing A FEMINIST PERSPECTIVE OF THE ACADEMY (E. Langland & W. Gove, eds., 1981)).

[15] *See, e.g.*, Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L, REV. 727 (1988); Martha Fineman and Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107 (1987); MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L. J. 115 (1989); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR (1991); BELLE HOOKS, TALKING BACK (1969).

[16] *See, e.g.*, Richard Delgado, *The Imperial Scholar: Reflection On a Review of the Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (exclusion of civil rights scholarship of minority scholar); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1990); Patricia J. Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986).

[17] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133-40 (1977) (discussing judicial activism and judicial restraint as to deliberately "vague" constitutional terms).

provisions, are a means by which courts exercise their own institutional power. Professor Richard Delgado and others have demonstrated that alternative dispute resolution "silences" minority voices by creating greater discretion and less formality.[18] Professor Eric Yamamoto has written as to how sanctions in the discovery process are a form of "silencing" by excluding politically powerless minorities from the political process.[19]

Within this context, the growing use of memorandum decisions presents obvious threats to traditional values of the legal process.[20] By its very nature, the memorandum decision violates the assumption that the law is readily accessible. There is no defense in ignorance of the law.[21] Thus, hiding the impact of law undermines the validity of this essential assumption. Others have commented on the dangers of the

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[18] *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW AND CONTEMP. PROBS. 111 (1988).

[19] Eric Yamamoto, *Efficiency's Threat to the Value of Minority Accessibility to the Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990).

[20] First, the refusal to allow such opinions to be cited publicly, when in fact the opinions are written much in the form of other opinions, seems incongruous. Second, if these uncitable decisions represent the final result of a state case, the refusal to allow them to be publicly used in the same manner as other cases—that is to be cited back to the court as evidence of its previous stance on an issue—is evidence of the court's desire to "hide" some undesirable facet of its institutional action.

There is merit to this assumption. Our assumptions of political norms are created by the backdrop of the rhetoric of the Bill of Rights, in this case, the public's "right to know" stemming largely from the First Amendment. Thus, the American populace has an immediate suspicion of any refusal of government to make public any kind of official record, such as military records, information obtained by law enforcement agencies, or information deemed privileged for reasons of national security. It is national political folklore that this nation was founded on "open-government" and that the purposes of the First Amendment were to promote the scrutiny of "sunshine" and its qualities of either acting as a "disinfectant" or of creating the give and take akin to a Darwinian "marketplace" of ideas where information and ideas are tested against one another.

Thus, large scale use of unpublished memorandum opinions leads to a natural impulse of suspicion. The purpose of this essay is, however, to suggest that there are layers of complexity to the use of memorandum decisions that go beyond an analysis of these opinions as akin to a form of government "withholding." *See generally Non-Precedential Precedent*, *supra* note 8; George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477 (1988).

[21] *Ignorantia legis neminem excusat* [Ignorance of law excuses no one]. BLACK'S LAW DICTIONARY 747 (6th ed. 1990).

memorandum decision or the illusory quality of the premise that such decisions have no "weight" since they are not precedent.[22]

These commentaries are somewhat universal in their assumptions. They are based on a view that power groups in a society are monolithic and that government, including the courts, can be assumed to be the powerful—the "insiders"—while those who come before the courts can assumed to be the "outsiders."

The premise of this article is that although there has been a significant change in the practices of the Hawai'i judiciary in the last ten to twelve years, the practice results from scrutiny of the judiciary, both through the media[23] and by the federal court.[24] The attacks on the judiciary,[25]

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[22] *See, e.g., Non-Precedential Precedent, supra* note 8.

[23] To many, the assertion that the media has any conscious or unconscious agenda in terms of the state judiciary seems unfair. After all, it is the responsibility of the media to keep the public informed as to a very significant institution in Hawai'i. I do not disagree at all with the monitoring responsibility that the media has assumed. Rather, I am positing that the scrutiny reflects a double standard.

For example, one of the latest revelations about the judiciary appeared in a March 1992 article focusing on Chief Justice Lum's use of frequent flier miles, possibly for personal travel, that were the fruits of business travel paid for from state funds. The article described how the question had been put to the Chief Justice and that the response, a rather long, non-responsive memo prepared by the assistant administrator of the courts, never admitted the practice nor defended the practice. *Lum mum on frequent-flier benefits: Won't say if business-trip credits used personally*, HONOLULU ADVERTISER, Mar. 6, 1992, at A3, col. 1.

On the surface, the personal use of frequent flier miles, accumulated from state funded business travel, clearly raises issues of genuine concern to the citizens who cannot enjoy such a benefit. However, every state employee, appointed or civil service, is the beneficiary of the lack of clear state policy on the issue. This was admitted by Russell Nagata, the state comptroller, who stated that his office was struggling to develop a policy.

Although others were questioned about their use, it is not clear why the newspaper's focus was on the Chief Justice. The "selective use of scrutiny" is often overlooked, for it is common wisdom that widespread abuse does not justify any particular individual defense against such a practice. Nevertheless, even if wrong, the heightened scrutiny of the Chief Justice in this case appears to have been carefully chosen. In short, of all the various state employees to put on the "spot," the scrutiny of the Chief Justice appears odd.

The newspapers seem to be developing a theme from a series of incidents, even dealing with the use of travel funds by the Chief Justice, that reinforce an evolving picture for the public of the judiciary. While many of the earlier incidents did not involve selective scrutiny of this nature, where discretion existed among the press, even to the extent of focusing on the problem of use of frequent flier miles in general, choosing to focus on the article on the Chief Justice, although other articles focused on other

on a number of issues, have become more and more virulent.[26] While

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branches of government, seems to indicate that this choice, among many others, was intentional. *See* Editorial, *Justice Lum: Private perks at public expense?*, HONOLULU ADVERTISER, Mar. 7, 1992, at A10, col. 1 ("Lum and the Judiciary administration over recent years have been involved in a series of issues that seem to involve insensitivity to ethical considerations—the doings of former administrator Thomas 'Fat Boy' Okuda, a carpet in Lum's home, other travel questions, a trip to Molokai at the expense of a Japanese computer bidder, etc. It is not a good example by an agency that is supposed to deal in justice.").

The thrust of this article—that the judiciary (and associated institutions in Hawai'i such as the University of Hawaii Law School) have been the conscious or unconscious focus of an attempt, primarily through the print media, to undermine the authority and standing of the local courts—can really only be understood by examining the alternatives that the media had in treating many of the controversial events in the post-statehood history of the judiciary. The only means of such a comparison is to examine what was covered, often in excruciating detail and with high front page visibility, with what the media historically examine in detail.

For example, one must contrast the high visibility given problems associated with the formation and administration of the University of Hawaii Law School, viewed as part of the judicial "agenda" and philosophy of Chief Justice Richardson and other visionary Democrats, with the lack of coverage of the racially exclusive hiring policy of the major Honolulu law firms well after statehood. Or, going back to territorial days, one must contrast the "favoritism" implied to the admissions and graduation, and bar passage policies of the law school and the bar with the institutional bias against attorneys who were not of the elite *kama'aina* families or tied to the Big Five. During the territorial period, the major papers paid little attention to the division of the Hawai'i bar on racial and ethnic grounds into an "uptown" bar and a "downtown" bar.

Moreover, one must examine the nature in which the parking ticket scandal involving a key official in the judiciary, Tom Okuda, was handled. Although it was clear that many in the press itself, as well as prominent non-Democrats received the benefits of discretionary disposal of these tickets, the general approach of the daily media was to describe the practice as a creation of the post-statehood newcomers to the courts. Practically no coverage was given to the testimony of Mr. Okuda during his trial that this practice was inherited from his predecessor and that previous persons in his position, during the territory, dispensed the same favors.

Criticism of the judicial system has been made easy by the ready access of present critics to a forum for public hearing of complaints, whether within the boundaries of the professional canons of such criticism as set by the bar. Thus, many judges during the past decade have had to bear the brunt of vicious attacks without the opportunity, constrained by the judicial code of ethics, to respond. However, non-whites did not have the privilege of access to the daily media to criticize the decisions during Territorial days, as in the extremely disparate treatment of Myles Fukunaga and Lt. Thomas Massie. Indeed, because of the lack of press coverage of the treatment of local, non-whites before the judiciary, there is a lack of an easily accessible public record of the failure of the media during those periods. Only when those who suffered through those period, such as Chief Justice Richardson, or Kazuhisa Abe, have spoken publicly today as to the difficulties of being equally received by the judges prior to statehood, is there

often couched in substantive critiques, the tone, nature, and frequency

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any record at all of such discrimination.

It is only within this context of comparison, examining what the media would have uncovered about prior judicial practices, that there can be any sense to the thesis that the behavior of the present judiciary reflects a "siege" mentality. Moreover, when placed in the more acceptable context that a "wrong is a wrong" no matter what occurred in the past, the judiciary cannot muster much of a response to such scrutiny.

[24] The most visible example is the 30 years of litigation over the status of surface water rights in Hawai'i. The state court action in McBryde Sugar Co. Ltd. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973) (Abe, J.) (Marumoto, J., dissenting), *aff'd on rehearing,* 55 Haw. 260, 517 P.2d 26 (per curiam) (Marumoto, Levinson, JJ., dissenting), *cert. denied,* 417 U.S. 976, *cert. denied and appeal dismissed sub nom.*, McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974), resulted in "appeal" to the Federal District Court of Hawaii in Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977) (Pence, J.). See *infra* notes 31 and 56 for a discussion of the *Robinson* federal court litigation; *see also* Williamson B.C. Chang, *Unraveling* Robinson v. Ariyoshi: *Can Courts "Take" Property?*, 2 U. HAW. L. REV. 57 (1979) [hereinafter *Unraveling Robinson*]; Williamson B.C. Chang, *Missing the Boat: The Ninth Circuit, Hawaiian Water Rights and the Constitutionality of Retroactive Overruling,* 16 GOLDEN GATE U. L. REV. 123 (1986) [hereinafter *Missing the Boat*].

