

Exhibit 177

in the case of:

**People of the Republic of Texas
and the
Sovereign Nation of the Republic of Texas**

v.

**UNITED NATIONS
(and all it's Political Subdivisions)
and
UNITED STATES
(and all it's Political Subdivisions)**

Under Pains and Penalties of perjury and the laws of the Almighty, and being sworn under a vow and oath, I attest that the attached pages are true and correct reprints of the:

Native Hawaiian Sovereignty, an article by William H. Rodgers, Jr., from Washington Law Review, Vol 71:379, 1996.

This attestation is made on August 14, 1998.

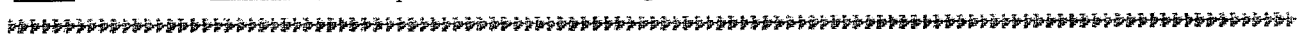
Attest: Jocelyn Savage

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Native Hawaiian Sovereignty

THE SENSE OF JUSTICE AND THE JUSTICE OF SENSE: NATIVE HAWAIIAN SOVEREIGNTY AND THE SECOND "TRIAL OF THE CENTURY"

William H. Rodgers, Jr.*

The Congress . . . apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination¹

I. INTRODUCTION

In 1993, Congress apologized to the Native Hawaiians for the political funny business of a century ago when the pineapple and sugar interests overthrew the Kingdom of Hawaii with tactical help from U.S. officials.² Another apology will be in order for an unconscionable political trial now underway in the islands to punish one of the sovereignty leaders, Dennis "Bumpy" Kanahele, for a variety of imagined offenses that amount to the infliction of embarrassment on the U.S.

To put this essay in context, it should be understood, first of all, that the struggle for Native Hawaiian lands and sovereignty is a longstanding one, with more than the usual historical, political, and legal complexities.³ It is accurate to say that Native Hawaiians today are frequently "landless" in their own ancestral lands⁴ although a full account defies a summary restatement.

Not surprisingly, the federal courts in Hawaii frequently have been drawn into these conflicts, often with unhappy consequences for the legal positions advanced by Native Hawaiian advocates. To mention an example, in the 1970s when the late George Boldt (federal district judge in Tacoma, Washington) was enduring death threats and public vilification to enforce the fishing rights of native Americans,⁵ his colleague on the federal

district bench in Hawaii (Senior Judge Martin Pence) was rushing to the aid of the sugar growers to protect their water from being returned to native taro farmers under the controversial state supreme court decision in *McBryde Sugar Co. v. Robinson*.⁶ By way of further illustration, on November 3, 1995, the Ninth Circuit heard argument on appeal from a decision by District Judge David Ezra who ruled that the Pai `Ohana (the Pai family), who had occupied a place on the Kona Coast of the Big Island from time immemorial, had become "tenants at sufferance" because their ancestors had failed to file for Kuleana (fee simple) title during a brief window of opportunity that was opened for the legally astute between 1848 and 1854.⁷ A "tenant at sufferance" can be ousted at the whim of any landowner who feels like it, so the Ezra decision must be recognized as a dangerous and threatening precedent for the 99-plus percentage of native land tenants in Hawaii whose paperwork falls short of formal Kuleana title. Understandably, the folks adversely affected might be expected not to soon forget decisions of this ilk.

Dennis Kanahale, too, has not stood remote from the Hawaiian Native sovereignty conflicts that have boiled over since Hawaii became a state in 1959. It can be safely said that he has long been a thorn in the side the state-federal establishment of Hawaii.⁸ In 1987, he led a takeover of state land at the Makapuu Point Lighthouse, claiming it to be the property of the Native Hawaiian people. He was an outspoken member of the `Ohana Council, one of the more militant arms of the Hawaiian sovereignty movement. After the 1993 Apology Bill, he worked to set up the Independent and Sovereign Nation State of Hawai'i that has its own constitution with himself as the popularly chosen "head of state." Over the years, he has encouraged Ghandi-like small disobediences, such as the refusal to carry state-issued drivers' licenses or display state-issued vehicle plates, that are widely practiced by Hawaiian sovereignty advocates.

Kanahale and his supporters also have criticized federal judges, and challenged them, which raises hard questions about the limits of political debate in the United States today. Considerable official latitude, perhaps too much, has been extended to the tough-talkers and bullies who have become part of land-use debates in many parts of the West.⁹ The Branch Davidians, the Unabomber, the Montana freemen, the Michigan Militia and many others continuously push the legal envelope testing where talk stops and crime begins. The law is forever exploring when insouciance gives way to impudence that becomes insolence that leads to insubordination that is meant to be intimidation, that is deservedly treated as crime.

My approach in this Essay is to look at the conflict through a lens suggested by evolutionary theory, sometimes described in the law schools as "Law and Biology." In this world, the sense of justice is a set of expectations about how others should behave, backed by a proclivity towards moralistic aggression against deviators.¹⁰ The sense of justice entails both cognition and emotion, with a match of expectations and then the fit that

follows if there is no fit. Compare and despair is the name of the game.¹¹ To elaborate somewhat on this evolutionary theory, the sources of the expectations that drive the sense of justice are rooted in the social system. Frans de Waal presents a strong case that the foundations of moralistic aggression among nonhuman primates stem from reciprocity failures in one-to-one interactions.¹² Understandably, these expectations that prop up an emotionally laden apparatus of justice can be derived from a variety of social considerations—status, in-group defense, repeated defection by a member, misbehavior by peers, etc. The typical courtroom, especially in an emotionally charged trial, offers a panorama of justice checking—the prosecutor is searching for the proper measure of contrition by the person charged, the defendant is hoping for divine retribution against the informant, the judge has a sharp ear out for slurs and slights coming from the defense table, defense lawyers are recalling the last time this prosecutor did them in, defendant's family is looking for a huge store of mercy (that is due to course) from Juror No. 7 who was seen to smile in the hallway.

Understandably, this building up of expectations (and judgments also about departures from them) can be influenced further by the twin engines of deception and self-deception, both of which have deep roots in evolutionary theory:¹³ deception because actors in justice conflicts must disguise unacceptable personal motivations as acceptable legal norms; and self-deception because high uncertainties about motives and future behavior of others must be interpreted as being coincident with the professed aims of the enterprise. A prosecutor who has charged the crime of treason is obliged to read ambiguous evidence as supporting the charges.

II. POLITICAL TRIALS

A political trial, as the term is used here, requires punitive action by the authorities to punish unpopular views of a politically prominent defendant. Viewed through the lens of what we know about the sense of justice, we would expect political trials to present special difficulties at three levels: the charges, the proof, and the conduct of the trial.

