

Testamentary Incorrectness: A Review Essay

PAUL D. CARRINGTON†

INTRODUCTION

*Broken Trust*¹ tells an extraordinary tale of private corruption indulged by private trustees and public officials in the state of Hawaii. The reported misdeeds were enabled and perhaps inspired by racial politics. The authors are legitimate heroes of the story they tell.²

The troubling events depicted may be results of diverse causes. In some measure, they may have been a consequence of insularity— island cultures, much like small town communities, may tend to reinforce our impulse to “go along in order to get along” with our neighbors with whom we share a sense of isolation, even if we know we shouldn’t. Many in the story told in this book seem to have done that. The events may also be in part a consequence of the extraordinary size of the trust estate involved, for it grew to exceed in value the combined endowments of Harvard and Yale and vastly exceeded what was necessary or even useful to serve the testator’s explicit aims to maintain a private school for disadvantaged children. This wealth empowered the trustees beyond the dreams of avarice. But there is also

† Professor of Law, Duke University. The author was in 1972 a consultant to the University of Hawaii regarding the establishment of the William S. Richardson School of Law. He was honored to serve as a visiting professor in that school in 1995. For a brief account of the American acquisition of the islands by the present author, see PAUL D. CARRINGTON, *SPREADING AMERICA’S WORD: STORIES OF ITS LAWYER MISSIONARIES* (2005).

1. SAMUEL P. KING & RANDALL W. ROTH, *BROKEN TRUST: GREED, MISMANAGEMENT, & POLITICAL MANIPULATION AT AMERICA’S LARGEST CHARITABLE TRUST* (2006).

2. Samuel P. King is a senior federal district judge; Randall Roth is a professor of law at the University of Hawai’i.

a relation of the story told to the racial politics of our times, and that is the subject of this review.

I. THE MAKING OF THE WILL: HAWAII IN 1883

The authors' story begins with the making of the last will and testament of the Hawaiian Princess Bernice Pauahi (1831–1884). She was virtually the sole heir of the royal family that had ruled the archipelago for a time in the 18th and 19th centuries. As a member of that royal family, she had been raised in the Calvinist faith brought to Hawai'i by New England missionaries in 1821 and warmly embraced by many of her contemporaries among the indigenous population.³ As a child, she became bilingual. As an adolescent, she was an avid reader and served as school librarian at her Royal School. At nineteen, contrary to the royal family tradition of marrying siblings or kin, she married Charles Reed Bishop, the kingdom's Customs Collector. Bishop had been born in America but was a naturalized subject and a person held in high regard by the King. The Princess developed a taste for classical music, sang Verdi and Haydn in a choir, and played the piano for the pleasure of her guests and companions. She even taught classical music to neighboring children. Like many of her royal relatives, she was childless. With her American-Hawaiian husband, who left government to become a prosperous merchant, she was well-traveled in both America and Europe. Her friends and acquaintances included European royalty and wealthy mainland Americans.

The text of Pauahi's will tends to confirm that the Princess's view of her native land was one shared by other Congregationalist Hawaiians and at least somewhat resembled that of the journalist Mark Twain, who visited the islands in 1865. He later recorded his impressions in *Roughing It*.⁴ Reporting what he saw of the remnant indigenous culture, he expressed an assessment that was destined to become politically incorrect even if it was not far off the truth:

3. Her story is told by KING & ROTH, *supra* note 1, at 2-15.

4. See MARK TWAIN, *ROUGHING IT* 431-531 (Univ. Cal. Press 1996) (1872).

The King and the chiefs [had] ruled the common herd with a rod of iron, made them gather all the provisions the masters needed, build all the houses and temples, stand all the expenses, of whatever kind, take all the kicks and cuffs for thanks, drag out lives well flavored with misery, and then suffer death for trifling offenses or yield up their lives on the sacrificial altars to purchase favors from the gods for their hard rulers.⁵

.....
[Woman's] place was to do all the work, take all the cuffs, provide all the food, and content herself with what was left after her lord had finished his dinner. She was not only forbidden by ancient law, and under penalty of death, to eat with her husband or enter a canoe, but was debarred, under the same penalty, from eating bananas, pineapples, oranges or other choice fruit at any time or in any place.⁶

This indigenous culture was maintainable only in isolation from others less brutal. It had evolved in the most remote archipelago on the planet, not to be uncovered until 1778. By 1821, when the Congregationalist missionaries came to the islands to teach pre-destination, the flagrant disobedience of women to the dictates of the traditional priests, who had forbidden their contact with foreign seamen, had resulted in a disintegration of the local faith and the resignation of most of the priests, making the royal family ripe for conversion to the Puritan faith.⁷ The result of its immediate conversion was a crude merger of church and state that some missionaries found embarrassing.⁸ Churches resembling those in New England were erected everywhere at the command of the monarch. As several missionaries reported to their governing board in 1834: “[t]he reception of Christianity by the people of these

5. *Id.* at 441.

6. *Id.* at 459. “These poor ignorant heathen,” Twain mused “seem to have had a sort of groping idea of what came of woman eating fruit in the Garden of Eden, and they did not choose to take any more chances.” *Id.*

7. The native priests forbade women to have contact with foreign sailors, upon pain of death. But that contact soon led to feminine resistance to the indigenous priesthood. See GAVAN DAWS, *SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS* 56-57 (1968).

8. *Id.* at 65-70, 82-105.