[25] The judiciary (or related institutions) was "attacked" because of various incidents. By "attacks," I refer to the high visibility (compared to pre-statehood days) given to problems or incidents portraying the judiciary and related institutions as now administrered by persons acting unfairly or without respect for the proper judicial decorum. For example, (1) Chief Justice Richardson's "activism" was criticized, *see supra* note 13, (2) A scandal involving court administrator Tom Okuda was covered extensively, (3) Chief Justice Lum was admonished over an incident involving carpeting of his home ostensibly at judiciary expense, (4) Arthur Fong, Court Administrator, was criticized for giving foreclosure work to "political favorites." Further, the University of Hawaii Law School, established as a vision of William S. Richardson and originally associated with the judiciary, was also attacked. For example, a scandal alleging favoritism by the Dean in admitting "politically connected" students brought front page headlines. *See, e.g., UH law school admissions stir questions of favoritism,* SUN. STAR BULL. & ADVERTISER, Jan. 30, 1983, at A3, col. 2 (publishing internal memorandum that was six-months old); *Ending UH favoritism,* HONOLULU ADVERTISER, Feb. 8, 1983, at A6, col. 1; *Admissions Decisions at UH Law School,* HONOLULU STAR BULL., Feb. 4, 1983, at A20, col. 1 ("[T]he admissions issue is another headache for a school that is already troubled by allegations that several students were involved in voter registration fraud in last year's elections."). The school was severely criticized for an incident involving a student accused (and later convicted) of voter fraud. *See also, Hood & the U.H.*, HONOLULU ADVERTISER, Nov. 14, 1975, at A20, col. 1 ("Despite continuing denials that politics and policy disputes with the regents are involved, the departure of David Hood, first dean of the University of Hawaii Law School, remains disturbing. . . . Whatever the reason for Hood's quitting, regents and top administrators of the University must face the fact many people on and off campus feel it relates to local-vs.-Mainlander factionalism and unwarranted meddling in academic affairs."); *see also infra* note 29.

[26] Honolulu City Prosecuter Charles Marsland used the media to attack numerous state judges. *See, e.g., Prosecuter Marsland urges transfer of Judge Conklin,* HONOLULU ADVER-

of these critiques, seems consistent with the goal of disempowering the state judiciary.[27]

If the Hawaii Supreme Court is more conservative in the 1980s than in the 1970s,[28] perhaps it is because the criticism of the judiciary which reached a zenith during the last years of Chief Justice Richardson, has indeed succeeded. When such scrutiny can neither be fully explained

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TISER, Feb. 4, 1983, at A9, col. 1; *Marsland: 50% raise too high for judges*, HONOLULU ADVERTISER, Feb. 15, 1985, at A8, col. 1; *Marsland attacks judge's handling of rape hearing*, HONOLULU ADVERTISER, July 19, 1986, at A3, col. 1 (accusing District Judge Herbert Shimabukuro of medieval and chauvinistic behavior); *Child-abuse term draws irate reaction*, HONOLULU ADVERTISER, Oct. 22, 1986, at A1, col. 1 (attacking Circuit Judge Leland Spencer); *Judge accused of 'bullying' by prosecutor*, HONOLULU ADVERTISER, May 1, 1987, at A1, col. 2. (attacking administrative judge Robert Chang); *Marsland blasts Yim over McKellar lawsuit*, HONOLULU ADVERTISER, Apr. 25, 1988, at A3, col. 3 (attacking Circuit Judge Patrick Yim).

[27] *See* CAROL S. DODD, THE RICHARDSON YEARS: 1966-1982, at 54-55 (1985) [hereinafter THE RICHARDSON YEARS]:

> Through a series of decisions stretching from the late 1960s through the next decade, Hawaii's Supreme Court would show a willingness to defy the existing body of Anglo-American case law. In rendering its decisions in these cases, the Court recognized the validity of both native Hawaiian and Anglo-American tenets of jurisprudence. . . . Harsh critics of these decisions charged the Richardson Court with tyranny and heresy. The Court, they said, assumed lawmaking and public policy-making authority which was assigned to other government bodies. Other critics of these Court decisions raised their concerns in gentler fashion.
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> A Star Bulletin editorial, for example, acknowledged that many people understood and sympathized with the underlying reasons for these decisions. But, the editorial continued:
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> > 'The danger in such a course . . . is that the whole foundation of law in the state, as developed and interpreted through most of this century, can now be said to be undermined and uncertain. No man can be sure that contract means much in these circumstances.'

In a more sublime manner, the above editorial echoes the turn-of-the-century, more blatant view of the haole oligarchy as to the inability of Hawaiians to respect the system of law and order their own life by its demands: "Kanaka's are children . . . a kanaka's word on any transaction is good for nothing." PACIFIC COMMERCIAL ADVERTISER, Apr. 9, 1900, *quoted in* A HISTORY OF HAWAI'I, *supra* note 13, at 129.

[28] *See* Frankel, *Overview*, *supra* note 5; *see also* Jeffrey S. Portnoy, *The Lum Court and the First Amendment*, 14 U. HAW. L. REV. 395, 421 (1992) ("This is not a court that has demonstrated any real interest in expanding First Amendment rights. Its decisions have shown that the Lum Court is generally conservative in its First Amendment rulings. . . ."); Richard S. Miller & Geoffrey K.S. Komeya, *Tort Reform in a Common Law Court*, 14 U. HAW. L. REV. 55, 66 (1992) ("[T]he pro-plaintiff tort revolution has all but come to an end.").

in a historical context to a population in Hawai'i that has dim memories of territorial days, or when incidents are portrayed as exceptional given the higher standards of propriety that the judiciary must be held to, the judiciary, and those responsible for appointments understandably will select more conservative judges and justices—those whose decisions and prior associations have never been and are unlikely to ever be controversial.

Thus, the judiciary has responded with less "openness." The use of the memorandum decision is thus, I contend, a reaction to the deliberate fanning of public criticism of the court. Indeed, at least in the early years of the new, post-statehood Hawaii Supreme Court, such criticism was racist[29] in nature. The apparent purpose for this heightened scrutiny of the court has been genuine displeasure with the post-statehood changes initiated by the political revolution that placed the Democratic party in power.[30] The effect of sustained attack on the decisions as well as administration of the court, has been to undermine its authority in an attempt to render the court less "final," particularly as to legislation or law that affects property rights, and thus subject to judicial "correction" by federal trial courts.[31]

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[29] Prominent lawyers from the predominantly haole firms objected to the appointment of Justice Kazuhisa Abe on the grounds that he did not speak English well enough to write an opinion.

> Three major haole law firms confronted the Burns-appointed, non-haole (with the exception of Levinson) State Supreme Court. Justice Abe, whose nomination to the Court in 1967 met stiff resistance from these same firms [Goodsill Anderson & Quinn, Cades Schutte Fleming & Wright, Anthony Hoddick Reinwald & O'Connor] on the grounds that he couldn't speak English well enough to write an opinion, vigorously defended the Court's January 10, 1973 decision which he had written.

Dennis Loo, *State Supreme Court Decision Would Restore Ownership of All Surface Waters to the State*, HAWAII OBSERVER, Oct. 16, 1973. Dodd characterizes Abe as "[o]utspoken, he sometimes bordered on an inarticulateness bred partly of impatience, partly of very strong feelings, and partly of an early background where pidgin English was the normal mode of communication." THE RICHARDSON YEARS, *supra* note 27, at 54.

Such opposition to Abe would now be considered a possible form of national-origin discrimination under state and federal civil rights laws. *See, e.g.*, Fragante v. City and County of Honolulu, 699 F. Supp. 1429 (D. Haw. 1987), *modified*, 888 F.2d 591 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990).

[30] "The Richardson Court consistently would favor State and public ownership of property over ownership by private interests. These decisions would be met with great consternation by legal conservatives and traditionalists, who viewed them as shocking, almost capricious, disjunctions of the law." THE RICHARDSON YEARS, *supra* note 27, at 57.

[31] The most visible example is the Hawaii Federal District Court's "reversal" and

Thus, I am arguing that the growing use of the memorandum opinion by the Hawai'i appellate courts must be seen within the

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criticism of the Hawaii Supreme Court's decision in McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973). *See supra* note 24. In Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977) (*Robinson I*), *aff'd*, 753 F.2d 1468 (9th Cir. 1985), *vacated on ripeness grounds*, 477 U.S. 902 (1986), Federal District Judge Martin Pence held that the Hawaii Supreme Court's decision in *McBryde* (declaring that surface water is held in trust for the people by the state of Hawai'i) was an unconstitutional taking of property rights without just compensation.

Pence criticized the court vehemently. In describing the background of the *McBryde* holding, Pence wrote: "[I]gnoring both H.R.S. § 602-5(1) and its own Rule 3(b)(3), the [Hawaii] Supreme Court decided, sua sponte, without warning to any of the parties nor argument from them (a) that the State owned all the waters of the River . . . ." 441 F. Supp. at 563 (footnotes omitted). In discussing the *McBryde II* decision, his opinion reads: "the majority (three justices) in *McBryde II* refused to consider the same and summarily and most tersely, in a completely unenlightening per curiam opinion, held . . . ." *Id.* at 564. The decision then describes the court's holding:

> Thusly did the court 'proceed to spit the victim for the barbecue', and held that neither McBryde nor G&R owned the water of the river; the State owned it! But the court was not through with its culinary creations. . . . The court, giving lip service to the doctrines of res judicata and stare decisis, held that 'the rule of *Terr. v. Gay* . . . .is binding . . . . The barbecue was done!
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> From the manner in which the court wrote the majority opinion in *McBryde I*, it was obvious that the court determined, without notice to any party of its intent, that it was going to completely restructure what was universally thought to be the well settled law of waters of Hawaii. . . . It was strictly a 'public-policy' decision with no prior underlying 'legal' justification therefor. . . . In this case stare decisis interfered with the court's policy!
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> . . . .
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> The entire rationale of the majority is one of the grossest examples of unfettered judicial construction used to achieve the result desired — regardless of its effect upon the parties, or the state of the prior law on the subject.