In developing the charges, the prosecution has the problem of identifying crime (reserved for gross departures from social norms) from a variety of other status- offending, reciprocity-upsetting behaviors that will spark the moralistic retaliation that will play itself out in the criminal law arena. Was it a Police Academy movie where the question was asked, "What is the crime?" and the sheriff answered, "Pissing me off"? That's a nice account of motivation; but it leaves something to be desired in most legal forums.

Since all states presume the importance of self-perpetuation (and express it through law), the charges in a political trial frequently focus on convenient categories of interfering with the wheels of government or other variations on "making life difficult" for the authorities.

As a rule, political defendants are not charged with murder, arson, or car theft. They are charged with conspiracy, incitement to riot, interference with the work of officers, or obstruction of justice. Only a few historians of Hawaii now remember that at the turn of the century Queen Liliuokalani was charged by the inaptly named "Republic of Hawai'i" not with "treason" (attempting to overthrow the government) but "misprision" of treason (some ill-defined form of seditious or disloyal conduct that includes concealment of knowledge of those who are attempting to overthrow the government).¹⁴

The proof will present a special challenge in political trials because, by definition, there is a sharp disparity between the motives of the prosecution (retaliation against a political opponent, getting even for offensive speech) and the hard-core particulars of the crime charged. This mismatch in proof will be reflected in the conduct of the trial because there are substantial differences between the scope of the case as perceived by prosecution and defense, and these differences will force the court into repeated rulings that only can generate growing dissatisfaction in the minds of the losers.

This Essay will focus on the social origins of the expectations that drive this sense of justice, emphasizing (1) in-group solidarity, (2) status, (3) the bounds of socially acceptable communication-herein of threats, and (4) reciprocity and reputation damage.

III. THE CASE OF UNITED STATES V. DENNIS "BUMPY" KANAHELE: A LEGAL ANTHROPOLOGY ¹⁵

On August 2, 1995, the defendant Kanahale was indicted (together with co-defendant Gordon Kaaihue) and charged by a District of Hawaii grand jury with interfering with a police officer, a misdemeanor; and two felonies-harboring a fugitive and interfering with a United States Marshal while he was engaged in his official duty.¹⁶ Kanahale was held for three and a half months without bail, and eventually was brought to trial before District Judge Helen Gillmor.¹⁷ A mistrial was declared on October 31, 1995 (Halloween), amidst newspaper speculation about "jury misconduct" and even "tampering," as one of the jurors fell victim to the belief that a little independent research on the meaning of the Fourth Amendment was bound to be an improvement on anything he was likely to hear from the presiding judge.¹⁸ Subsequently, after 118 days in prison, Kanahale was released on bail by order of District Judge David Ezra.¹⁹ Government prosecutors have expressed an intention to seek convictions at a new trial in 1996.²⁰

IV. SOCIAL DEFECTIONS: SOURCES OF EXPECTATIONS

A. The Question of In-Group Solidarity: Defection and Disloyalty

Kanahele, it seems, has made several mistakes that have attracted the moralistic aggression of the federal prosecutors, and none of them relate directly to the charges brought against him.

The first is an enthusiastic reading of the famous 1993 Congressional "Apology Bill" (which acknowledges, after all, the "illegal overthrow" of the Kingdom of Hawaii and expresses regret for "the deprivation of the rights of Native Hawaiians to self-determination"), construed by Kanahele to be the justification for the Independent and Sovereign Nation State of Hawai'i that has been set up with its own constitution and himself as the popularly chosen "head of state." That Kanahele takes this position partly on the basis of legal advice (international law expert Prof. Francis A. Boyle) ironically gives his group the same legal veneer ("lawyer approved")²¹ that large corporations hide behind every day of the year. On the street, this belief in independence led Kanahele to tell his arresting officer, "I must notify you that I am the 'Head of State of the Nation of Hawaii,'" and that "I do not recognize your jurisdiction over me," and that "if anyone should be under arrest, it is you for your war crimes and the overthrow of the Hawaiian government."²²

John Hartung, among others, has elaborated upon the strikingly different moral calculus humans apply to in-group as opposed to out-group members.²³ Kanahele's declaration of independence is as good a way as any to effect a separation from the group, and that separation will strip the offender of many legal benefits of the doubt. This interpretation is confirmed by the government's briefs in the case, which bristle with moral indignation, describing the organization as a "cult," and a "so-called" sovereignty group; its place of business as a "remote rural compound" that is "rumored to be fortified;" its members as "followers" and "subjects;" and Kanahele himself as "volatile and dangerous."²⁴ Kanahele's independence cost him dearly when he came to court. In his August 7, 1995 decision denying bail, Magistrate District Judge Barry M. Kurren adroitly turned Kanahele's political beliefs against him. The findings in the Order of Detention Pending Trial are that "defendant denies the jurisdiction of the court and there is no basis to believe that he will abide by any lawful order of the court;" and that "[t]he nature of the charges and evidence at the hearing are evidence of the defendant's strongly held conviction to ignore the order of the court."²⁵ Worse, defendant could not undo the damage caused by his political philosophy by statements and proof that he would appear for trial.

On appeal, U.S. Attorney Leslie Osborne extended the argument: a defendant "can not claim strong ties to a community whose laws he repudiates and whose court he openly disdains."²⁶ This is the defection-from-the-community theory in full bloom. Its implications are clear: "You have left us and we have no reason to expect your cooperation in any future legal proceeding; if you subscribe to Hawaiian Sovereignty, by definition you

do not believe in U.S. Sovereignty; therefore, all Hawaiian Sovereignty advocates charged with crimes in the U.S. courts must be held without bail." Of course, the "strongly held" beliefs in the lack of federal jurisdiction that sufficed to keep the defendant locked up without bail suddenly didn't matter when it came to defense at trial. No state is sympathetic to jurisdictional challenges by those who think some other sovereign should be in charge. In repeated rulings, Judge Gillmor confirmed the expectation in "political" cases that the court's tight control of the legal agenda will be a source of constant friction. The defense was not allowed to pursue the claim of selective prosecution, which shut off all inquiry into the retaliatory motives that fueled this case.²⁷ The question of sovereignty was foreclosed. As one observer put it, "The 'S' word was a 'question of law,' not 'a matter of facts,'"²⁸ and this meant that Professor Boyle, who had guided Kanahale on his course of legal independence, could not testify. Kanahale's good-faith beliefs were out of bounds too so that this man who worked his "harboring" and "obstructing" under cover of the Congressional Apology Bill had to pay the price for any mistakes. Surprisingly, trial Judge Gillmor ruled that Kanahale could claim no "self defense" for standing his ground when unidentified agents swooped down on his home in pursuit of fugitive Nathan Brown (more about this later). That ruling, in all likelihood, is an error of law²⁹ (not to mention an encroachment on the sense of justice) and may have been the last straw that drove one of the jurors to the law library in a vain search for some legal direction he could trust.