Islands was not strictly a voluntary act.”⁹ The missionaries also brought literacy, reducing the local tongue to writing to enable translation of the Bible to make it accessible to the Puritan converts.¹⁰ Twain was moved to lionize the services of the missionaries to the people:

[They had] clothed them, educated them, broken up the tyrannous authority of their chiefs, and given them freedom and the right to enjoy whatever their hands and brain produce, with equal laws for all and punishment for all alike who transgress them. The contrast is so strong—the benefit conferred upon this people by the missionaries is so prominent, so palpable and so unquestionable, that the frankest compliment I can pay them, and the best, is simply to point to the condition of the Sandwich Islanders of Capt. Cook’s time and their condition today. Their work speaks for itself.¹¹

We are not told whether Pauahi met Twain or read *Roughing It*. But her life was lived as a devout Congregationalist. In 1872, she had been strongly importuned by the dying King Lot, her kinsman and schoolmate whom she had declined to marry, to accept the crown as Queen of Hawai‘i.¹² She flatly refused that honor, giving as the reason her marriage to a person of American ancestry. Her husband, like many other immigrants, advocated closer relations with the United States. And, although she did not give it as a reason for her refusal, it seems that she shared much of Twain’s assessment of the situation and also her husband’s aspirations for closer links to America, as did at least some others of her indigenous kin.

By 1883, when Pauahi wrote her will, persons of pure aboriginal blood were a shrinking minority of the population of the islands. Captain Cook, who discovered the

9. *Id.* at 12; see also 1 PATRICK V. KIRCH & MARSHALL SAHLINS, ANAHULU: THE ANTHROPOLOGY OF HISTORY IN THE KINGDOM OF HAWAII: HISTORICAL ETHNOGRAPHY 124 (1992).

10. TWAIN, *supra* note 4, at 441. Twain hopefully perceived that by the 1860s, “there is not one [Hawaiian] above the age of eight years, but can read and write with facility in the native tongue.” *Id.* at 454.

11. *Id.* at 441. For a less generous, but perhaps reasonable, assessment that seems not to have been shared by the Princess, see SALLY ENGLE MERRY, COLONIZING HAWAII: THE CULTURAL POWER OF LAW (2000).

12. KING & ROTH, *supra* note 1, at 23.

islands, had estimated the population in 1778 at three-hundred thousand.¹³ That population was soon devastated by diseases brought to the islands by European and North American whalers, adventurers, and missionaries, all of whom were known in Hawaiian as *haoles*. By 1883 (the date of Pauahi's will), the surviving descendants of the 1778 population were approximately forty thousand, and many of that number were children of interracial marriages. There were at least an equal number of farm workers from China, Japan, the Philippines, and diverse other origins, as well as many *haoles*. The migrants had been welcomed and sometimes even recruited by the royal government or ruling class *alii* because they were sorely needed. Some managed international trade and relations,¹⁴ and many others harvested exportable sugar and pineapples grown on lands formerly controlled by the kingdom's ruling class *alii* and cultivated for subsistence crops by their feudal serfs, the *kanakas*, and slaves.

Much of the tillable land in the islands had been sold in a grand auction conducted by the royal government in the 1840s on the advice and with the support of its advisory parliament composed of the *alii*. That auction, known as the *Great Mahele*, was conducted by the royal government to end feudal conditions¹⁵ that were no longer sustainable, at least in part as a result of the depopulation. While only citizens of the kingdom were permitted to buy in the auction, they were free to sell what they bought, and many did. This enabled agricultural development soon to replace the relatively undemanding subsistence farming to grow products for export. Most of the entrepreneurs were *haole* immigrants or their descendants and they employed many immigrant workers from Asia. Most of the surviving peasant *kanakas* became displaced persons in their own land. Most of the immigrant farm workers were male and many found spouses among the Hawaiian women, as had many earlier *haole* immigrants. As a result, even by 1883 a high percentage of the population was of mixed ancestry. A

13. It might have been much more. See DAVID E. STANNARD, *BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT* (1989).

14. On the Asian influx, see LAWRENCE FUCHS, *HAWAII PONO: A SOCIAL HISTORY* (1961).

15. For a full account, see JON J. CHINEN, *THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848* (1978).

parliament had been established by a constitution proclaimed in 1852, but in 1864 the King revoked the earlier instrument, in part to deny the vote to citizens of pure Asian ancestry.

The increasingly polychromatic population of the kingdom was governed in 1883 by King Kalakaua. He had succeeded "Whiskey Bill" Lunalilo who had been chosen by parliament in 1872 when Pauahi had refused the job. Lunalilo died in 1874. Kalakaua was then elected by the Parliament despite bitter opposition from Lunalilo's widow Emma.¹⁶ This choice evoked a moment of disorder causing King Kalakaua to seek support from American sailors then in the harbor. They came ashore for brief peacekeeping duty, but hostile feelings between the royal factions remained despite the absence of any clear difference of substance between the rivals. Both professed to welcome foreigners and insisted on the prerogatives of royalty to control the islands for the presumed benefit of the old ruling class and of other indigenous folk who cherished aspects of the old culture, if not its discarded religious faith. Both had the support of racially diverse constituents from which only those of pure Asian stock were excluded.