Id. at 565-68; *see also infra* note 56.

On remand from the United States Supreme Court, the Ninth Circuit Court of Appeals held that the original decision in *McBryde* was not final and thus reversed *Robinson I*. Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1989). Previously, the Ninth Circuit had certified questions to the Hawaii Supreme Court which William S. Richardson answered for the Hawai'i court in Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982), one of his last decisions.

After his retirement at the end of 1982, Richardson participated in the appeal of *Robinson I* to the Ninth Circuit Court of Appeals as amicus curiae.

> In his brief and in conversations about the matter, Richardson pointed out that the federal district court would in effect become the appellate court of the State of Hawaii if review by the federal court was permitted. Also, since there are no time limits on the bringing of challenges to the state court decisions in the federal

particular political context of Hawai'i. On the surface this practice may seem to raise issues of fairness and procedural due process. At a deeper level it represents resentment with the changing face of power. Thus, if memorandum decisions are indicative of a retreat into silence, it is an understandable act by an institution that still perceives itself as politically vulnerable.

Hence, an analysis limited to whether the efficiency gains of memorandum decisions and other practices by the "Lum Court" outweigh the costs in lost access to the "law" is too limited. It is clear that in a more perfect world, with unlimited resources in terms of more judges, more law clerks and unlimited time in which to properly craft the written decision, there would be no justification for a memorandum opinion. Since, however, the Hawai'i judiciary operates under the same constraints as all judicial administrations, throughout the various states and federal districts, the state judiciary is following a practice that exists throughout the nation.[32] Thus, the state judiciary cannot be condemned any more than other state or federal jurisdictions that engage in the practice, unless local practice is particularly inimical. Assuming that there is no peculiar local manner of using the memorandum decision to single out certain groups for disparate treatment, then singling out the Hawai'i judiciary would not be fair. While we

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district courts, the judicial system of the State would be deprived of its most important quality, the ability to resolve any controversy before it with conclusiveness.

Ho'oponopono, *supra* note 1, at 21 n.49. *See generally*, *Missing the Boat*, *supra* note 24.

In a later proceeding, Judge Pence taking another opportunity for judicial comment, *see infra* note 56, awarded the property owners in the *McBryde* attorney's fees of $1,179,467. Robinson v. Ariyoshi, 703 F. Supp. 1412 (D. Haw. 1989), *rev'd*, 933 F.2d 781 (9th Cir. 1991).

The federal court also reviewed a shoreline boundary decision of the Hawaii Supreme Court. In Sotomura v. County of Hawaii, 402 F. Supp. 95 (D. Haw. 1975), the federal district court agreed with the plaintiff/appellants that the Hawaii Supreme Court's determination of a new seaward boundary in County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973), constituted a taking of property without just compensation and enjoined the state from enforcing the decision. "Misunderstanding and bureaucratic bungling prevented the State of Hawaii from filing a timely notice of appeal." *Ho'oponopono*, *supra* note 1, at 25.

[32] "'If we don't do it by memo, we don't get around to handling the rest, and this is not a unique practice,' [Chief Justice Lum] said, pointing out it is being done by other courts around the country." *New Laws, Society's Problems Pile Work on the Judicial System*, HONOLULU STAR-BULL., Feb. 21, 1992, at A-4, col. 4.

might encourage the Hawai'i judiciary to be among the first to adopt what might be viewed as a better practice, the state judiciary cannot be unduly condemned for a practice that exists nationwide.

Therefore, an examination of the Hawaii Supreme Court in terms of its own history and practice must focus on what is unique about that practice, as to what is uniquely "Hawaiian" in terms of the Hawai'i judiciary. We gain little by applying a generic criticism that would apply to all courts, including the United States Supreme Court,[33] if our goal is to examine our own state system. Thus, my intent is to avoid issues that apply to memorandum decisions that would be universally applicable. Rather, I examine what is unique to Hawai'i about the use of the memorandum decision.

II. The Role of the Courts in the Political Transformation of Hawai'i After Statehood

Since statehood, the Hawai'i judiciary has been largely non-white, reflecting the power of the Democratic party. This was an enormous change from the Territorial judiciary that was almost solely Caucasian, primarily Republican, and associated with the social and political elite in Hawai'i.[34] Many of the judges and justices appointed after statehood were descendants of the Japanese, Filipino, or Hawaiians who worked in various low to mid-management positions on the plantations.[35] Thus,

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[33] The United States Supreme Court itself summarily disposes of cases in ways that would appear to afford less than full procedural due process to the parties. Given that the high court has summarily affirmed and reversed cases arising from the lower courts without briefings on the merits by either side, even the losing party, the resort to memorandum decisions would not appear to trouble the court in terms of procedural due process. *See, e.g.*, Vachon v. New Hampshire, 414 U.S. 478 (1974) (summary reversal on appeal); Eaton v. City of Tulsa, 415 U.S. 697 (1974) (certiorari); Menna v. New York, 423 U.S. 61 (1975) (certiorari).

[34] For example, in 1950 the territorial judges and justices were all male Caucasians (15 of 15). In 1959, aside from Masaji Marumoto (a supreme court justice) and Benjamin Tashiro (a fifth circuit judge), the judiciary was all male caucasian (14 of 16). In contrast, in 1971, 10 of 14 circuit court judges and 4 of 5 supreme court justices were of Asian or Hawaiian ancestry.

[35] For example, Justice Abe recalls growing up in a plantation town on the Big Island of Hawai'i. He stated that one was denied company housing if a member of the family joined the ILWU, the union attempting to organize the sugar workers. Justice Kazuhisa Abe, Lecture at the University of Hawaii School of Law (Mar. 25, 1988) (transcript available from author).

the perspective of the post-statehood courts was vastly different from their territorial counterparts. The dramatic social and political revolution that resulted in statehood was reflected in the former "outsiders" of Hawai'i becoming the judges and justices of the state courts.

Statehood effected a reversal of fortune for the Big Five. Prior to statehood, citizens in Hawai'i could not choose their own governor or their own judges.[36] Self-government for the non-white majority, allowing the majority of non-white citizens to elect a governor of their own choosing, had always been the greatest fear of the sugar industry. Clearly, once the franchise was granted with statehood, a tiny numerical minority, despite their economic power, could no longer dominate the executive, legislative, and judicial branches of the state.[37]

Thus, it is no surprise that even upon annexation, the sugar industry sought association with the United States in a manner that would deny the right to vote to the Asians and Hawaiians who were a majority of the island population.[38]

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[36] During the territorial years,

> the Governor, appointed by the U.S. President for a 4 year term, could be reappointed but not impeached. He held fiscal powers stronger than the [P]resident's. He could veto items in appropriations bills and extend the legislature if such bills did not pass. He controlled education, welfare, safety, sanitation, health, highways and public works. He could suspend the writ of *habeas corpus*—the right of people to know what crimes they are charged with—and could put any part of the Territory under martial law.

HISTORY OF HAWAI'I, *supra* note 13, at 131.

[37] As Fuchs comments:

> [T]o the majority of Hawaii's citizens, justice in the Islands had finally been done [with statehood].
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> Justice—what did it mean? For years, Hawaii's leaders had complained that it was unjust for Islanders to be excluded from first-class citizenship. Now, the peoples of Hawaii would be on an equal legal footing with their fellow citizens on the mainland. But justice within Hawaii was another issue. Statehood symbolized, but did not create, the vast changes that were taking place in the Islands' economic, political, and social systems, making it a "just" society.

HAWAII PONO, *supra* note 11, at 414.

[38] *See* THOMAS J. OSBORNE, EMPIRE CAN WAIT: AMERICAN OPPOSITION TO THE ANNEXATION OF HAWAII 1893-98, 131 (1981) [hereinafter EMPIRE CAN WAIT] ("The government headed by President Sanford B. Dole was alarmed about the growing number and influence of Orientals in Hawaii, a situation that resulted largely from the sugar economy and the reciprocity treaty upon which that economy depended.").

On the eve of the signing of the Organic Act, in 1900, the haole press in Hawai'i made clear their disdain of Hawaiians and their fear of being outvoted: "Kanaka's are children . . . they vote whichever way, not their best, but what their last friend says

The social and political revolution that came with statehood for Hawai'i eventually resulted in a non-white, non-Christian state supreme court.[39] The values of the attorneys who were appointed to the bench after statehood differed greatly from their predecessors who sat on the Territorial Supreme Court. Many of the new Justices were part of the Democratic party that fought for statehood.[40] It was always clear that statehood would result in dramatic shifts in power, politically emancipating the non-white, largely Asian-American plantation workers.

It was the sugar industry that had dominated the politics of the Hawai'i, both before and after annexation by the United States in 1898. Indeed, the primary force driving for annexation of Hawai'i

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. . . a kanaka's word on a commercial transaction is good for nothing." "If color is to rule any subdivision of American territory, that color will be white." HISTORY OF HAWAI'I, *supra* note 13, at 129 (citing *The Pacific Commercial Advertiser*, Apr. 9, 1990, and *The Hawaiian Gazette*, Apr. 29, 1900).