Two other factors tend to drive political trials like this one to unhappy conclusions. One is the element of momentum (sometimes called the sunk-cost factor), which makes it difficult for the prosecuting enterprise to turn away from the leaps of faith or displays of loyalty that get the case going in the first place. The principal participants in the prosecution enterprise (prosecutors, judges, witnesses) were directly involved in the early bail proceeding, and it was impossible to admit later that the flight risk presented by this defendant was nonexistent and the danger to the community strictly fictitious.

On top of this, the "us vs. them" atmosphere of the political trial puts severe pressure on the lawyers and judges alike to show their institutional loyalty. The danger here is that these institutional commitments can lead to a proceeding where conviction is the only possible outcome. In the Kanahale case, these institutional factors were accelerated by the particular personalities of U.S. Attorney Leslie Osborne and presiding judge Helen Gillmor. Osborne is a very tough prosecutor, quick to attack, strutting with self confidence, prone to sarcasm. Gillmor is a very new judge, uncomfortable before the jury, fearful of losing control, uncertain of her rapport with the prosecutor and the defense. The combination was unfortunate, as the prosecutor was quick to object and the court quicker yet to sustain. The "sustains" would rush forth if the prosecutor objected, if he stood up contemplating an objection, or if he stirred about showing discomfort with the line of questioning. Gradually, the prosecution came to be treated with ingratiating deference while the defense got a strong dose of impatience, annoyance, condescension, preachiness,

and scolding. The "sidebar," made infamous in the O.J. Simpson trial, made conspicuous appearance again in the Kanahale trial, not unexpectedly, since it is the last resort of an inexperienced judge forced to make rulings of a novel kind.

B. The Question of Status: the Lowered Gaze, the Shuffling Step

Kanahale's second transgression was to couple his declaration of independence with a display of disdain for the presently constituted U.S. authorities. It was this disregard of status and reverential debate that unleashed an avalanche of federal legal retaliation against him. The criminal charges against Kanahale came over a year and a half after the incidents took place but within weeks after the federal and state judges in Hawaii were served papers by the Nation of Hawai'i putting them on notice for ongoing human rights violations against the Native Hawaiian people. A timeline might be helpful to keep the order of events in mind (Figure 1).

Figure 1

One of the notices served on United States District Court Magistrate Barry M. Kurren, for example, stated that "you have made [yourself] personally liable for war crimes" and "crimes against humanity;" your acts "show contempt" towards the Kanaka Maoli People [Native Hawaiians]; service of this document "is prima facie evidence of your full knowledge and participation in the direct murder and extermination of the Kanaka Maoli People and their Government;" recipients were advised that they could be arrested and "imprisoned" and "brought before" an "international Criminal Tribunal to answer for your participation in crimes of Apartheid and Genocide;" and the punch line: "There will be no appeal," and "Judgment will be final."³⁰ These notices of human rights violations were written and signed not by Kanahale but by Maltbie Napoleon, the "Attorney General" of the Nation of Hawai'i, who was to appear later as a witness for the defense at Kanahale's trial.

There is a crime of threatening the safety of public officials, but these notices don't establish it. For a conviction on this score it is necessary to establish explicit threats and overt acts to distinguish criminal undertakings from free speech.³¹ In these days of anti-government backlash and tough talk, federal officials routinely turn a deaf ear to criticism, abuse, and other displays of unhappiness that make "war crimes notices" seem like so many letters to the editor. Indeed, virtually all of the officials who received the "notices" of the Nation of Hawai'i shrugged them off as just another ripple in the tide of public discussion. But nobody talks to federal judges in this tone. Threats of arrest, references to "war crimes" and "judgment will be final" is not the kind of discussion they are accustomed to hearing. They don't like to be accused of something the Nazis did, especially when the parallels are not glaringly obvious. And the "judgment will be final" reference has an ominous ring to it, particularly if interpreted in the worst imaginable light

of the assassinations, clinic bombings, and nerve gas attacks that dominate the nightly news. Senior Judge Samuel King of the District of Hawaii expressed this opinion in June of 1995 when he described the notices he had received from the Nation of Hawai'i as unacceptable and threatening.³² This is where the Kanahale case should have ended-talk against talk, speech against speech.

That it didn't end here says something about the federal courts as an institution. Federal district judges are among the most pampered, protected, and revered of any elite in human history. They are appointed for life, move in distinguished company, and are answerable to nobody unless one reckons casual appeals processes that might uncover "error" within the normal two to three years' span of lawyers' time. They are served by a retinue of clerks, secretaries, and bailiffs. People rise when they walk into the room. As a rule, federal judges are immune from criticism. Lawyers learn to keep their mouths shut out of ethical necessity or a practical account of tomorrow's prospects when they confront this judge again. To the media and the public, judicial decisionmaking is a technical thing, like searching for a heart murmur, and thus judges customarily escape the criticisms and inquiries that go to their less immunized colleagues on the planning commission or in the state legislature. Actually, political and ideological tests always have been strong for acceptance into the exclusive club of the federal judiciary, and they have become intensely so since the Reagan years. Federal judges get their authority by surviving close political scrutiny and exercise it by pretending they are not political decisionmakers.

Offending judges is not a crime of course, but it is a way to stir resentments and freshen memories of other wrongs long since past. The charges against Kanahale and his co-defendant Kaaihue grew out of two botched attempts by the authorities to arrest tax protester and sovereignty activist Nathan Brown on January 27 and March 16, 1994. Fugitive Brown was long gone (he had not been seen for over a year) and the circumstances of his escape had been consigned to the dustbins of old business. But the policy of official forbearance came to a sudden end when the Nation of Hawai'i provoked the law enforcement apparatus with its "war crimes notices" campaign, and unleashed the unhappy memories of a Nathan Brown gone for good. In short order, the federal Club Honolulu went to work, in the form of thin-skinned federal judges, compliant U.S. attorneys, a dutiful FBI, and a scheming U.S. Marshal's office. The low point in this campaign to stalk the defendants anew was a meeting between the Kanahale group and the U.S. Marshals on June 13, 1995,³³ called by the Nation of Hawai'i to dispel suspicions that they were hiding fugitives (such as the notorious Jack Gonzalez³⁴ and the elusive Nathan Brown), gathering arms, and preparing for some sort of "Waco" confrontation. One cannot hear an account of this meeting without thinking of President Grover Cleveland's reference to the United States's shameful exploitation of a "friendly and confiding" people that has marked the history of the islands.³⁵ Marshal Anne Kent's treacherous mission at this June 13 meeting was to extract from Kanahale damaging admissions that in the past he

had intended to prevent the authorities from arresting Brown. The warnings that one reads about in the lawbooks (e.g., "anything you say can be used against you," etc.) don't apply because Kanahale hadn't been arrested yet, although that clearly was the plan. Anne Kent did succeed in coaxing from Kanahale a comment the gist of which was: "You put your hand on my gate, I move your hand. You come through my gate, or into my yard, I'll knock you down."³⁶ In Idaho, remarks like this are evidence of red-blooded American spunkiness. In Hawaii, they are an admission of an intent to obstruct justice.