The government led by Kalakaua, like that of his royal predecessors, lacked stability and sometimes even competence. The King did go to Washington in 1874 and succeeded in securing a treaty with the United States that gave Hawaiian growers access to the American market and committed the United States to employ economic sanctions to protect the Kingdom from the diverse imperial powers that threatened it.¹⁷ But in order to maintain a suitably royal lifestyle, Kalakaua had borrowed money that he had no means to repay. He depended on immigrant advisors,¹⁸ chiefly on the advice of one born as the son of an English lord who was widely despised by the King's subjects.¹⁹ The

16. See EDWARD JOESTING, *HAWAII: AN UNCOMMON HISTORY* 215 (1972) (discussing public reaction to the coronation).

17. See *Commercial Reciprocity*, ch. 19, 19 Stat. 625 (1875).

18. On contemporary criticism of the foreign advisors, see SAMUEL M. KAMAKAU, *RULING CHIEFS OF HAWAII* 398-400 (1961).

19. The advisor was Walter Murray Gibson. His story is told by JACOB ADLER & ROBERT M. KAMINS, *THE FANTASTIC LIFE OF WALTER MURRAY GIBSON: HAWAII'S MINISTER OF EVERYTHING* (1986).

full measure of Kalakaua's improvidence was not demonstrated until after Pauahi's death when he dispatched a tiny navy to conquer Samoa, a venture ending in ridicule.²⁰ Meanwhile, German and Japanese navies were cruising the Pacific in search of new territories to add to their growing empires, much as the British and French navies had done earlier. When Kalakaua took a tour of Europe in 1887, the *New York Times* reported that it was for the purpose of negotiating a sale of his kingdom. Because that accusation seemed credible, American diplomats signaled their disapproval of such an event to the several nations he visited.²¹

While these last events were not known to her, it was fully evident to the Princess as she wrote her will that radical change in the people and government of her islands was imminent. It was not her aim as testatrix to perpetuate the royal regime or the often oppressive ancient culture, although it was from them that she derived her status and the power to dispose of her ancestors' lands. She aimed instead to facilitate integration of Hawaiians and other impoverished children into a peaceful, polychromatic, Protestant, industrious society.

She expressed this integrationist aim by directing her trustees to devote her estate to the establishment and maintenance of schools preparing "orphans and others of indigent circumstances" for useful and gratifying lives in the world she could see coming to her Hawai'i. She directed them to give a preference to "Hawaiians of pure or part aboriginal blood," but her concern for indigent children was not limited to those qualified by race. She insisted that her trustees and all future teachers at her schools be Protestants. She directed that the children be provided "first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches

20. The story is fully told by GEORGE HERBERT RYDEN, *THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA* (1928). See also Paul M. Kennedy, *Germany and the Samoan Tridominium 1889-98: A Study in Frustrated Imperialism*, in *GERMANY IN THE PACIFIC AND FAR EAST 1870-1914*, at 89 (John A. Moses & Paul M. Kennedy eds., 1977).

21. See JOESTING, *supra* note 16, at 214 (discussing the American attitude toward Kalakaua's tour of Europe).

to be subsidiary to the foregoing objects." She explicitly empowered the trustees to decide "to what extent said school shall be industrial, mechanical, or agricultural."²²

The Princess did designate the name of her Kamehameha Schools, identifying them with her royal ancestor who had been among the first to engage in trade with *haole* traders and whose lands constituted the bulk of her estate. The choice of that name honored the reality that the wealth of her estate was largely the result of his military achievement, but it may have mistakenly implied an admiration for the race-consciousness perpetuated by then King Kalakaua, his rival Emma, and many but not all of the surviving *alii* and *kanakas*. She was careful to deny Kalakaua or Emma or other royalists, any role in the administration of her estate.

Pauahi designated five trustees. One was her husband, who had served as advisor to the King on educational matters and as trustee and benefactor of the Punahoa School earlier established by the missionaries as a preparatory school modeled on the New England tradition. Her husband surely best understood her testamentary purpose and in time, he subscribed to it by leaving to it the remainder of his estate, extending its holdings at one time to as much as 470,000 acres. All five of the trustees she chose were known to her to be Protestant *haoles* who were active in her church and all openly favored annexation of Hawai'i by the United States.

II. FOUNDING THE SCHOOL, AND A REPUBLIC

In keeping with the aims of the Princess, the trustees' first step was to hire an American Congregationalist minister to run the school for boys. He established a military tradition with himself as drill master. He reviled King Kalakaua as immoral and incompetent. The American flag flew over his school. The girls' school was staffed with teachers who were single women brought in from the Midwestern United States; their assigned task was to "stand firm for truth and purity" and supply the girls with the moral fiber to resist temptation. Both schools earnestly

22. KING & ROTH, *supra* note 1, at 302 (the full text of the charitable trust provisions of the will appears at 301-03).

sought to impose a puritanical work ethic on their indigenous students, in keeping with the testator's expressed aim. Both, for the present, admitted only "those having native blood," but it was understood that the preference depended on their acceptance of the assimilationist training their benefactor sought to provide.²³ These decisions were surely in accord with the Princess's wishes.

In 1887, the year the boys' school opened, the improvident King Kalakaua returned from his travels to find his constitutional authority questioned by a mistrustful parliament. The parliament's demands for control of the government were actively supported by all the trustees whom the Princess had selected, and by the principal of her school. No violence was necessary to effect the change in the relation of royalty to parliament, but there was a confrontation between the King's House Troop and the Honolulu Rifles, a group who supported parliament's demand. While Kalakaua backed down and accepted the change peaceably, the amended constitution empowering the parliament became known among the King's friends and supporters as "the bayonet constitution."²⁴ A weak rebellion was organized in 1889 to fully restore the powers of the monarch, but it foundered with scant violence.²⁵ Few were willing to put themselves at risk to support Kalakaua as a powerful monarch.

In 1892, Kalakaua died. Like his two immediate predecessors, he was childless. So Parliament elected Pauahi's kinswoman, Lili'uokalani, Queen despite her participation in the rebellion of 1889. She was a friend of Mr. Bishop and was notably honored at the Trustees' boys' school. However, the next year when she declared her repudiation of the "bayonet constitution" empowering Parliament and stated her intention to disregard that body and reclaim absolute authority, she was overthrown by a

23. See Mary Leigh Caroline Case, Note, *Hawaiian Eth(n)ics: Race and Religion in Kamehameha Schools*, 1 WM. & MARY BILL RTS. J. 131, 132 (1992) (citing GEORGE HU 'EU SANFORD KANAHELE, PAUAAHI: THE KAMEHAMEHA LEGACY 177 (1986)).