In a study of Hawaiian Statehood, Bell writes:

> Haoles 'always wanted to keep the vast and unruly mass of natives from the ballot' [former Governor] Burns recalled, and Hawaiians and part-Hawaiians often accepted this as they accepted other changes, because they knew resistance would be futile. Like many dispossessed aboriginal peoples in other parts of the Pacific, native Hawaiians tended to internalize the very assumption of inferiority used by white settlers to rationalize colonization. Powerlessness, paternalism, and inequality gradually inculcated what Burns and other locals referred to as 'a subtle inferiority of spirit'—feelings of incompetence and separateness bred of domination by other cultures. And the haole paternalism which had helped nurture these feelings dissipated very slowly. . . .
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> If many Hawaiians and part-Hawaiians experienced a loss of pride and self-confidence, some other groups shared this problem, although to a substantially lesser degree. Burns noted that, like Hawaiians, many local Japanese simply accepted their unequal position in society.

LAST AMONG EQUALS, *supra* note 9, at 115.

[39] *See supra* note 9.

[40] *See* THE RICHARDSON YEARS, *supra* note 27, at 52 ("Even in his younger days, Bill Richardson's feelings about the islands' power structure were clearly defined. His intent to change that structure to a more equitable one became a persistent theme in his life, as did his intent to somehow reverse the flow of history and to better the lot of the Hawaiians."); *see also id.*, at 71-72 ("In early 1974, Thomas S. Ogata and Benjamin Menor . . . filled vacancies created by the retirement of Justices Marumoto and Abe. While neither had been part of the inner, original core of the earliest Democratic fighters, their backgrounds were akin to many other Burns appointees: their outlook was shaped by their immigrant heritage and their primary identification with non-Western cultures. . . .").

over the wishes of its native Hawaiian inhabitants was economic—the desire of the sugar industry to avoid tariff treatment as a foreign nation.[41] With a favorable tax treaty set to expire,[42] the Hawai'i sugar industry in the 1890s faced the imposition of disastrous tariffs on Hawaiian sugar. There were two political paths to avoid the tariffs—a continuation of the tax holiday by treaty, or incorporation of Hawai'i as a territory of the United States with the guarantee that sugar grown in Hawai'i would be treated equally with Louisiana and California sugar.[43]

The boldness of the new Hawaiian monarch in 1892, Queen Lili'uokalani, forced the hand of the small minority of businessmen who controlled the sugar industry in Hawai'i. When she threatened the political power of the sugar industry by seeking to curb the legislative power of the privy council, sugar interests and American marines overthrew the lawful government of Hawai'i.[44] The clear goal of the rebels was to seek annexation, by treaty, with the United States.[45] It would take five years of public debate before the U.S. Congress would annex Hawai'i.

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[41] HISTORY OF HAWAI'I, *supra* note 13, at 63.

> Hard times hit Hawai'i's sugar industry after 1866. With the close of the Civil War (1861-1865), the high demand for Hawaiian sugar also ended and prices dropped. Furthermore a high tariff on sugar entering the United States made it more difficult for Hawai'i to sell its product. Planters and their agents could not pay their bills. From 1866 to 1867 an economic depression hit Hawai'i.

Id.

[42] In 1887 the United States and Hawai'i had renewed the Reciprocity Treaty which temporarily removed the high tariff on sugar. Hawai'i gave the United States use of Pearl Harbor in 1867. In 1887 this use was broadened to allow the U.S. Navy access to the harbor.

[43] "To Hawai'i's sugar growers, the solution was clear—end the high tariff on sugar. This could be accomplished in one of two ways: by a reciprocity treaty or by annexation to the United States." HISTORY OF HAWAI'I, *supra* note 13, at 63.

[44] To support annexation, McKinley commissioned his own report to negate the findings of Cleveland's Blount Commission. In the so-called Morgan report, a pro-annexation version of the overthrow, holding the Queen responsible was presented to the United States Senate. The report vindicated everyone involved in the Hawaiian affair, excepting the queen and her cabinet. It upheld Steven's view that Lili'uokalani triggered the Revolution by attempting to promulgate a new constitution on January 14, 1893. Because of the disorder ensuing from the Queen's act, the report condoned Steven's landing of United States troops and his recognition of the provisional government.

[45] The benefits of extending the Reciprocity Treaty were nullified by the subsequent

Much of the difficulty lay with the hypocritical position of the sugar interests. They sought incorporation into the United States but made clear that such association should never lead to statehood. This created a legal enigma. It was difficult to reconcile annexation without the eventuality of statehood. To annex Hawai'i, without a clear intent that the people of Hawai'i would someday have the right to seek statehood, was to admit that the taking of Hawai'i was purely imperial.

Many in Congress and in the United States saw the proposal of the sugar interest in Hawai'i as fundamentally un-American.[46] If any conquest or "annexation" were to occur, it would only be palatable if was similar to the annexation of Texas, an act according the people of a nation their desire to become American.[47]

McKinley Tariff Act which removed the tariff on all foreign sugar but replaced it with a "bounty" of 2 cents on every pound of sugar produced in the United States. By 1890 Hawai'i again suffered an economic depression. HISTORY OF HAWAI'I, *supra* note 13, at 66.

[46] Elements from both Congress and the American press opposed annexation. Senator White of California and Speaker of the House Thomas Reed opposed annexation as a departure from the Republican tradition of the United States. E.L. Godkin of *Nation* magazine saw annexation as a "perversion" the American mission to extend Republicanism. The anti-imperialist press was led by the *New York Times*, *The Evening Post*, and *Nation*. EMPIRE CAN WAIT, *supra* note 38, at 95-98.

[47] Godkin of *Nation* magazine expressed the dilemma in his article "How are we to Govern Hawaii?":

> In that article Godkin asseverated that before reaching a decision on annexation, the Senate should consider the problem of how the archipelago would be governed if brought into the Union. He then proceeded to raise such thorny questions about the manner of government as to prove, at least to his own satisfaction, the folly of granting statehood. Consequently, only territorial status remained. In every case involving the acquisition of territory since the Ordinance of 1787 local governments were established with universal suffrage. But if universal suffrage prevailed in Hawaii, annexation itself would be rejected. Furthermore, Godkin depicted restricted suffrage in the islands as inconsistent with Section 1859 of the *Revised Statutes of the United States Respecting Territories*, which declared that all male citizens above the age of twenty-one are entitled to vote and hold office in the Territories. Yet if this law were implemented in Hawaii, the *Americans* would be voted out of office, and Godkin did not wish that to happen. Until these difficulties were resolved in a manner compatible with the United States code of laws, the question of annexation should be held in abeyance, he declared.

EMPIRE CAN WAIT, *supra* note 38, at 99 (citation omitted) (emphasis added).

Hence one can see the dilemma. Given the view of native Hawaiians and Asians as inferior, any status which allowed the possibility of eventual self-government threatened the hegemonic control of America by whites.

Annexation without statehood, at least in the future, forced Americans to contemplate their nation acting deliberately to enforce the subjugation of a majority of the persons of a nation, without even the pretense that they were entitled to eventual equality. Americans, even liberal Americans, were simply not currently prepared to extend to more non-whites the privileges accorded white Americans.[48]

Any annexation with the possibility of statehood meant that the large population of non-white, plantation labor, would obtain political power through numbers. Thus, the tight control by the sugar industry eventually would be lost if statehood were an inevitable part of the decision to annex.

In the end, the sugar industry was forced to concede that statehood would be possible, and Hawai'i was annexed, albeit according to many unconstitutionally, as an "incorporated" and not an "unincorporated territory." In post-statehood Hawai'i, political power is now largely divided. Successors to the Democratic revolution of 1954 hold institutional political power; the Big Five retain economic power.

Thus, with statehood an issue to be raised again and again, the reins of government would eventually fall to the "leprous Asiatics" and "semi-savage" Polynesians—even to the extent that they would stand in judgment, as duly appointed judges and justices, over the rights and liberties of the oligarchy that took power in 1893.[49]

Many of the post-statehood judges and justices had personally witnessed the suffering of the plantation lifestyle: from the personal racism directed at non-whites, the discrimination against them in terms of

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[48] Americans opposed to annexation seemed to hold two reasons for their position: that it would lead America down an imperialist path inconsistent with the intent of the Constitution and that it would contribute to the mongrelization of America through the introduction of "leprous Asiatics" and "semi-savage" native Hawaiians. "Of course, there was within the anti-imperialists' camp a large degree of hostility toward Hawai'i's nonwhite residents. One publicist warned in the pages of a leading journal that if annexation occurred, the "detested and dangerous Asiatic" would be a baneful influence in American elections." EMPIRE CAN WAIT, *supra* note 38, at 100.

[49] The white American view that Asians and Hawaiians were not fit to judge a white person were made clear during the Massie Rape trial. The American press that flocked to cover the trial in Hawai'i doubted the fairness of any proceeding where a jury of non-whites sat in judgment of a white man, such as Lt. Massie: ". . . and much was made of the fact that of the 12 jurors, six were part-Hawaiian, two were Chinese, two were Japanese, one was Portuguese 'and one of American descent.' This was not journalism's finest hour." HISTORY OF HAWAI'I, *supra* note 13, at 232.

admission to clubs, use of public utilities, entrance to private schools, availability of credit, respect for native Hawaiian customary law, and treatment by the "ex-patriate" judiciary in terms of equality of sentencing in criminal cases and respect for land and other rights in civil cases.[50] Moreover, the non-white population that appeared before the largely white, politically protected, territorial courts, suffered both subtle and blatant racism in the courts. These experiences were part of the drive for statehood. They also formed the basis for a different institutional and theoretical understanding of "law."