At the June 13, 1995 meeting Anne Kent went so far as to say to Kanahale: "Repeat after me: I, Dennis Kanahale, [pledge that I will not] invite Nathan Brown into my home if he is cold and hungry [and in the greatest of need]."³⁷ Michael McGuire reminds us that status among primates requires frequent reinforcement,³⁸ and here is a nice example. In the campaign against Kanahale, a number of officials repeatedly demanded from him the respect they were due—the police, the marshals, the judges among them. After 118 days in prison and one mistrial, Kanahale was more than anxious to give them the assurances they wanted—no objections to jurisdiction, pledges of nonviolence, promises of future cooperation, and commitments to desist from the service of notices of human rights violations.

Judge David Ezra's decision from the bench on November 27 finally releasing Kanahale was a triumphant reaffirmation of federal judicial authority over its humble but grateful subjects. The scene was suggestive of the highly paternalistic tradition established under martial law in the "Republic of Hawaii" where oppressive sentences were dispensed, only to be relaxed later in a great showing of official magnanimity.³⁹ There were no apologies or regrets to Kanahale for the lost four months. There was mention of the recent assassination of the Prime Minister of Israel by a true believer. There was reference to the "serious" nature of the crime of obstruction of justice, and how under the ancient Hawaiian "kapu" system one would "defy" the chiefs only at risk of death. There was repeated talk of the government's "concern" for the safety of law enforcement officers and how Kanahale had many "followers" and "supporters" who may be "more zealous than you are." Thus Kanahale was free to go, but he was warned against "inciting criminal conduct," which is another one of those criminal laws that is marvelously responsive to discretionary anxiety.

C. The Question of Threat: The Role of Self-Deception

Physical intimidation of another person has to be one of the most efficient ways to start the moralistic retaliation associated with the sense of justice. The only worse offense would be threats that encompass individuals and family. The awkward genius of the war crimes notices campaign of the Nation of Hawai'i was that it could be perceived as accomplishing both goals simultaneously—threatening the physical safety of individual judges and the

collective enterprise of law enforcement. This transgression, so construed, requires decisive countermeasures.

The evidence that succeeded in imprisoning Kanahale for four months occurred not at trial but at his bail hearing where a decision is supposed to be made about whether the defendant is a flight risk or a threat to the safety of the community before he is tried. It is hard not to be released on bail. The Menendez brothers are strong candidates for bail. In the course of their careers, Manson and Bundy got out on bail. If they have some ties to the community, people charged with murder, robbery, and rape routinely get out on bail.

But Kanahale, the man recognized as one of the five or six leading figures in the Hawaiian sovereignty movement? No way; he was a flight risk and a "danger" to the safety of the community. The "evidence" on this score was an impressive accumulation of hearsay (which is allowed in proceedings of this sort), gossip, rumor, and fantasy supporting the official prediction that Kanahale would either flee or beat somebody up before he was brought to trial. A bail hearing is an ideal forum for reducing the government's worst fears to fact.

The government's proof at the pre-bail phase of the case shows considerable skill in enhancing the scope of the threat (that is, "we are all in this together") and its credibility. Thus, the defendant has shown "disdain" for law enforcement, has "stridently denounced" the jurisdiction of the federal court, has "actually threatened" to arrest state and federal officers, has "[harassed] the judiciary and [shows] contempt for legal authority," has told arresting officers that they lack jurisdiction over him, has a "strongly held conviction to ignore any order of the court," has "threatened state judges, federal judges, and law enforcement officers," and "has even had the audacity to threaten the U.S. Marshal with the District of Hawaii with physical violence."⁴⁰

The credibility of the threat is enhanced in argumentation by inflating the danger posed by the offender. Thus defendant has a "long criminal history," has lived a "life of crime and anti-social behavior,"⁴¹ has used six aliases (two of those listed are alternative spellings of his nickname: "Bumby" and "Bumpie"), has an extensive rap sheet that includes a long list of offenses, including criminal contempt, driving with a suspended license, trespass, criminal trespass, resisting arrest, criminal property damage.⁴² Incredibly, the man has three felony convictions (use of a gun, terroristic threatening, resisting arrest):

[The convictions stem from] an illegal occupation of state land at the Makapuu Point Lighthouse. The defendant and others had settled on State property and claimed it as their own. The State of Hawaii, Department of Land and Natural Resources had called upon the Honolulu Police Department to evict the trespassers. The trespassers and this defendant simply refused to obey law

enforcement officers who were in the lawful discharge of their duty.⁴³

From the depths of historical political conflict thus emerges a reputation for violence, which will loom large in later legal proceedings.

Once government agents convince themselves that this is a violent man charged with violent crimes, argumentation can proceed within the limits of imagination while deception/self-deception is given full sway. The government "proof" of threats to the physical safety of judges and police officers need not be limited to the innocuous notices of violation but can include wild rumors about associations with militia madmen, subtle hints about a weapons buildup at Weimanalo (the place is "rumored to be fortified to some extent"),⁴⁴ and identification of symptomatic incidents of civil disobedience that must be nipped in the bud. Judge Gillmor's decision affirming Magistrate Kurren's detention order denying bail to Kanahale shows how the legal system tolerates self-deceptions that masquerade as reality:

The magistrate judge declined to consider evidence that the Nation of Hawaii has had contacts with the Michigan Militia, that its members are storing arms and ammunition in former World War II bunkers in Waimanalo, and that on September 24, 1993, 25 to 30 members of an affiliated group, the "Ohana Council for the Hawaiian Kingdom", disrupted a state court hearing on the island of Hawaii, refused to leave the courtroom and prevented the judge and staff from exiting the courthouse.⁴⁵

This is an example of what might be called a footnoted version of nonverbal communication and signaling.⁴⁶ What is meant by the message is that reviewing judges should understand that the Nation of Hawai'i is very likely a gun-toting cult of Waco terrorists but it would be a reversible legal error to insist on the truth of that proposition for the moment.