24. For a fuller account, see MERZ TATE, *THE UNITED STATES AND THE HAWAIIAN KINGDOM* 86-93 (1965).

25. See DAWS, *supra* note 7, at 256-58.

group whose leaders included the Bishop Estate Trustees. Their participation in her overthrow resulted in a protest by some indigenous parents and some students were withdrawn from the school.

This bloodless coup of 1893 resulted in the establishment of a republic led by *haoles* active in the former Parliament; an event warmly supported by the Princess's trustees. The coup was facilitated by the presence of 162 American sailors summoned from the harbor by the United States Minister acting without authority, for the stated purpose of assisting in keeping the peace, much as other sailors had done in 1874 at the request of Kalakaua. Their presence was deeply resented by the royalist supporters of the Queen, who were predominantly but not exclusively persons of indigenous ancestry. Again, however, few if any of her supporters were then prepared to put themselves at risk to support her cause.

The coup divesting the Queen of her crown did not lead to the annexation of Hawai'i by the United States because Congress and President Cleveland rejected that proposal.²⁶ Mainland anti-imperialists, who held the nation's attention at the time, labeled the presence of the sailors and their peacekeeping in Honolulu as "the crime of 1893."²⁷ No doubt that presence was inappropriate and a technical violation of international law, but it was very probably inconsequential. It could not be reversed, as President Cleveland seems to have wished, without a more substantial violation of international law because the Republic quickly gained international recognition. An offer was made by the State Department to press the Republic to reinstate the Queen as a ceremonial monarch if she would accept the terms of the 1887 constitution and respect the authority of the Parliament that had elected her, but she refused that offer. In 1895, the Queen and some supporters made an effort to overthrow the Republic. The effort was redolent of the brief disturbance of 1889; it failed almost

26. On the politics in Washington, see PAUL D. CARRINGTON, SPREADING THE WORD: STORIES OF AMERICA'S LAWYER MISSIONARIES 69-73 (2005). See also WILLIAM ADAM RUSS, JR., THE HAWAIIAN REPUBLIC (1894-98): AND ITS STRUGGLE TO WIN ANNEXATION (1992).

27. RUSS, *supra* note 26, at 332-33. For the sovereigntist account of the crime, see MICHAEL DOUGHERTY, TO STEAL A KINGDOM 165-76 (1992).

harmlessly, and she then abdicated. No foreign sailors were called to keep the peace while it was suppressed. She was convicted of treason to the *haole*-dominated Republic, but was pardoned.

III. THE TERRITORIAL ERA

In 1898, while America was at war with Spain, the Republic was annexed as a colonial member of the new empire of the United States headed by the Republican President McKinley. While thousands of the Republic's citizens, mostly those of predominantly indigenous ancestry protested, annexation had the warm support of the Bishop Estate trustees. All possible doubt was for them now resolved: the obviously appropriate aim of the Estate was to fit the islands' children to the mainland culture. Incidental to annexation was an end to *de jure* racial discrimination against Hawaiians of Asian ancestry—the only racial segregation ever practiced in the islands.

In 1921, Congress enacted the Hawaiian Homes Commission Act for the stated purpose of “rehabilitating” the native Hawaiian population, which was defined to include “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”²⁸ Congress did not in this enactment limit its largesse to poor orphans as the Princess had, nor extend it to impecunious children who lacked the qualification of an indigenous ancestor, as she did. But then Congress did not appropriate large sums to fund the territorial government's program as the Princess had done.

Continuing intermarriage steadily diluted the biological identity of the persons to be served by either the Bishop Estate or the 1921 legislation. In 1934, successor trustees of the Estate began to move away from Pauahi's vision with an effort to raise academic standards by means of an entrance examination, an IQ test, and smaller classes. While the change was explained as a response to the need for leadership among the indigenous population, it reflected the usual preference of teachers for more able students, and perhaps an emerging tendency of the market to value academic competence more and applied skills less. There

28. See Hawaiian Homes Commission Act, 1920, ch. 42, 42 Stat. 108 (1921).

was surely an element of social and academic status-seeking in this shift, and it tended to favor children with fewer indigenous ancestors rather than more, and to de-emphasize their impoverished economic status as a qualification. The poor orphans most in need of the training the Princess had hoped to provide were at risk of being excluded because of their low test scores, a result she would surely have deplored. The notion newly expressed that an ethnic group needs leaders might be taken to imply that the group should resist the assimilation that the testatrix plainly hoped to achieve.

This was also the era when the Bishop trustees first began to compensate themselves, allegedly on account of the risks of personal liability they were taking by assuming responsibility for so large an estate, but in disregard of the usual practice of those holding office as trustees of charitable institutions to serve without pay. In 1943, the trustees were exposed to sharp criticism in the territorial legislature for these changes away from the testator's intent. Their elitist admission policy was abandoned, their compensation was reduced, and the school principal with elitist ambitions resigned.

In the 1950s came the civil rights movement, an event of global consequence. The champions of that movement were fully aware that most individuals whenever or wherever they live identify themselves by cultural ties such as religion, language, or race that link them to others, and they knew that many cling to such markers as a source of emotional security. Their aim was peace between races and ethnicities. This required a measure of mutual respect, and a reduction of the emotional force of divisive cultural ties, enabling diverse neighbors in a shrinking world to tolerate, and perhaps even enjoy, one another's differences.