III. The Conservative Response to a Liberal Post-Statehood Court

After statehood, the political forms of power, as opposed to economic, were in the hands of former "outsiders." Former insiders—roughly put, the "Big Five" including the two major newspapers—had become "outsiders" in terms of the formal institutions of political power—the legislature, the executive branch, and the judiciary.[51] As the balance of power dramatically shifted through the "new deal" legislation and the decisions overruling territorial jurisprudence, the press, and in several cases, the federal courts,[52] became the only institutions for former insiders to use to disempower the new "insiders."

The form of disempowerment use legal theory to discredit the work of the court by stripping the judiciary of its institutional credibility. By focusing on the court in terms of its personalities—by employing such terms as the "Richardson Court," and by focusing on the personal experiences of the judges and justices of the judiciary, both the media

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[50] *See generally* The Richardson Years, *supra* note 27, at 49-76.

[51] *See, Ho'oponopono*, *supra* note 1, at 29-30.

> In handing down its controversial decisions on land and water rights, the Richardson court seemed to use as its test the same test used by the Warren Court. In deciding these cases, Hawaii's jurists did not ask primarily, "What is the legal precedent? What is the law?" They asked instead, "What is fair?"
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> "Fairness", like many other human qualities, depends upon several variables for its definition. One variable—voiced by attorney Wally Fujiyama, vocal champion of the "local" as opposed to the "outsiders"' point of view is this: "It depends whose ox is being gored."

Id.

[52] *See supra* note 31.

and particularly the federal district court in the *Robinson*[53] series of litigation, generated and reaffirmed a public hesitancy about the validity and finality of judicial decision.[54]

In other words, by portraying the court and its personnel as "real people," whose prior experiences—whether unfortunate, unjust, or merely ordinary—dictated the results from this new post-statehood judiciary, those now out of power could cast doubt on the legitimacy of these decisions as the "law." The psychoanalytic, "people-story" approach to coverage exploited a weakness that exists with every judicial system—namely realist skepticism that judges are applying "neutral" principles as opposed to interlacing their own values within the enterprise of interpretation.

This realist achilles heel is not unique to Hawai'i; it applies as blatantly to the Supreme Court of the United States. Indeed, in the contest over the Thomas nomination to the high court, there was not even the scantiest of lip-service given to the pretense that Clarence Thomas, the person, and not some robotic interpretation machine, was the nominee whose values either frightened or comforted one.[55]

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[53] Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977); *see supra* note 31.

[54] *See* J. Russell Cades, *Judicial Legislation in the Supreme Court of Hawaii: A Brief Introduction to the "Knowne Uncertaintie" of the Law*, 7 HAW. BAR J. 58, 65 (1970) ("[T]he floodgates of uncertainty have been let open and established precedent is, in effect, overturned. . . . Even the most active of the judicial activists would hardly advocate the divesting of property rights long settled and relied upon as coming within the proper scope of the judicial process. . . . To create uncertainty in the law where none exists is indeed as great a social evil as to attempt to carry out the dictates of social justice as they appear to the judge who happens to be writing the opinion.").

[55] When questioned during confirmation hearings on how he would rule on issues such as abortion, Thomas deferred and said basically that he would apply the "law,"—the appropriate answer from a classical, Blackstonian point of view that judges have no hand in the decisions they issue, that they are just conduits in which the existing natural law is transferred to paper. However, the public knew of course that the personal values of Judge Thomas would influence his decision. There is thus a double standard: the person, we know, makes the law, but the pretense of law being a "brooding omnipresence" is a illusion that we all recognize, but an important illusion for the sake of maintaining the system.

To be able to understand how law works in our system is to be able to hold two contradictory ideas simultaneously—that law is both "outside" of one's values, and that one's "values" properly do play a role in judicial decision making. The Blackstonian view of interpretation where the judge simply records what is "out there" is given sarcastic lip service by many: the most famous being Holmes' "irony tipped phrase" "brooding omnipresence of the law." Beryl H. Levy, *Realist Jurisprudence and Prospective*

Nevertheless, the pre-statehood treatment of the Court in the Territorial period, as a rather faceless, neutral (and thus dull in a newsworthy sense) institution, sharply contrasts with the highly personalized portrayal of the judiciary after statehood.[56]

Overruling, 109 U. PA. L. REV. 1, 2 (1960) (quoting 1 W. BLACKSTONE, COMMENTARIES 69).

The myth that law is "outside" and not a product of the judges preferences provides a check and balance between the legislature (which engages in policy decisions) and the judiciary (which does not, but rather neutrally applies principles of restraint). While this distinction is invisible in many cases, the distinction is critical to maintain, otherwise the judicial system crumbles as there is no finality. *See Unraveling Robinson*, *supra* note 24. As Justice Jackson said in Brown v. Allen: "We are not final because we are infallible, but we are infallible only because we are final." 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[56] One indicia of "personalizing" the court, thus diminishing the credibility of the Hawaii Supreme Court as an institution that "interprets" and thus does not "make" laws based on personal preferences is the widespread use of the term "Richardson Court" during Richardson's tenure. The phrase came to be used in an extremely sarcastic manner during the *Robinson* proceeding, where the finality of the Hawaii Supreme Court as to questions on Hawai'i state property law was ridiculed by Judge Pence of the Federal District Court in Hawai'i. His opinions bristle with personal attacks on Chief Justice Richardson himself. Of the several decisions in this contest of power between the state supreme court and the federal district court in which Judge Pence appears to address Chief Justice Richardson as the primary source of the abuse of the power of finality, Judge Pence's decision of November 27, 1987, is the clearest indication of Judge Pence's low regard for the competency of the state supreme court. This opinion is remarkable because it was written after the state [and therefore Chief Justice Richardson] had prevailed before the United States Supreme Court, achieving a written opinion that the plaintiff's complaint [primarily the sugar industry] should be dismissed as inappropriate on the basis of ripeness. Subsequently, the Ninth Circuit directed the case back to Judge Pence, who, given the opinion written by the United States Supreme Court, clearly had been instructed to dismiss the complaint in light of the ripeness decision in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

Instead of dismissing the opinion as was his duty, Judge Pence refused and reaffirmed his earlier opinion. In the course of his written opinion, Judge Pence pointed out the lack of judicial honesty of Chief Justice Richardson, failing to admit that his decision reflected his own values, but more incredibly, pointed out how and why the United States Supreme Court was wrong (they knew nothing of Hawai'i) and had been led astray by an amicus curiae brief filed by the U.S. Solicitor General's office urging dismissal on the grounds of ripeness (the attorney from that office did not "understand" Hawai'i.). Robinson v. Ariyoshi, 676 F. Supp. 1002 (1987).

It is the rare property rights case where a federal district court judge refuses to abide by the clear implications of a Supreme Court decision intended for his benefit. More rare is the opportunity to read the thoughts of such a judge and the structure of his

Indeed, there were sufficient, highly prominent critics of the judges[57] and nominees[58] to the court. Moreover, the manner of the criticism,

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reasoning:

> [t]his judge has concluded that it was the brief of the Solicitor General and his uncritical assumption of the unripeness of this case which triggered the Court's granting certiorari and remand. . . .

676 F. Supp. at 1004.

> [I]t is impossible for this judge to understand how the Solicitor General could make such a gross accusation that the "court of appeals failed to appreciate: the significance of the "Answers" to the taking inquiry and "essentially ignored them". The Solicitor General maintains that the "court of appeals failed to even mention, much less rebut, the Hawaii Supreme Court's explanation . . . that the law of Hawaii with regard to the ownership of water was unclear prior to McBryde. The above statement was an insult to the intelligence and integrity of the Ninth Circuit Court of Appeals. . . .
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> . . . .
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> It is clear from the above statement that the Solicitor General completely ignored all of the case law on water rights in Hawaii prior to *McBryde*.

Id. at 1012-13.

In critiquing the opinion of the United States Supreme Court, Judge Pence found an interesting basis for undermining the credibility of their decision in favor of the state and Chief Justice Richardson: they were hurried into an incorrect decision in the crunch of seeking to recess on time:

> A review of the record and briefs filed with the Supreme Court shows that less than one month from the time the Court received the Solicitor General's brief, and only 14 days before the end of its 1985 term, it issued the above remand. This judge [Judge Pence] draws the conclusion that the Court, "caught in the end of the term crunch," [citing remarks by Justice O'Connor at a 1987 Ninth Circuit Conference] and having a high regard for all briefs filed by the Solicitor General of the United States, simply followed the Solicitor General's recommendation [citing the Soliciter General's Brief]".

Id. at 1004.

No leniency was reserved for the "Richardson Court" in Judge Pence's criticism; his opinion plainly accused the Hawaii Supreme Court of deliberately subverting the integrity of the judicial process in the answers that court gave to questions certified to it by the Ninth Circuit: "The Richardson Court's discussion of the takings issue sharply illustrates the obfuscation and evasiveness of the Answers of that Court." *Id.* at 1017-18.

Consistently, Judge Pence personalized the evils of the Judiciary in Richardson himself: "Of course, no one knows the full impact of the Water Code upon waters of Hawaii. The Commission's report itself shows that the Commission felt that the Legislature had not substantially renounced the conclusions of the *Richardson Court*." *Id.* at 1024 (emphasis added).