Another version of judicial signaling was occasioned by the fact that Magistrate Judge Barry M. Kurren, the original decisionmaker who denied Kanahale's bail motion on August 4, 1995, was the unhappy recipient of one of the Nation's war crimes notices and had gone so far as to state at the detention hearing his agreement with Judge King's opinion that the notices constitute a "threat" against duly constituted authority.⁴⁷ The legal difficulty is that a judge who is threatened by a defendant could be thought to have a "personal bias or prejudice" that would require some other judge to sit in judgment.

This "fear" was not considered by Judge Kurren to be sufficiently disabling to prevent him from reaching a fair decision, and he did so by denying all bail and effectively insuring Kanahale's incarceration for the next four months. This ruling by Judge Kurren was later

affirmed by Judge Gillmor (a new appointee obviously feeling her way gingerly in the world of judicial politics), and then affirmed again by a 2-1 vote of a three-judge panel of the Ninth Circuit.⁴⁸ Judge Gillmor explained why the formal law did not require the disqualification of Kurren: "Magistrate Judge Kurren's characterization of the Notice as a 'threat' was an objective assessment of the intent of its sender. This comment was not an acknowledgment that the magistrate judge subjectively felt threatened or an indication that the Notice compromised his impartiality."⁴⁹ Thus the "threats" lurking in the deep background of the war crimes notices were sufficiently credible to keep Kanahale locked up but not real enough to disqualify the judges who were hearing the case.

At trial, the illusory nature of these "threats" against public officers was brought into sharp focus. The principal charges dealt with Kanahale's attempts on two separate occasions to interfere with the arrest of Nathan Brown. Nathan Brown must be one of the most casually pursued fugitives in the history of federal jurisprudence. Rarely has a man been so vulnerable to arrest but so immune from it. He moved freely about the community. He lived on the beach. He did research in the law library. He testified at public hearings.

Occasionally, somebody would try to arrest him but not with much enthusiasm. On January 27, 1994, the "fugitive" Nathan Brown testified at a water commission hearing in Waihole in full view of ten or twelve police officers⁵⁰ who must have been deterred from their mission by the eloquence of his remarks. This man was begging to be arrested but it never quite happened. The "arrest," such as it was, occurred on the Kamehameha highway that evening as the three vehicles in the Kanahale party (with men, women, and children) were pulled over by several police vehicles. The arrest was announced by one of the officers who rushed up to the vehicle carrying Brown, declined by Brown ("I can't go with you Bro"), and eventually was resolved by Brown's agreeing to show up for a meeting a few days hence (which he never did attend). One officer later testified that it was "not prudent" to press the issue because there were "six of us" and "eighteen or twenty of them" (which drew groans in the courtroom because most of the "thems" were women and children plus some bystanders drawn to the scene by the flashing lights on the police vehicles).

The sole evidence of "obstruction" against Kanahale's co-defendant Kaaihue that night is that he stood by during the conversations with Brown, perhaps with his chest "puffed out" according to prosecutor Osborne (more chortles from the gallery on this one). The reason that the image of Gordon Kaaihue with his chest "puffed out" brings instant mirth is that he is a giant of a man, with a classical Hawaiian physique, who could dispose of a dozen assailants if they chose to go unarmed. As Kaaihue said simply at trial, "God blessed me with a nice body." Having a nice body, it seems, becomes "obstruction of justice" at the discretion of the United States.

Kanahele's "interference" during this January 27, 1994 incident consisted chiefly of serving the officers with copies of the 1993 Apology Bill and other documents. Again, the awesome job of arresting Nathan Brown might have been easier without the presence of Kanahele and the bulky Kaaihue, not to mention the crying children, the flashing lights, and the rubbernecking bystanders. Detecting an "interference" here with an arrest that was abandoned as a bad job is a reach of the lowest kind, and it shows the ease with which prosecutors can manufacture crimes out of thin air.

For the next several weeks, Nathan Brown continued to move freely about town where he could have been arrested hundreds of times by scores of officers. But this slow motion hot pursuit could end at only one place-Kanahele's doorstep in Waimanalo. On March 16, 1994, two federal marshals dressed in plain clothes who were staking out the place spotted Brown and Kanahele in a vehicle approaching the property. A fair summary of events is that the officers rushed to arrest Brown, who ran into the carport, across the property, never to be seen again. Marshal Lawrence Tice testified that he "collided" with Kanahele, who said, "Who the hell are you?," and "You can't be here. This is Hawaiian land;" that Kanahele told a woman (his sister) on the property to "padlock the gate" and "call the boys;" that "five minutes later I told him [Kanahele] who I was;" that he, Tice, said to Kanahele that a "fugitive has just gone across your property;" that Kanahele announced that "Nathan Brown is not subject to the laws of the U.S." and that "we were violating the law and were subject to arrest;" that Kanahele had given them copies of the Apology Bill, and that Tice had responded, "We're not here to argue sovereignty;" and that after a short passage of time, Kanahele had invited the Marshals onto the property to search for Brown, but that they declined on the supposition that he would not be there.

Once again, it is hard to detect any crime arising out of this little *màlÇe*, unless it is one with regard to Brown whose debt to society increases with each fresh escape. Constitutional scholars might speculate on how ancient Hawaiian notions of "refuge" (which offered safe harbor to fugitives who could make it to the protected places) might qualify the federal law on harboring fugitives.⁵¹ Before that, one wonders what degree of aid and assistance must be rendered a fugitive to constitute "harboring": A short lift in an automobile? A cup of hot coffee? The point of the crime obviously is to discourage rendering sustained aid and assistance to enable somebody to escape from the authorities.⁵² It is not enough to know that "a fugitive has just gone across your property," to use Marshal Tice's words. Any "obstruction" charge based on these facts is a reach, too. Kanahele, again, didn't do much, other than drawing the Apology Bill from its accustomed resting place. The officers' credentials were in order but the case is complicated by Kanahele's genuine belief that the authorities lack jurisdiction on Hawaiian lands. (State of mind is always the key question in criminal cases.) On top of this, the incident gives rise to hard-core defense of person and property issues since nobody, even law-abiding Hawaiians, can be expected to sit idly by while a couple of rough-looking characters storm

the place looking to seize a friend.⁵³ Had Kanahale said he was defending "private property" rather than "Hawaiian lands" perhaps a surge of official sympathy would have conceded him the privilege of a little testiness in defense of boundary.

These two Nathan Brown nonincidents (the failed arrests of January 27, 1994 and of March 16, 1994) happen all the time in law enforcement and they never make it to the prosecutor's desk, much less to the court dockets. But Kanahale and Kaaihue were not to be the beneficiaries of this usual fate of official forbearance. More than a year later the service of the war crimes notices was the watershed event that revived the prosecutor's interest in the case.