In 1959 statehood came to Hawai'i, in part as an expression of national gratitude for the heroism in military combat in World War II of a regiment of Hawaiians of mixed Japanese ancestry.²⁹ On that occasion, some citizens of Hawaiian ancestry were heard to proclaim that "Now we are all *haoles*."³⁰ Hawai'i was at that time perhaps the

29. See generally LYN CROST, *HONOR BY FIRE: JAPANESE-AMERICANS AT WAR IN EUROPE AND THE PACIFIC* (1994).

30. DAWS, *supra* note 7, at 391.

premier if imperfect model in the world of culturally diverse groups practicing virtually universal tolerance despite continuing ethnic consciousness. Credit for that distinctive achievement was generally assigned to the host culture that had assimilated people of all colors, faiths, and tongues. Perhaps the Kamehameha Schools and the Bishop Trust deserved a little of that credit. Whether so or not, it seems certain that the Princess would have approved the directions of social change in Hawai'i as it transformed itself from kingdom to republic to territory to state.

As a feature of the statehood legislation, Congress granted the new state title to public lands formerly held by the federal government and some previously held by the Republic. It provided that those lands—and the proceeds and income that the lands generated—were to be held as a public trust for various purposes, *including* the betterment of the conditions of native Hawaiians whose interests had been advanced by the 1921 law. Although this enactment had no direct consequences, it reconfirmed the longstanding inclination of Congress to share the Princess's goal of integrating Hawaiian-Americans into the mainland culture featuring equal individual rights and a market economy.

A secondary feature of statehood was a steep elevation in land values. The Estate accordingly grew rapidly in the market value of its assets. It continued to hold nearly a tenth of the land in the islands.³¹ And among the trustees' prudent investment was the acquisition of ten percent of Goldman, Sachs. The net worth of the Estate was said to have reached ten billion dollars by 1990.³²

IV. THE HAWAIIAN RENAISSANCE

But the spirit of the civil rights movements of the 1960s also had a contrary spin. People everywhere became increasingly sensitive to racial differences not only as sources of inequity and injustice but as opportunities for

31. Jon M. Van Dyke, *The Kamehameha Schools/Bishop Estate and the Constitution*, 17 U. HAW. L. REV. 413, 413 (1995).

32. Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy pres Doctrine*, 21 U. HAW. L. REV. 353, 357 & n.9 (1999) (quoting Andrew Murr, *Trouble in Paradise: Steamy Intrigue at a Huge Hawaii Charity*, NEWSWEEK, May 10, 1990, at 73).

individual self-aggrandizement. Claims to compensation for group injustices began to be advanced around the globe by ethnic leaders. The idea of reversing historic injustices perpetrated by generations long deceased began to gain an audience. If an ancestor was guilty of an ethnic injustice, perhaps a putative beneficiary should compensate a descendant of the victim of that injustice. Accusations of White Guilt became fashionable³³ in America, and also in Canada, Australia, and in other lands. Territorial and other claims of indigenous groups around the world gained the attention of the United Nations.³⁴ This impulse was especially visible in the United States where proposals were advanced for racial quotas in elite academic institutions.

There are at best serious problems with the correction of historic injustices, or the misdeeds of whole populations. But it is a special problem for racial groups not justified in claiming to be victims. The Hawaiians are as good an example as any of an ethnic group that can impose moral blame on no other group for the frustrations experienced by its members. Many Hawaiians in the past experienced deprivations related to their cultural traits or values, and some continue to do so,³⁵ but not on account of their race. And the foul deeds committed against their ancestors since 1778, as before, were almost all committed by other Hawaiians. Slavery and feudalism were imposed on Hawaiians only by other Hawaiians. If the *Great Mahele* was an injustice, it was not one committed by *haoles* or the Asian immigrants who came to work the land, but by the *alii* who profited from it. As the Princess fully understood, there were Hawaiians whose inculturated traits put them at a disadvantage in the global economy that they were among the first to encounter in full force. But who can be *blamed* for that?

33. See generally T. ALEXANDER SMITH & LENAHAN O'CONNELL, *BLACK ANXIETY, WHITE GUILT AND THE POLITICS OF STATUS FRUSTRATION* (1997); SHELBY STEELE, *WHITE GUILT: HOW BLACKS AND WHITES TOGETHER DESTROYED THE PROMISE OF THE CIVIL RIGHTS ERA* (2006).

34. See, e.g., G.A Res. 1514(XV), at 66, U.N. Doc. A/519 (Dec. 14, 1960). See generally KEN COATES, *A GLOBAL HISTORY OF INDIGENOUS PEOPLES: STRUGGLE AND SURVIVAL* (2004); RONALD NIEZEN, *THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY* (2003).

35. For an account of their grievances, see MICHAEL KIONI DUDLEY & KEONI KEALOHA AGARD, *A CALL FOR HAWAIIAN SOVEREIGNTY* 77-88 (1993).

Despite the demerits of their claim of racial injustice, racist sentiments in Hawaii seem to have gained momentum from the civil rights movement on the mainland. In response to the times, individuals qualified by an Hawaiian ancestor came with increasing frequency to put themselves forward in the public arena as champions of a victimized race whose status and civil rights had been denied, and who might therefore claim compensatory entitlements.

That a rise in racist sensitivities was occasioned by the mainland civil rights movement may be confirmed by the fact that it was not until 1963 that the Bishop Estate became the object of heated public attention. As noted, the market value of its vast land holdings was rising precipitately. Some of it had been leased to small home builders on long terms for small rents that were increasingly low in relation to the rising land values. Homeowners whose leases expired would be driven from their homes by their inability to pay land rent proportional to the value of their homes. To protect homeowners, the state considered legislation requiring the Estate to sell rented land to the tenant at whatever price might be agreed upon. This would as a practical matter effect a transfer of wealth from the Estate to some homeowners who were not its intended beneficiaries. In a first manifestation of a new political movement for Hawaiian rights, its supporters ringed the legislature with burning torches to secure the defeat of the proposed legislation, thereby sheltering the wealth held by the Estate from dilution by state law.³⁶ Small homeowners would have to pay the Estate a full price for their leased land. Many of Hawaiian ancestry had come to think of the Estate corpus as a racial asset.