In a later proceeding, Judge Pence awarded attorney's fees of over a million dollars to the private landowners, Robinson v. Ariyoshi, 703 F. Supp. 1412 (D. Haw. 1989), but was overturned by the Ninth Circuit in Robinson v. Ariyoshi, 933 F.2d 781 (9th

in simply repeating the emphasis on personalizing the judiciary,[59] was a not so discrete means of undermining the slender institutional credibility of all courts to their unique power to render "judgment."[60]

Cir. 1991). In his decision, Judge Pence again attacked the Richardson court:

> The initial reaction of anyone, not thoroughly familiar with the political background behind [*McBryde*] as well as the history of the movements of this litigation up and down through the Hawaii Supreme Court, this United States District Court, the Circuit Court of Appeals, and the United States Supreme Court . . . might be that any such request [for attorneys fees of over $2 million] is outrageous. . . . [I]t must be remembered that Hawaii's Governor Waihee, who appointed the present Attorney General, became Governor through the support of the political machine built up by former Governor Burns and preserved and continued by Governor Ariyoshi.
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> The casual observer would not know that on January 10, 1973, the 'Richardson Court' (which on December 20, 1973 became a 3-2 majority), headed by Chief Justice Richardson and Justice Abe, and without any warning to any of the parties . . . had decided sua sponte, that it was going to change all of the laws regarding flowing waters in the State of Hawaii. . . . By also holding that there could be no diversion of waters out of the watershed, Justices Richardson and Abe, in implementing their own political philosophy—some have likened it to that of Robin Hood—of taking the property of big business entities and giving it to the people of the State. . . . Those Justices apparently were oblivious to the obvious fact that the implementation of their opinion would meant that all of the sugar plantations on Kauai, on Oahu, on Maui, and some on the Big Island, would be forced instantly to close down and go out of business—throwing thousands of workers out of jobs.
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> [T]he attitude of the Attorney General . . . on January 10, 1973 when by ukase and fiat of Justices Richardson and Abe, the water rights of Robinson, McBryde, Olokele, and the Small Owners were, without warning, expropriated, taken away from them and, forthwith, given to the State of Hawaii, was, in effect, one of instant glee and rejoicing. Greedily, the Attorney General of the Burns administration not only accepted this unconstitutionally expropriated (judicially 'stolen') property, but thereafter, he and his successors have fought, relentlessly, through all courts to keep it.

703 F. Supp. at 1417-18.

[57] *See supra* note 54.

[58] *See, e.g., supra* note 9.

[59] Further quotes from Robinson v. Ariyoshi, 676 F. Supp. 1002 (D. Haw. 1987) exemplify the "personalization": "Without directly answering the question, [certified from the Ninth Circuit] the Richardson Court ('R. Court') said that when *McBryde I* held . . . ." 676 F. Supp. at 1013. Subsequently, Pence continued to use "R. Court" rather than spelling out the Chief Justice's name. 676 F. Supp. at 1014.

[60] The major ire of Judge Pence seems to be that the Richardson Court engaged in "policy-making"—the province of the legislature, not the judiciary. *See supra* note 31. While courts are urged to avoid usurping the role of the legislature, it is not simple to

IV. The Dominant Discourse of "Judicial Competence": How to Turn Social Reform Against Itself

Hence, institutional silence, exemplified by the memorandum decision, can be seen as a defense mechanism. The increasing use of memorandum decisions might be interpreted as resulting from the success of attacks on the Richardson Court, both as to the substantive nature of judicial revisions of territorial precedents regarding water rights and shoreline boundaries dividing public and private land, and as a reaction to the high scrutiny given the administration of the system in the last years of the court under Chief Justice Richardson and the few years subsequent.

Such criticism may have had a "chilling effect" on the court's willingness to put its reasoning fully before the public. Indeed the repeated theme used to criticize the court during the tenure of Chief Justice Richardson was its "inconsistency" and failure to adhere to law developed during territorial days.[61] The memorandum decision is a technique by which "inconsistency" does not come to light, or, does not "really count" because the memorandum decision does not have the full weight of decisions which are deemed precedential. The memorandum decision is a means of generating an illusion of consistency in a line of cases which does not exist.

Without more, observers of the court may deem this an egregious example of the court's hidden agenda and desire for secrecy. On the other hand, I am suggesting that the increasing use of the memorandum decision is a predictable result of the intense scrutiny and personal attacks experienced by the court when it challenged the property rights decisions that were deemed settled during the territorial period. The use of the memorandum decision may not be motivated by a desire to avoid responsibility for reconciling possibly divergent results; it may be an exaggerated response to the unforgiving nature of public criticism, in an atmosphere created by constant scrutiny and wooden insistence on a mechanical form of consistency, when any divergence from prior law is detected.

In short, both Judge Pence and the establishment media have used

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determine when interpretation of open-textured terms such as "fair" or "due process" constitutes policy making. Pence's criticism plays on the laypersons lack of awareness of the fine distinction between "interpretation" of a open-textured term and "out and out" legislating by the court where there is a "plain meaning." The difficulty of interpretation is well-studied. *See, e.g.*, Ronald Dworkin, Taking Rights Seriously 133 (1977) (describing the practice of referring to "strict" and "liberal" interpretation).

[61] *See supra* notes 54 and 56.

the inherent contradictions that exist in the judicial process (true of all courts, including Judge Pence's) to fashion a public atmosphere where any decision that retroactively overrules prior state law is simplistically "trashed" as illegitimate. This is a simplistic approach because all lawyers know that consistency is a self-imposed obligation. All courts, even the British by now, have abandoned the wooden obligation to precedent. All courts, even the United States Supreme Court, engage in retroactive overruling. Thus, all courts are candidates for the kind of diatribe that Judge Pence applied to the Hawaii Supreme Court. If the Hawaii Supreme Court went further and faster than others, it is clearly because the social predicament of the underclass in Hawai'i required that both the courts and legislature act quickly to eliminate the vestiges of plantation society that existed in both formal rules and societal life.

Thus, the purported criticism that the Hawaii Supreme Court is illegitimate because it engages in public policy-decisions seems racist and elitist when compared with the same policy oriented decisions made by many courts. After all, if *Brown v. Board of Education*[62] constitutes retroactive overruling with societal effects as large as that of *McBryde v. Robinson*,[63] why is such a dramatic overturning of rules regarding property rights and social life less "barbaric" than the decisions regarding water rights and beach access in *McBryde* and *Sotomura*?[64]

If the retort is that the United States Supreme Court is "final" or "superior," then much of the character of that message is racist in a subtle way. The Hawaii Supreme Court, the real message apparently seems to be, was incompetent and thus, compared to the United States Supreme Court, it lacked the intellectual and political credibility to overturn the privileges that existed among the elite. It is one thing for the United States Supreme Court to decide a decision such as *Brown*; it is quite another for a basically non-white, non-Christian court, as the makeup of court was at the time of *McBryde*, to undermine the privileges enjoyed by a dominant, white minority.

The argument that one court is "Supreme" and the other is not, is a makeweight argument. The Hawaii Supreme Court is "supreme" on issues of state law, such as property rights, in the same manner that the United States Supreme Court is "supreme" on issues of

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[62] 347 U.S. 483 (1954).

[63] McBryde Sugar Co. Ltd. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973). See *supra* note 24 for the subsequent history of *McBryde*.

[64] 55 Haw. 176, 517 P.2d 57 (1973). *See supra* note 31.

constitutional law and federal statutory and common law. The unspoken resentment reflected in the refusal to tolerate the "activism" of the court between 1966 and 1982 was simply the protracted refusal of the former minority elite to accept the reality that political power would have to be shared with those who were formerly subordinate in Hawaiian society.

Finally, the larger point that is often missed is that these changes were part of a political mandate that reflected the desire of the majority of the people, voting for new directions in their legal as well legislative system. The vote on statehood, where a popularly elected governor replaced one appointed by a President (without input from the local populace), was not only a vote simply on the political status of "statehood," but also a referendum on a new social order. The approval of statehood thus was a mandate for change in the judicial as well as executive branches. Voting for statehood was a vote for a judiciary reflective of the values and experiences of the majority of the population, not a judiciary that shared the privileges of the small oligarchy that controlled pre-statehood Hawai'i.

It is no surprise that the post-statehood judiciary, once reflective of the Democratic majority, would develop a judicial practice and philosophy that eliminated the worst aspects of the elitism, racism, and insulated power wielded by many of the territorial judges. Those judges, beholden only to the President of the United States and the Governor for their tenure, felt and acted with little obligation to the concerns of the vast majority of persons in Hawai'i. As in the distinction between the treatment of Myles Fukunaga and Lt. Thomas Massie,[65] most local persons of non-white origin felt the judiciary was biased against them.

Since this undercurrent for change in the judiciary was common knowledge during the debates on statehood, it would be foolish for any observer to insist that the Hawaii Supreme Court, now democratically selected, would parrot and replicate the injustices of the past. Indeed, if anything, the fight for statehood was a fight for the elimination of a double standard in the administration of justice. This double standard not only applied to the race-oriented decisions emanating from the courts,[66] the inability of non-whites, or those of unpopular political views, to receive adequate legal representation,[67] the inability of non-

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[65] *See supra* note 13.

[66] *See supra* note 13.

[67] *See, e.g.*, ZALBURG, *supra* note 12, at 333-37 (describing the difficulty of the Smith Act defendants to obtain counsel).

whites to fully participate as equal members of the bar and inability of the average non-white person growing up in territorial Hawai'i to receive a law degree.

Thus, even the establishment of the University of Hawaii Law School, which suffered from intense negative scrutiny in its early years,[68] was a natural outcome of the social revolution culminating in statehood.

These arguments are all aimed at putting the "hype" over the court's consistency with precedent, which reached its zenith in the property rights decisions during the Hawaii Supreme Court from 1966 to 1982, in the proper context. Both the media and the former elite were able to reverse the normal presumption: after statehood it would have been shocking if the state supreme court had not used its power to uphold legislative changes creating a fairer society.

Indeed, the court would have been more validly criticized had it adhered to the territorial decisions on water and land that simply reaffirmed the privileges of the propertied class who achieved wealth through these common law and legislative rules. If the court had acted to nullify or change then, as had the United States Supreme Court early in the New Deal, history would write that such a Hawaii Supreme Court had manipulatively used the artificial and empty principle of stare decisis to deny changes reflective of a "living constitution."