When Kanahale came up for his second try for bail on November 27, 1995 before Judge David Ezra, after 118 days in jail, U.S. Attorney Leslie Osborne did not even mention the fictitious armed uprising that was supposed to be under way in Waimanalo. His major points of concern were Kanahale's "antisocial" past and the great risks "of serious injury and even death" that ensued when the police stopped the Kanahale group on the Kamehameha highway in an attempt to arrest Nathan Brown. That this "public danger" was the work of the authorities and not Kanahale did not escape the notice of Judge Ezra, who finally ordered the defendant's release, subject to a number of onerous conditions (spend the nights in a half-way house provided he pays for the service, stay away from Waimanalo) that were supposed to assure his appearance at the next trial.⁵⁴

D. Reciprocity, the Question of Honor, Embarrassment and Provocation

One expects the sense of justice to go to work against gross reciprocity lapses but most observers would be surprised that omissions of this sort can keep the offender in jail. The government's brief to the Ninth Circuit Court of Appeals in support of the detention order (that is, the bail denial) tells this version of negotiations between Kanahale and the Assistant Chief of the Honolulu Police Department over arrest warrants growing out of the refusal of some members of the sovereignty movement to carry state issued license plates on their vehicles:

The defendant and his associates agreed to settle their outstanding warrants and take care of the sovereignty plate problem. However, the defendant and his associates simply reneged on their commitments to the Chief and other law enforcement officials After the defendant breached the agreement with [the Chief], it became necessary to arrest the defendant's followers on those State warrants. When the arrest began, Kanahale contacted the Police Department and threatened to either "crack" or "whack" Honolulu Police officers if they proceeded with their efforts. . . . Eventually, defendant did apologize for his inflammatory language.⁵⁵

Thus, the defendant "cannot be trusted to keep his word" and the incident "shows the illusory nature of this defendant's promises."⁵⁶ The record "is replete with the defendant's contempt for the court and his refusal to honor his word to law enforcement."⁵⁷

There was another score to settle—that is, the political embarrassment stemming from the Makapuu Point Lighthouse takeover:

The defendant and others had settled on state property and claimed it as their own. The State of Hawaii, Department of Land and Natural Resources had called upon the Honolulu Police Department to evict the trespassers. The trespassers and this defendant simply refused to obey law enforcement officers who were in the lawful discharge of their duty.⁵⁸

These incidents support another view of the Kanahale case, namely, that it represents opportunity to even the score on a person whose conduct had embarrassed and provoked officialdom, to the point of loss of reputation. Kanahale had engineered the takeover of the Makapuu Lighthouse a few years earlier, and had walked away a political winner. He had encouraged scofflaw policies of refusing to carry state-issued drivers' licenses and to display license plates. He had negotiated a warrant settlement with the Assistant Chief of Police, and had not honored the settlement. And now, after serving his notices, he was heard to "brag" about how he had prevented the authorities from arresting Nathan Brown.⁵⁹ That there are no crimes of impudence, bragging, intentional infliction of embarrassment on public officials, or disdain for process is but a tactical and temporary limitation. Conduct that leads to strong official resentment can inspire imaginative searches for some other charge that might suffice to teach the requisite lesson.

V. CONCLUSION

The Kanahale case is a shining example of the sense of justice at work in human affairs. Kanahale was prosecuted because he threatened the authorities, defected from the group, offended the elite, alienated his peers, and tarnished the reputations of officials. But what makes the U.S. courts the envy of the world is that people who come there expect to see justice happen. The same sense of justice that drove this case can be turned on its managers, and what do we find? Trumped-up charges and self-deceptions by a bunch of nervous authorities who are protecting their status and reputations by manipulating the laws of the greatest democracy the world has ever seen.

APPENDIX: NATION OF HAWAI'I WAR CRIMES NOTICE*

Notice is herein given to you that you have made yourselves personally liable for war crimes and war crimes against humanity.

Your acts show contempt towards the Kanaka Maoli People and the international obligations of the world. Your [] violation of the rights of the Kanaka Maoli People and our Government in full knowledge of those rights and process of restoration of our inherent sovereignty, traditions and culture, shows your intent to separate the Kanaka Maoli people and their lawful government.

This document, inclusive of exhibit "A", the Legal Foundation of Hawai'i, the Hawai'i Constitution, The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Principles of international co- operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, is prima facie evidence of your full knowledge and participation in the direct murder and extermination of the Kanaka Maoli People and their Government.

In the future, you shall be sought out, arrested and imprisoned, to be brought before an international Criminal Tribunal to answer for your participation in crimes of Apartheid and Genocide.

There will be no appeal.

Judgment will be final.

/signed/
Maltbie Napoleon
Hawai'i Attorney General

* Professor of Law, University of Washington; George C. Johnson Visiting Professor of Law, William S. Richardson School of Law, University of Hawai'i, Fall, 1995. This paper was originally prepared for the "Sense of Justice" panel, Association for Advancement of American Science, Baltimore, Md., February 9, 1996, organized by The Gruter Institute.

FOOTNOTES

1. The Apology Bill to Native Hawaiians, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

2. See S. Rep. No. 126, 103d Cong., 1st Sess. 21 (1993).

3. See generally Michael Dougherty, *To Steal A Kingdom* (1992); David E. Stannard, *Before the Horror: The Population of Hawai'i on the Eve of Western Contact* (1989); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 *Ariz. J. Int'l & Comp. L.* 77 (1991).

4. See, e.g., Michael Kioni Dudley & Keoni Kealoha Agard, *A Call for Hawaiian Sovereignty* 1-23, 64-71, 89-93 (1990); *Native Hawaiian Rights Handbook* 3-146 (Melody Kapilialoha Mackenzie ed., 1991); Haunani-Kay Trask, *Coalition-Building Between Natives and Non-Natives*, 43 *Stan. L. Rev.* 1197, 1198-1203 (1991); Bradley Hideo Keikiokalani Cooper, *A Trust Divided Cannot Stand - An Analysis of Native Hawaiian Land Rights*, 67 *Temp. L. Rev.* 699 (1994).

5. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

6. 517 P.2d 26 (Haw. 1973), cert. denied, 417 U.S. 962, and cert. denied, 417 U.S. 976 (1974). See *Robinson v. Ariyoshi*, 441 F. Supp. 559, 564-67 (D. Haw. 1977) (attacking the McBryde Court for its "completely revolutionary holdings" and "culinary creations," condemning the court's "sua sponte" efforts to "completely restructure" state water law, and mocking the "speciousness" of its reasoning: "It was strictly a 'public-policy' decision with no prior underlying 'legal' justification therefor. The majority wanted to see streams running down to the sea on an all-year-around basis.").