Other similar disputes over the management of Trust lands would ensue. These and similar encounters led the Supreme Court of Hawaii (that had been empowered by the Princess to select her trustees' successors), with the support of the state's political leadership, to Hawaiianize the trustees.³⁷ No more would *haole* Puritans of the sort she preferred be entrusted with the Princess's Estate. Only those with an Hawaiian ancestor or two might be

36. See KING & ROTH, *supra* note 1, at 60-61.

37. See *id.* at 69.

considered for appointment as trustee. No matter that the testatrix had wanted to make poor orphans as much like *haole* Puritans as possible; her religious mission was forsaken. And no matter that she had selected trustees who plainly saw their mission as providing training to fit students for integration with the population of the mainland. New trustees were freed to pursue disassimilationist aims.

One early manifestation of growing disregard for the testator's aims came in the 1960s³⁸ when the School (now uniting boys and girls) introduced the study of the Hawaiian language and of *hula*. *Hula* had been suppressed by Puritan missionaries in the nineteenth century and was seldom seen to be performed in the mid-twentieth century. It is today hard to see the harm in *hula*, although it seems clear that the testatrix disapproved of it as a commission of sexual license. She would surely have preferred to teach children Haydn and Verdi.

The Hawaiian language training is perhaps more questionable. At the founding of the schools, the teaching of English had been an explicit priority as the means to assimilation and the use of the indigenous language was discouraged. Today, one might question the need to invest students' energies in learning a second language not spoken in any marketplace or affording access to notable literature. Perhaps the occasional use of the native tongue, like a presentation of *hula*, adds to the islands' attraction to tourists. Otherwise, a knowledge of that tongue serves chiefly as a cultural identifier separating those who know it from those who do not; it may even be a source of disassimilation or ethnic segregation, and to that extent it may be contrary to the intent of the Princess. The apparent purpose is to bond those with weak ancestral ties more strongly to the sovereignty movement.

Another manifestation of a departure from the testator's aims was the return to the elitist admission policies of the 1930s that had been the subject of legislative intervention in 1943. The school became one for the "best and brightest" students available among those who were qualified by having at least one Hawaiian ancestor. The program was designed to reinforce any impulse these

38. *See id.* at 54-59.

academically qualified students might have to identify themselves more with a racial minority.

Disassimilation had become the stated aim of a growing number of Hawaiians. The chair of the new Hawaiian Studies Department of the University of Hawai'i proclaimed at that time that, although born in California, she was not an American and would die a Hawaiian. She became a celebrated prophet to what some denoted as a Hawaiian Renaissance leading to what became known as the Hawaiian Sovereignty Movement, a name implying to some an ambition to achieve secession and possible expulsion of offensive *haoles*. Kamehameha School was, it seems, increasingly conducted as a source of supporters for that movement as well as for the enrichment of the trustees.

As the authors report, the Sovereignty Movement began to be a major presence in state politics in the 1970s. Its objectives were imprecise, and did not seem to include secession.³⁹ But it sought some form of preferential reward or recognition for those having some indigenous ancestors, such as free access to an increasingly fancy school. That aim may have served to attract the political support of more potential beneficiaries of the largesse to be awarded.

In 1978, the state in response to the Sovereignty Movement established the Office of Hawaiian Affairs (the OHA). This agency was to be independent from other branches of state government and responsible for programs and activities relating to two groups. One group was the "native Hawaiians," as narrowly defined by the 1921 Hawaiian Homes Commission Act, but the other was "Hawaiians," more inclusively defined as *all* descendants of the aboriginal peoples inhabiting the Hawaiian Islands in 1778. Among OHA's responsibilities was the administration of a share of the revenue from some of the lands granted by the federal government to the state of Hawai'i upon admission.

OHA was to be overseen by a board of trustees who were required by state legislation to be elected by "Hawaiians," the population defined as including everyone with an indigenous ancestor, no matter how remote nor how prosperous. A comparison was drawn to the reservations

39. *But see* DUDLEY & AGARD, *supra* note 35, at 131-41.

governed by some indigenous tribes on the mainland. But there is the difference that those are local governments that are not empowered to make decisions affecting non-residents of the locales they govern. The provision regarding the electorate resulted in a constitutional challenge resolved in 2000 when the Supreme Court of the United States held that the racial qualification of voters selecting the OHA trustees violated the Fifteenth Amendment.⁴⁰

Nevertheless, as the ambition to achieve disassimilation rose, the instinct of the state's citizens who lacked the appropriate ancestor was to humor those who did, seemingly in the hope that tolerance and modest support would enable all to remain amiable neighbors. Few if any citizens stepped forward to question efforts to assign White Guilt to the polychromatic people of the state when in 1993 Congress was asked to apologize for "the crime of 1893" and did so,⁴¹ with the possible implication that some further apology to a defiled group might be in order. Never mind that "the crime" was at most a minor event or that Congress had at the time offered to support a restoration of the political situation *ex ante*. Congress thus cheerfully acknowledged a little unwarranted White Guilt in the hope that this might diminish the hostile feelings being nurtured by the sovereigntists. It discounted the possibility that its unwarranted apology might elevate the racist sentiment, as may have happened.

The practice of Congress in indulging the sovereigntist illusion of historic injustice as a form of tolerance may have been even more common among the citizens of the state who were not among the allegedly victimized group. This seems to explain the willingness of otherwise honorable judges, political leaders, and journalists to observe in timid

40. *Rice v. Cayetano*, 528 U.S. 495 (2000).