Only the blind or those with vested interests in an oligopoly would refuse to acknowledge that Hawai'i had changed vastly by 1960. Given that change, as well as the continuing denial of the fundamental human and American right of self-governance by the powers then in charge, the use of the idea of "precedent" or "stare decisis" to nullify law that supported the changes in Hawaiian society would have been to use "law" to mask the underlying tyranny of a minority.

Thus one can conclude that the "campaign" to undermine the possibility of a progressive and visionary judiciary may indeed have succeeded. The criticism of the present Hawaii Supreme Court by most of the articles in this symposium issue is either that the court

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[68] *See, e.g.*, W. Buddy Soares, *Phase out law & Med at U.H.*, HONOLULU ADVERTISER, Mar. 25, 1979, at A15, col. 2 ("I believe it is our responsibility at this time to curtail further funding of the Medical and Law Schools and place a freeze on enrollment so that the schools can close its doors after graduation of the present freshman class."); W. Buddy Soares, *UH law school opposed*, HONOLULU ADVERTISER, Feb. 25, 1980, at A13, col. 1 ("It is . . . gratifying to know that the Legislature has decided that a re-evaluation of the need for the law school is in order[.]"). W. Buddy Soares was a Republican state senator.

exhibits a conservative or middle-of-the-road position on substantive issues, or that, as in the case of constitutional issues or issues involving native Hawaiian rights, the court simply avoids controversies. To me, these traits are an example of individual and institutional response to the judiciary's version of "when did you stop beating your wife?" The structure of criticism directed towards the court in its most active period, 1966 to 1982, succeeded in making both judges and those who select judges "gun shy."

Both the media and powerful institutional enemies of reform in the society of the islands structured their criticism of the court in rhetoric that seemed fashionable and indisputable: what right does the court have to overturn settled law? Such a question forces acceptance of an assumption that is unwarranted: that change is impermissible. More important, it masks the historical fact that the privileges of the "Big Five" and the institutions and individuals that derived their privileges from its existence, benefitted themselves from massive changes in the law pre-existing their rise to power. Perhaps the most appropriate example is the criticism by Judge Pence, and the powerful firms representing the sugar industry as well as the daily press, regarding the "barbaric" overturning of the so-called settled law of water rights by the Hawaii Supreme Court in 1974.[69]

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[69] The evenhandedness of the two major newspapers in Honolulu should also be measured by the events that failed to be given coverage during this period of journalistic scrutiny of seemingly every action and facet of judicial behavior. For example, in the newspaper coverage of the state's ultimate victory in nullifying the attempt to use the Federal District Court to undermine the Hawaii Supreme Court, the two major papers failed to point out the extraordinary actions of the attorneys for the sugar industry in seeking victory.

For example, in reporting on the decision which thus overturned Judge Pence's award of attorneys fees to the lawyers for the various sugar companies, the papers failed to mention that part of the attorneys fees awarded to the firm of Cades Schutte Fleming & Wright was, as is stated in an opinion of Judge Pence, for the purpose of "Stifling Publications of Professor Chang's Writings." Robinson v. Ariyoshi, 703 F. Supp. 1412, 1430 (D. Haw. 1989). Judge Pence, in awarding attorney's fees to Cades Schutte, stated:

> The court is well aware of the fact that in this case, Professor Chang was more than an erudite professor of law at the University of Hawaii School of Law. Chang was selected by and purportedly represented Chief Justice Richardson, and paid by the State in order to assist the State's Attorney General in the State's Defense. This court can take judicial notice that some of the circuit judges of the Ninth Circuit during the pertinent years appeared to hold law review articles and conclusions therein in high esteem, since law review articles are normally written from an impartial scholar's standpoint. Anything written by Professor Chang

The law that they deemed to be "self-evident" was itself the result of judicial tampering between 1840 and 1904 where the laws by which

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during the time relevant here, however, could and would be only construed as written on a solidly partisan basis from the standpoint of an advocate representing his client. This court agrees with McBryde that the publication was intended to be, and was in effect, an additional brief for the State, after oral argument. The court of appeals even allowed McBryde to reply after the publication.

From what actually occurred after its publication it appears that CSF&W [Cades Schutte Fleming & Wright] soundly devoted a considerable amount of time in making every effort available to stop the publication of Chang's article, and McBryde is reimbursed for the charges.

703 F. Supp at 1430.

The attempts "to stop the publication of Chang's article" never received any attention, either at the time of these efforts nor during the arguments and award for attorneys fees during the 1983 proceeding. To this author, obviously speaking as the one subject to these efforts, these appeared "newsworthy" in that the two primary incidents appear to go beyond on the normal bounds of zealous lawyering.

As to the first, attorneys from the firms of Cades, Goodsill, and Hoddick appeared at a meeting of the Board of Editors of the *Hawaii Bar Journal* to argue that an article that had been accepted for publication, written by myself as one of the editors of the journal, cite-checked by Mr. Richard Morry and then in final "galleys," be excluded from the next issue of the journal. The attorneys argued that the article constituted (1) a violation of ethical canons in that it created a biased atmosphere in the midst of a judicial proceeding [although the case was then in the Ninth Circuit] and (2) constituted a violation of the page limitation rules of the Ninth Circuit since when the article was cited in the brief that was submitted by myself as counsel, the additional pages accorded to the article exceeded the forty-page limit of the Ninth Circuit. In any event, the editors of the *Bar Journal* [except myself] voted to quash the publication of the article. It was republished in the same form in the second volume of the *University of Hawaii Law Review*. *See Unraveling Robinson*, *supra* note 24.

For the record, the article was not initiated as a part of "litigation." Moreover, I was never called to testify in the attorney's fees proceeding as to the origination of the article. The article was the product of a grant from the University of Hawaii, Water Resources Research Center. When I received the grant, I was not a special deputy attorney general. Only after my research revealed that certain jurisdictional arguments were not being fully explored did I approach the state with inquiries. At that point, since the state already had existing counsel, and since the state officials deemed my arguments to be quite worthy, I was retained as counsel to the Chief Justice who appeared as an amicus curiae in the proceeding. It should be noted that at all times the Ninth Circuit had the discretion to deny amicus curiae standing or to refuse to accept the submission of briefs from an amicus. However, as a testament to their interest in the arguments presented, they granted Chief Justice Richardson through his counsel the right to participate in oral argument on two occasions, an extraordinary privilege not usually given to those presenting amicus briefs.

As to the second "effort . . . to stop Professor Chang's article," I would assume that

water could not be owned and was held in trust for the use of all were

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Judge Pence is referring to the decision to initiate a disciplinary complaint against me before the office of the Disciplinary Counsel. Mr. Russell Cades presented arguments at the hearing alleging that the publication of the aforementioned article, as well as a subsequent article, Williamson B.C. Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337 (1981) [hereinafter "*Rediscovering Rooker*"], again violated ethical canons and disciplinary rules by attempting to influence the judicial process through the [media] and therefore create an atmosphere in which no fair proceeding could take place. Secondly, Mr. Cades asserted that the deliberate citation to my own articles in briefs submitted in the Ninth Circuit intentionally violated their page limitations. Finally, he asserted that the use of two attorneys to represent state officials created confusion and conflict of interest. Professor Addison Bowman, a former criminal defense attorney in Washington D.C., represented myself at the proceeding. When asked if Mr. Cades was billing his clients for this action, Mr. Cades, at that time, refused to answer.

The disciplinary counsel issued a one-sentence decision dismissing the allegations.

Even from the very personalized perspective of an unwilling participant to both incidents, I would suggest that both the uses of "powers" of suggestion (appearing before the *Hawaii Bar Journal*) and formally filing disciplinary charges that clearly seemed to involve protected First Amendment conduct, *see* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (law review articles written by attorneys are protected by the First Amendment), were newsworthy. Indeed, if the parties had been reversed, and Chief Justice Richardson or myself had sought to stop Mr. Cades from either speaking on the case, as he has done, writing on the philosophy of judicial activism (*see* Cades, *supra* note 54), both newspapers would have seen such displays as excessive abuse of the power of the judiciary.

In examining the conduct of Mr. Cades, one must consider that the proceeding was, when the "efforts to stop . . . Professor Chang" occurred, were before the Ninth Circuit, hardly the kind of citizenry that would be easily swayed by a post-trial press conference designed to drum up sympathy for one's client. Second, if the reader examines both articles, the reader must realize, that, as in the case of almost all law review articles, the journals that published these articles sought to ensure the accuracy of citations. Moreover, while both articles raised questions about the jurisdiction of the federal courts to collaterally review state supreme court decisions, neither article can be deemed "clearly one-sided." Indeed, the article that seems most controversial concludes by saying that the case (McBryde v. Robinson) was "much ado about nothing." *Unraveling Robinson*, *supra* note 24, at 91. I meant then that the state had the power to regulate water under its police powers and really did not even have to rely on the landmark decision for such powers. This same legal conclusion was already well known, as it had been discussed in the 1978 constitutional convention.

Of course, Mr. Cades objections to my purported violations of Ninth Circuit rules were really the province of that court. The Ninth Circuit never had the obligation to accept these briefs (they were amicus briefs) in the first place. Moreover, the Ninth Circuit knows how to police its own procedural rules, and if briefs which incorporate law review articles (even if written by the same person) amount to attempts to cheat the rules against page limitations, the federal courts certainly have the power and acumen to deal with such irregularities.

overturned in favor of decisions privatizing water, largely because of the commercial needs of the sugar industry.[70]

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such irregularities.

Indeed, one colleague, who clerked on the Ninth Circuit, even noted to me that my article "Rediscovering Rooker" in the *Hastings Law Journal* had been placed on a "recommended reading" list for law clerks, independently, I assume, of the relationship of that article to the *Robinson* case.