7. *Pai 'Ohana v. United States*, 875 F. Supp. 680, 687, 695 (D. Haw. 1995).

8. The story is told in Plaintiff-Appellee's Memorandum in Support of the Detention Order at 2-8, *United States v. Kanahele* (9th. Cir. Sept. 11, 1995) (C.A. No. 95-10373) [hereinafter U.S. Brief on Appeal from Detention Order].

9. See, e.g., David Foster, *Sorting Tough Talkers from Terrorists*, *Seattle Times*, April 18, 1995, at A1; Paul de Armond, *Wise Use in Northern Puget Sound* 59 (1995) (reporting on tactics such as "video-taping environmentalists, disrupting meetings with noisy livestock or heavy equipment, and other methods of harassment and intimidation"); see also *id.* at 186 (reporting on enthusiastic announcement of the Snohomish County Property Rights Alliance featuring an appearance by Dick Carver, Nye County, Nevada, who "personally" drove a bulldozer into a road despite "forest service orders to stop"); Timothy Egan, *Federal Uniforms Become Target of Wave of Threats and Violence*, *N.Y. Times*, April 15, 1995, at A1.

10. Roger D. Masters, *Toward a More Coherent Theory of Justice*, in *The Sense of Justice: Biological Foundations of Law* 290, 292 (Roger D. Masters & Margaret Gruter eds., 1992) [hereinafter *Sense of Justice*]. See also Frans de Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals* (1996).

11. See Masters, *supra* note 10, at 295 ("When there has been a departure from expected norms, the emotions (anger, moralistic aggression) constitute a feeling of injustice, whereas compliance with expectations and the restoration of previously established norms are associated with emotions of pleasure

or even euphoria underlying the sense of justice.").

¹²Frans B.M. de Waal, *The Chimpanzee's Sense of Social Regularity and Its Relations to the Human Sense of Justice*, in *Sense of Justice*, supra note 10, at 241, 242, 248; see also Michael T. McGuire, *Moralistic Aggression, Processing Mechanisms, and the Brain: The Biological Foundations of the Sense of Justice*, in *Sense of Justice*, supra, at 31, 32 (Roger D. Masters & Margaret Gruter eds., 1992).

¹³William H. Rodgers, Jr., *Deception, Self-Deception, and Myth: Evaluating Long-Term Environmental Settlements*, 29 *U. Rich. L. Rev.* 567, 569-70 (1995); Robert Trivers, *Social Evolution* 395-420 (1985).

¹⁴Jon M. Van Dyke & Paula Henderson, *The Trial of Lili'uokalani, February 1895*, in *Trial of a Queen: 1895 Military Tribunal 1* (Jud. History Ctr., Hawai'i State Jud. ed., 1995) [hereinafter *Trial of a Queen*].

¹⁵The author attended significant portions of the trial and hearings arising out of the case. Unless otherwise noted, what follows is based on notes taken from personal observations of those and related events.

¹⁶Indictment, *United States v. Kanahale* (D. Haw. Aug. 2, 1995) (CR. No. 95-00764).

¹⁷See Order Affirming Magistrate Judge's Detention Order, *United States v. Kanahale* (D. Haw. Aug. 21, 1995) (CR. No. 95-00764) (affirming detention-without-bail order of Aug. 7, 1995) [hereinafter *Order Affirming Magistrate Judge's Detention Order*]. Kanahale was held from the date of his arrest on August 2, 1995, see *id.* at 2, until his release in mid-November after Judge Helen Gillmor declared a mistrial, see Linda Hosek, *Judge Sets Kanahale "Free with a Short Leash"*, *Honolulu Star-Bull.*, Nov. 14, 1995, at A1.

¹⁸See Mark Matsunaga & Ken Kobayashi, *Turmoil Surrounds Kanahale Mistrial*, *Honolulu Advertiser*, Nov. 1, 1995, at A1, A2.

¹⁹See Hosek, *supra* note 17, at A1.

²⁰See Matsunaga & Kobayashi, *supra* note 18, at A1. Kanahale's attorney, Hayden Aluli, submitted a motion to have the charges dismissed on double jeopardy grounds. Judge Gillmor rejected the motion and Kanahale has appealed that decision to the Ninth Circuit Court of Appeals. See Order Denying Defendants' Joint Motion to Dismiss the Indictment with Prejudice, *United States v. Kanahale* (D. Haw. Jan. 22, 1996) (CR. No. 95-00764 HG). A second trial is pending the decision of the appeals court. Linda Hosek, *New Kanahale Trial Postponed Until Ruling by Appellate Court*, *Honolulu Star-Bull.*, April 23, 1996, reprinted at <http://www.aloha.net/nation/postponed.html>.

²¹See generally Affidavit of Francis A. Boyle, October 20, 1995, at <http://www.hawaii-nation.org/boyleaff.html> (providing brief history of how Professor Boyle came to serve as "Legal Adviser to the Nation of Hawaii" and stating that Professor Boyle provided "legal advice and counsel to Mr. Kanahale and the citizens of the Nation of Hawaii concerning the establishment of their state"); Francis A. Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 *St. Thomas L. Rev.* 723 (1995) (analyzing the Apology Bill and concluding that the legitimacy of Hawaiian sovereignty claims are one of the bill's implications); Professor Believes U.S. Apology Gives Hawaiians Right to Nationhood, *Maui Press*, January 14-20, 1994, reprinted at <http://www.aloha.net/nation/profapology.html> (describing Professor Boyle's views on Hawaiian

sovereignty). Cf. Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. Haw. L. Rev. 463 (1995) (arguing that the U.S. violated international law when it participated in deposing Queen Liliuokalani and that monetary reparations to Native Hawaiians are appropriate); Francis A. Boyle, *American Foreign Policy Toward International Law and Organizations: 1898-1917*, 6 Loy. L.A. Int'l Comp. L.J. 185 (1983) (tracing themes in U.S. foreign policy and detailing U.S. recognition of international law during the period between 1898-1917).

²²U.S. Brief on Appeal from Detention Order, *supra* note 8, at 9.

²³John Hartung, *Love Thy Neighbor: The Evolution of In-Group Morality*, *Skeptic*, No. 4, 1995, at 86; Gary R. Johnson, *The Evolutionary Roots of Patriotism*, in *Patriotism in the Life of Individuals and Nations* (D. Bar-Tal & E. Staub eds., forthcoming 1996).

²⁴U.S. Brief on Appeal from Detention Order, *supra* note 8, at 2, 5-8.