41. S.J. Res. 19, 103d Cong. (1993) (addressing Congress' formal acknowledgment of a violation of international law and expressing a "commitment to acknowledge the ramifications of the overthrow of the kingdom of Hawaii . . ."). It was apparently presumed by Congress in 1993 that the involvement of the American destroyer crew a century earlier had been crucial to the fate of the Queen's effort to prorogue her parliament and revoke the constitution of 1887. It does not appear that any factual inquiry has been conducted since 1894. See DAWS, *supra* note 7, at 270-80 (discussing whether Stevens threatened use of force); JOESTING, *supra* note 16, at 236-38.

silence the rampant breaches of trust committed by the Hawaiian trustees and reported by authors King and Roth.

Thus, there was scant remonstrance when the “Hawaiian” trustees paid themselves nearly a million dollars a year to mismanage the Estate.⁴² Or when a trustee presumed to micromanage the school, generating the mistrust and hostility of the faculty.⁴³ Or when they abandoned an acclaimed outreach program for poor children. Or when their improvident judgments as investors of trust assets resulted in a \$264 million loss for one year. Or when trust assets were deployed to enrich amiable contractors possessed of the right genes. What citizen of the islands would want to step forward and complain at the risk of being identified as an insular White Supremacist? Well, finally in 1997, some did raise their voices, and the brave authors of *Broken Trust* were among them. So did the Internal Revenue Service, which threatened to withdraw the Estate’s tax exemption as a charity if all the trustees were not removed. In 1999, the trustees were removed by the Probate Court on the initiative of the state’s attorney general, and two were indicted for their misdeeds. New measures of accountability were imposed by the interim trustees. But whether the reforms were complete or even adequate is a question on which the authors express a measure of skepticism that may reflect not a lack of respect for the successor trustees, but a sensitivity to the enduring cultural environment that produced the misfortune. Also in 1999, the name of the institution holding the assets was changed from the Bishop Estate to the Kamehameha Schools Trust. It was said that the purpose of the change was to bring closure to the turmoil and promote healing, but the change also incidentally eliminated the name of the testator, perhaps further liberating those responsible from any further concern for her testamentary intentions.

V. ABIDING ISSUES

There are other, larger issues than the adequacy of the reforms to correct corrupt practices that remain open to consideration. There are questions of constitutional law, the

42. See KING & ROTH, *supra* note 1, at 100.

43. *Id.* at 134-35.

law of trusts, and federal tax law that are raised by the reported conduct of the Bishop Estate. These questions are raised but not fully resolved by the authors. They may deserve more attention than they have so far received, for their importance reaches far beyond the islands. And so the reader is invited to consider them.

First, the Constitution.⁴⁴ As early as 1972, Justice Abe of the Supreme Court of Hawaii expressed the opinion that the public nature of the Kamehameha School rendered racial and religious restrictions a violation of the Fourteenth Amendment.⁴⁵ His opinion was not accepted by the trustees. But the court did move away from the religious qualification of trustees and teachers that the Princess had required. And in 1998, in response to pressures from the Internal Revenue Service, the School announced that it would consider in lieu of a Hawaiian ancestor an admission applicant's demonstrated interest in Hawaiian culture, or his or her family's involvement in Hawaiian affairs. In 2002, the Trustees did so. When this was announced, those strongly identifying themselves as Hawaiians reacted "in the loudest and strongest negative terms," demanding the resignation of all five of the new Trustees.⁴⁶ But in 2005, the United States Court of Appeals held that the Trustees had violated the constitutional rights of a student by denying him admission for the stated reason that he had no Hawaiian ancestor.⁴⁷ Recent Supreme Court decisions appear to confirm the 1972 opinion of Justice Abe.⁴⁸ Does it suffice, as the trustees have been advised, to commit the school to Hawaiian culture and admit only students who manifest a serious interest in that subject? Or is that a transparent fraud on the rights of citizens who lack racial or religious qualifications? That seems to depend on whether the schools are deemed to be public institutions.

Second, there are debatable issues of trusts law. Were the court and the trustees sufficiently faithful to Pauahi's

44. For earlier reflections, see Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of the Native Hawaiians*, 106 YALE L.J. 537 (1996).

45. *In re Estate of Bishop*, 499 P.2d 670, 673 (Haw. 1972).

46. KING & ROTH, *supra* note 1, at 289.

47. *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir. 2005).

48. *See, e.g., In re Estate of Bishop*, 499 P.2d at 675.

will? By 1985, there were no pure blooded Hawaiian students in the school and there was a growing number whose ancestry was 1/64th Hawaiian. Today, or soon, there will be a growing number whose ancestry is 1/128th Hawaiian. But not so many are orphans or members of indigent families in special need of skill training and socialization to the work ethics demanded by globalization. Pauahi's hope to serve and integrate the children most in need seems to have been subordinated or abandoned in favor of a program that aims to socialize able students of very slight genealogical connection to membership in a racial minority resistant to assimilation. If that is so, the breach of trust may be a continuing one. If so, who can complain? Perhaps the circumstances have changed sufficiently since 1884 to justify an application of the doctrine of *cy pres* allowing the trustees to depart from the testator's integrationist aims.⁴⁹ Or might the equitable doctrine of deviation be appropriately applied to liberate benign trustees from the dead hand of a testatrix who did not foresee the conditions of the twenty-first century?⁵⁰ Or should the Rule Against Perpetuities have some application to terminate the influence of the dead hand?⁵¹ Perhaps one or all of these principles might apply if the testator's aims were indeed politically incorrect, but they might be deemed to require an overt statement by the trustees explaining their departure and the reasons for it, and requiring conformity to her aims as near as may be consistent with the constitutional constraints.