Finally, let me point out that I have remained silent on these two incidents since their occurrence. However, I was rather surprised when a student of mine brought me the published opinion which pointed out that Judge Pence had awarded attorney's fees for "stifling" my writings. Indeed, I am rather surprised that Mr. Cades and others thought it necessary to bill their clients for these activities since the outrage they displayed against these alleged violations were always deemed to have been morally wrong and not simply part of the game of litigation tactics played between competing attorneys.

I find it necessary to discuss this example because further silence, that is the silence of the only person [myself] who could discuss these events in their proper context, would amount to my own complicity in allowing a situation of domination to continue. Much like spousal abuse that goes unreported, the unpleasantness of this episode is a necessary part of this article.

Two facts are relevant to the basic premise of this article. First, the public revelation of the attempt to quash my scholarship is an episode that I would assume would be of great interest to any newspaper concerned with freedom of the press. When it did appear (at the time of the request for fees, at the time of the issuance of the decision awarding the fees, and at the time the paper's reported that the fees would not have to be paid by the state) the fact is that these extraordinary actions were clearly made public. Nevertheless, the newspaper coverage focused solely on the size of the monies involved.

Second, the pressure placed on the *Hawaii Bar Journal* to withhold a publication that it had already deemed (knowing that it related to ongoing litigation—a positive factor in its decision) worthy of printing, even to the extent that it was already in final proofs, is indicative of the pre-statehood exercise of power by the "Big Five" (a term that I use as referring to those who were accustomed to power prior to statehood) that I speak of here.

My episode pales in comparison to the more prominent: the failure of Hawai'i attorneys to represent the "Smith Act Seven," *see supra* note 67, fearing one supposes, the same kind of treatment I received—instigation of disciplinary charges on petty charges. Nevertheless I raise it first as a matter of honesty, namely that those who read this article should be aware that the thesis I present here, a thesis I firmly believe is based in objective facts outside of my own experience, is nevertheless, the product of my own experience as an attorney in Hawai'i.

Second, if one can be objective about this experience, it also exemplifies the essence of the conflicts that surround the high degree of journalistic scrutiny of the present court, the court's retreat into procedural forms of defense, and undoubtedly the ramifications of such an attack, a court increasingly conservative as a result of a designed campaign to undermine its institutional and personal credibility.

[70] *See generally* Reppun v. Bd. of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982).

Thus, while some of this issue's articles may be accurate in their contemporary snapshot of the court as "more conservative," I suggest that understanding how that has come to be is the more interesting enterprise. Such conservatism, hopefully a superficial label at best, is not the result of totally unmolested freedom to choose. Such so-called "conservatism" may be, much like the "will to blend in" of middle class non-whites in a still racist[71] American society.[72] As in the case of middle class blacks, economic success is often tenuously linked to toeing a certain acceptable moderate political line.

In Hawai'i, post-statehood scrutiny of the courts has destroyed the ability to pass on the visionary energy of the original social transformation. If we have a more conservative judiciary, I assert that a powerful force in that development is that the continuation of a visionary politics, either in the judiciary or the legislature, has been made a choice with high personal costs.

For those who look at the court itself and despair as to what it may lack, I suggest they are missing the forest for the trees. I suggest we are blind to the reality that the essential struggle symbolized around statehood is still in progress. Statehood itself may have been gained, but we have not fully achieved that original vision of fairness, of addressing the rights of Hawaiians to longstanding wrongs, of providing a society in which trust and personhood are superior to the self-serving assertion of one's legal rights.

There is a nostalgia for the past that could only exist if one believed the urgency of the fight was over. Many of the old time Democrats lament that social consciousness associated with the progressive spirit of the Revolution of 1954 has been forgotten or is non-existent in the present generation. They speak of the "old days" as if those battles are long gone and over—that the young people today can never experience these struggles. It saddens the elders to see that the next generation can never achieve the sense of passion that so energized the generation prior to statehood.

I believe that the struggle, along more complicated lines, still exists. The divisions that existed then continue today in much deeper "structures" of society. The more complicated manifestations of the former

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[71] *See, e.g., Kristi Yamaguchi Not Getting the Gold in Endorsements: Some Talent Brokers Say Her Japanese Ancestry is Why*, HONOLULU STAR-BULL., Mar. 16, 1992, at A1, col. 2.

[72] *See, e.g.*, SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA ch. 2 (1990).

struggles mask the underlying similarity between then and now. We lack persons who are able to identify the new forms in which old struggles are expressed.

Material success has created the illusion of fundamental transformation. It is common to hear of frustration with the apparently growing conservatism of the Democratic party, just as it is common among lawyers and law students to hear frustration about an increasingly conservative court. The demise of both is commonly attributed to the internal corruption of those ideals that originally spurred the Democratic party.

Rather, I suggest that any new conservatism is a continued manifestation of the political power of the former elite, the Republican oligarchy known as the Big Five. This political power has "chilled" social change in much the manner described here—by aborting fundamental rearrangements of power by disparaging the integrity and competence of the "social engineers" who took power after statehood. It is thus a more complicated exercise of power—for the rhetoric of "competence" and "integrity" has transformed former "democrats" of the old kind into elitists akin to those of the Big Five, though they may be non-white as well as "Democrat" by self-designation.

The rhetorical transformation of the more blatant political struggles prior to statehood into those formed symbolically around "competence" and "integrity" (meaning "values") has fooled many into believing that the fundamental political hierarchies in Hawai'i have been eliminated and replaced by a neutral, objective standard for allocating the privileges and benefits of society. Attacks on integrity and competence seem "neutral" and fair game on the surface.

Moreover, the children of those who fought for social change became educated in a society that trumpeted these norms as if they were not themselves "loaded" with hierarchical possibility. Below the surface, attacks on "competence,"[73] "integrity," or "understanding how to do

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[73] Much of the elite bar's resistance to the University of Hawaii Law School was that it would not be good. *See, e.g.*, *School of Law*, HONOLULU ADVERTISER, May 1, 1976, at A8, col. 1 ("[C]oncerns about communication between the law school and the local bar seem to rise from a deeper concern—subtly tinged with racism—that asks whether a law school can be both of high quality and heavily local in its career orientation and student selection."); *see also Law School, Anyone?*, HONOLULU ADVERTISER, Nov. 17, 1966, at E2, col. 1 ("Chief Justice William Richardson's proposal for a law school here may be somewhat controversial in the legal profession, but the idea of conducting a feasibility study on the question is a good one. . . . Any law school must not be designed just to

law''[74] can achieve the same disempowering results formerly achieved by attacking the ability of a local person to speak English with the proper enunciation.

Unfortunately, many who have ridden the social revolution to middle class success have seen the payoff in material, rather than experiential terms. For example, having experienced language or ''competence'' discrimination, the natural reaction of the middle class Asian-American parent has been to insist on the kind of private school education which will insulate their child from experiencing what they themselves suffered. Thus, while the goal becomes placing their children in schools, often private, which will insulate their offspring from the difficulties of their upbringing, the societal ramifications are exactly the opposite.

The next generation is thus deprived of the very experience that really counts: namely learning through experience that accent, or language, or ''competence,'' is not the measure of a person's social value. The children of reform thus become the most susceptible and sympathetic to the kinds of competence-oriented critique now leveled at many of the persons who led the vanguard for change.

Thus, Hawai'i's social pioneers are in danger of leaving their legacy to a generation that fails to understand the lesson that was so clear to their parent's generation: namely that the fights over ''competence'' or ''integrity'' often mask strategies to disempower persons with fundamentally visionary potential.[75]

In closing, the dangers of examining, and critiquing the use of the ''openness'' of the Hawai'i judiciary, absent examination of the his-

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turn out lawyers able to pass the Hawaii bar exam and serve here. The history of such schools on the Mainland is that they lower the quality of legal practice in the state.''); Addison Bowman, *In Defense of the Law School*, HONOLULU STAR-BULL., Sept. 22, 1979, at A8, col. 1.

Thus the bar didn't mind a law school, but most did not believe that it would be any good. Thus, they did not value the access to the profession afforded by a law school—good, great, or mediocre. Rather, unless lawyers were good—by their standards—the benefits of opening the opportunities of the bar to a greater number of local people was not as important as maintaining the quality of the bar. This ignored the vast legal under-representation of certain communities.

[74] Judge Pence's criticism of the Hawaii Supreme Court was that the justices did not understand the limits of their own power, that is that such finality was too dangerous in the hands of the newly empowered judges. *See supra* note 31.

[75] A clear example of the controversy over objective standards is the debate on objective criteria in law school affirmative action. *See* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990).

torical context, risks the same dangers of abstraction. When we fail to use history as a constraint on supposedly neutral standards that are applied elsewhere we become the forces that inhibit social change.

If anything, the greatest danger to a progressive judiciary in Hawai'i is confidence in the primacy of legal theory above real world experience. We ought to listen to Holmes who had sporadic bursts of great vision: "Experience," he said, in so many words, "is the real law."[76] If today's generation of law students had started life in the 1940s, their view might be similar. Concepts such as "access" and the "marketplace of ideas" would seem truly abstract compared to the sounds and smells of life at a Hanapepe sugar plantation on the eve of a strike in 1924.[77]

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[76] "The life of the law has not been logic, it has been experience." THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE (Clarence Morris ed., 1959) (citing OLIVER WENDELL HOLMES, THE COMMON LAW (1881)).

[77] In a 1924 plantation strike at Hanapepe on the Island of Kauai 16 plantation workers and four policemen were killed. HISTORY OF HAWAI'I *supra* note 13, at 186; *see generally* EDWARD D. BEECHERT, WORKING IN HAWAII: A LABOR HISTORY 216-32 (1985). The Hanapepe river, of course, was the site of the 30 years of litigation over ownership of surface water rights involved in the *McBryde* and *Robinson* cases.