²⁵Order of Detention Pending Trial at 1, *United States v. Kanahale* (D. Haw. Aug. 7, 1995) (CR. No. 95-00764).

²⁶U.S. Brief on Appeal from Detention Order, *supra* note 8, at 9.

²⁷Based on author's observations.

²⁸Sondra Grace, [Kanahale's Trial Is in Defense of All Rights](#), *Kauai Times*, Nov. 8, 1995, at A7 (providing first-hand observations on trial in opinion page essay).

²⁹Cf. 18 U.S.C. 111 (1994) ("Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties . . . shall . . . be fined under this title or imprisoned not more than one year, or both."). Generally, knowledge of the identity of a federal officer is unnecessary for a conviction under 111. *United States v. Feola*, 420 U.S. 671 (1975). However, the Feola Court also said:

We are not to be understood as implying that the defendant's state of knowledge is never a relevant consideration under 111. The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstance might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent.

Id. at 686. See also *United States v. Span*, 75 F.3d 1383, 1388 (9th Cir. 1996) (adopting the holding of Feola in a jury instruction). For one version of the Kanahale incident, see Vin Suprynowicz, *Federal Priestess Enforces Tyranny by Hiding the Bill of Rights*, *Libertarian*, Nov. 19, 1995, reprinted at <http://www.aloha.net/nation/priestess.html>.

³⁰War Crimes Notice signed by Maltbie Napoleon, Hawai'i Attorney General (June 20, 1995). See *infra* Appendix.

³¹18 U.S.C. 876 (1994) prohibits mailing a letter "containing . . . any threat to injure the person of the addressee." Under 876:

[The government] must present evidence sufficiently strong to establish beyond a reasonable doubt that the communication in question conveys a threat of injury. Where a communication contains language which is equally susceptible of two interpretations, one threatening, and the other nonthreatening, the government carries the burden of presenting evidence to remove that ambiguity.

United States v. Barclay, 452 F.2d 930, 933 (8th Cir. 1971).

³²See Mark Matsunaga, Nation of Hawaii Warns U.S., State Judges, Honolulu Advertiser, June 28, 1995, reprinted at <http://www.hawaii-nation.org/warns.html>.

³³The account of this meeting is based upon the notes of the author, drawn from the account of several witnesses.

³⁴U.S. Brief on Appeal from Detention Order, *supra* note 8, at 2 n.3. See also A. Kam Napier, The House that Jack Built, Honolulu, November 1995, at 68 (providing a history of Gonzalez's legal troubles).

³⁵Dudley & Agard, *supra* note 4, at 42.

³⁶U.S. Brief on Appeal from Detention Order, *supra* note 8, at 8.

³⁷Based upon author's recollection of witness accounts.

³⁸M. McGuire et al., Social Dominance in Adult Male Vervet Monkeys: General Considerations, 22 Soc. Sci. Information 89, 90 (1983). See also Frans de Waal, Peacemaking Among Primates 157-60 (1989) (describing status rituals of rhesus and stump-tail macaques); Frans de Waal, Good Natured: The Origins of Right and Wrong in Humans and Other Animals (1996).

³⁹Jon Kamakawiwo'ole Osorio, A Hawaiian Nationalist Commentary on the Trial of the Mo'i Wahine, in Trial of a Queen, *supra* note 14, at 29, 34-39 (listing persons accused of treason and misprision of treason in the 1895 trials; many of the sentences were in excess of five years, with some extending thirty to thirty-five years, but all offenders had been released by Jan. 1, 1896).

⁴⁰U.S. Brief on Appeal from Detention Order, *supra* note 8, *passim*.

⁴¹*Id.* at 3, 5.

⁴²See Pretrial Services Report, United States v. Kanahele (D. Haw. Aug. 4, 1995) (No. 95-00764HG-01) at 2, 3 (recommending against bail).

⁴³U.S. Brief on Appeal from Detention Order, *supra* note 8, at 4.

44. *Id.* at 6.

45. Order Affirming Magistrate Judge's Detention Order, *supra* note 17, at 4 n.2.

46. Nonverbal communication is a substantial subject in evolutionary biology. See, e.g., William H. Calvin, *The Ascent of Mind: Ice Age Climates and the Evolution of Intelligence* 23-25 (1990); P.B. Medawar & J.S. Medawar, *Aristotle to Zoos: A Philosophical Dictionary of Biology* 170 (1983) (on the origins of language). See also Matt Ridley, *The Red Queen: Sex and the Evolution of Human Nature* 332-34 (1994) (on the elements of deception in communication). The example in the text is an illustration of "coded" communication-saying one thing and meaning another. This writer would be surprised if this is not a phenomenon that is observable in judicial behavior.

47. U.S. Brief on Appeal from Detention Order, *supra* note 8, at 13-14.

48. One of the votes for keeping Kanahale locked up came from Alfred T. Goodwin of Pasadena who is best known in the islands for his dreadful ruling in the 1980s forbidding the Hawai'i Supreme Court from divesting sugar companies of their "vested" water rights. *Robinson v. Ariyoshi*, 753 F.2d 1468, 1475 (9th Cir. 1983). Divesting Kanahale of his freedom is a much more discretionary thing. Curiously, one measure of good judging today is the ability to defer to the foolishness of the authorities whose judgment is contested.

49. Order Affirming Magistrate Judge's Detention Order, *supra* note 17, at 8-9.

50. The account in the next several paragraphs is based upon the author's personal notes and observations. It has not been verified by reference to the official transcript.

51. This theory has been advanced by Williamson Chang of the William S. Richardson School of Law. Cf. Williamson B.C. Chang, *The "Wasteland" in the Western Exploitation of "Race" and the Environment*, 63 *U. Colo. L. Rev.* 849, 852, 858, 860 (1992) (discussing the wholly different world-view of traditional Hawaiian thought and the centrality of relationships with land to that view).

52. 18 U.S.C. 1071 (1994) makes it a crime to "harbor[] or conceal[] any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest" For an example of "harboring" analysis, see *United States v. Foy*, 416 F.2d 940 (7th Cir. 1969). For a discussion of the term "harbor" in the context of Anti-Alien Harboring Statutes, see Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 *Harv. C.R.-C.L. L. Rev.* 119, 141-48 (1993).

53. See *supra* note 25.

54. See Hosek, *supra* note 18, at A1.

55. U.S. Brief on Appeal from Detention Order, *supra* note 8, at 7-8.

56. *Id.* at 9.

57. *Id.*

58. Id. at 4.

59. Id. at 1.

* Transcribed from letter of June 20, 1995, bearing "Nation of Hawai'i" letterhead and signed by Maltbie Napoleon, Nation of Hawai'i Attorney General.

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