On such an analysis, it would seem that resident impecunious children who are being denied admission to the school because they lack an indigenous ancestor might have standing to maintain a suit in equity to compel the trustees to establish admission policies more in keeping with the Princess's aims.⁵² So also might the Attorney General of Hawaii as the officer responsible for public

49. See *In re Estate of Chun Quan Yee Hop*, 469 P.2d 183 (Haw. 1970) (applying the principle of *Cy pres*). See generally AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 399.2 (4th ed. 1987).

50. RESTATEMENT (SECOND) OF TRUSTS § 381 (1957).

51. See generally JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* (Roland Gray ed., Beard Books 2002) (1886).

52. See Johnson, *supra* note 32 (exploring these questions).

enforcement of the terms of charitable trusts.⁵³ It seems to be a recurring problem, and not just in Hawaii that the office of the state's attorney general has other fish to fry, that the political consequences of such engagements may be negative, and that the oversight of big charitable trust requires resources that the state's law office may lack. Should not the state impose some form of tariff on such charities in order to fund the enforcement of applicable state laws? Alex Johnson has suggested this.⁵⁴ And the authors' account suggests a need for serious reconsideration of state laws bearing on the regulation of charities.⁵⁵

Third, the Internal Revenue Code remains applicable and presents questions of general interest.⁵⁶ In 1998, the Internal Revenue Service, in disregard of the role and responsibility of the state's attorney general, questioned the practice of requiring Hawaiian ancestry as a condition for admission as one that would warrant withdrawal of its exemption from the federal income tax. It also questioned the undue enrichment of the trustees as a condition of private inurement disqualifying the trust from its tax-exempt status. It insisted on their removal, a ploy not explicitly authorized by the Code. These issues were settled for the moment by an agreement between the trustees and the Service, without a dispositive resolution of the issues posed. One question is whether the Internal Revenue Service should not perform its role in cooperation with state attorneys general in the oversight of such enterprises?

It also remains the fact that the Schools' assets are vastly oversized in worth in relation to the expenditure on the charitable purpose of conducting an educational program. Is that not also a problem? Consideration has been given to a requirement that trustees spend each year some minimum percentage of the endowed wealth of their trust on their charitable program if they are to maintain

53. See generally Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593 (1999).

54. Johnson, *supra* note 32, at 388-90.

55. The Revised Model Nonprofit Corporation Act of 1988 was an initiative in this direction. *But see* Deborah A. DeMott, *Self-Dealing Transactions in Nonprofit Corporations*, 59 BROOK. L. REV. 131 (1993).

56. See generally Evelyn Brody, *A Taxing Time for the Bishop Estate: What Is the I.R.S. Role in Charity Governance*, 21 U. HAW. L. REV. 537 (1999).

standing as a tax-exempt organization.⁵⁷ The Kamehameha Schools Trust presents an excellent example of the apparent wisdom of such a requirement. No charitable purpose is served by continued accumulation of capital. Yale Professor John Langbein, as consultant, so advised the trustees in 2002, but was told that a liquidation of the land holdings would be politically unacceptable. Yet, if the Schools were required to spend three and a half percent of their \$10 billion dollars each year, they would spend \$350 million. This would enable the school to serve a much larger student body that might even include some impecunious *haole* children. Perhaps it could provide scholarships for Hawaiian students attending universities. This might entail the sale of some of the land holdings, and that would be unpopular. And perhaps also contrary to the testator's will that authorized land sales only if necessary to serve her educational aims. But so little is left of her will that this would seem to be a minor impediment to compliance with such legislation. Yet the trustees continue to hold 350,000 acres as "program assets" to be used only "for educational purposes," whatever those might be.

Fourth, the book informs the reader of the continuing vitality of the robust racial politics brought on by the Hawaiian Renaissance. One need not regret for a moment the desegregation movement, the civil rights legislation of the 1960s, or the teaching of Martin Luther King, Jr. to get unwelcome vibrations from these tales of the Hawaiian Sovereignty Movement. That movement is presently served by the efforts of Senator Daniel Akaka, who in 2006 seeks to secure enactment by Congress of a Native Hawaiian Government Reorganization Act attempting to reverse the 2000 decision of the Supreme Court and create an office accountable only to persons having an Hawaiian ancestor and empowered to sell or lease land once controlled by the Republic and now controlled by the state.⁵⁸

The sovereignty movement does now arouse some opposition. There is a group identifying itself as Aloha for All willing to protest "how dumb it is" to create "a race-based government." And there is a Grassroots Institute of

57. *Id.* at 567-68.

58. See Janis L. Magin, *Hawaiians Weigh Options as Native-Status Bill Stalls*, N.Y. TIMES, June 11, 2006, at A37.

Hawaii insisting on a popular referendum on the issue posed. Would voters approve a scheme of special treatment only for those in the state blessed with a Hawaiian ancestor? We can continue to hope that consideration of the issues will not generate racial hostility against those identifying themselves as Hawaiians, but that seems to be a risk of the Senator's proposal, which may in the end, if enacted, be held to be unconstitutional.

CONCLUSION

The "Hawaiian Renaissance" continues to present difficult questions for Trustees of the Kamehameha Schools. The aims of the testatrix are now lost to view and have been replaced in much of the public's mind by somewhat contrary aims that invite not only racially-based opposition, but may evoke continued resistance in state and federal courts and in the Internal Revenue Service. True, the Princess is still celebrated as the sacred progenitor of the program, but that almost seems unjust to her memory, if anyone should care about that. Meanwhile, those of us who have no responsibility for dealing with the abiding issues enumerated above, can be grateful to the authors for providing us with a penetrating view of how fiduciaries can be placed in such a woeful pickle by twenty-first century racial politics.