

When All the Kāhuna Are Gone: Evaluating Hawai‘i’s Traditional Hawaiian Healers’ Law

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I. INTRODUCTION

Traditional Hawaiian healing arts have been used for over two thousand years to treat a wide range of health problems.¹ Kāhuna, traditional healers known as “keepers of secrets and traditional knowledge,”² served as the sole medical providers for Native Hawaiians³ before the introduction of Western allopathic medicine.⁴ They specialized in different types of healing practices, including ho‘olomilomi, or to “press, knead, or massage,”⁵ ho‘ponopono, meaning “to make, or to correct, in perfect order,”⁶ lā‘au lapa‘au, which included the use of medicines made from “plant, animal, and mineral products collected from the land and sea,”⁷ ho‘ohānau, or midwifery,⁸ and lā‘au kāhea, which literally translates to “the calling medicine,” and included the incorporation of suggestion and positive thinking energies to heal a patient.⁹

Both federal and State legislation have acknowledged the significance of traditional Hawaiian healing arts. In the Native Hawaiian Health Care Act of 1988,¹⁰ and the subsequent Native Hawaiian Health

¹ Kekuni Blaisedell, *Historical and Philosophical Aspects of Lapa‘au Traditional Kanaka Maoli Healing Practices*, IN MOTION MAGAZINE (Nov. 16, 1997), available at <http://www.inmotionmagazine.com/kekuninf.html>.

² Nanette L. Kapualani Mossman Judd, *Lā‘au Lapa‘au: Herbal Healing Among Contemporary Hawaiian Healers*, 5(2) PACIFIC HEALTH DIALOG 239, 239 (1998).

³ In this comment, “Native Hawaiian” and “Hawaiian” will be used to refer to “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778.” See HAW. REV. STAT. ANN. § 10-2 (Michie 2006).

⁴ Blaisedell, *supra* note 1.

⁵ Healani K. Chang, *Hawaiian Health Practitioners In Contemporary Society*, 8(2) PACIFIC HEALTH DIALOG 260, 265 (2001).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* This list is not exhaustive of all the different types of traditional Hawaiian healing practices. See O. A. BUSHNELL, *THE GIFTS OF CIVILIZATION: GERMS AND GENOCIDE IN HAWAI‘I* (University of Hawai‘i Press 1993) (describing other traditional Hawaiian healing disciplines).

¹⁰ Native Hawaiian Health Care Act of 1988, Pub. L. No. 100 579, § 5(b), 102

Care Improvement Act of 1992,¹¹ Congress recognized that traditional Hawaiian medicine is important to the healthfulness of Native Hawaiians, and is necessary to help reverse the group's overall deteriorating health status.¹² Hawai'i legislation regarding traditional Hawaiian healing practices, on the other hand, has also recognized the kāhuna's place in Native Hawaiian culture, but has had an inconsistent record of permitting kāhuna to practice their healing arts within the law.¹³

In pre-European contact Hawai'i,¹⁴ kāhuna were an integral part of the Native Hawaiian hierarchical society.¹⁵ Shortly after the abandonment of the kapu system in 1819, however, if kāhuna wanted to practice their healing arts on the public, they were forced to do so illegally.¹⁶ Except for lomilomi, which was permitted under Hawai'i's massage licensure laws, all attempts from 1865 to 1997 to license traditional Hawaiian healing have failed or been repealed.¹⁷ By the end of the Twentieth Century, the traditional Hawaiian healing arts were at risk of vanishing, with only a few surviving kāhuna, who were constrained by Hawai'i law from openly performing or teaching their healing practices without risk of prosecution.¹⁸

In response to the rapid decline of kāhuna and in an effort to preserve traditional Hawaiian healing practices, in 1998 the Hawai'i legislature passed Act 162, now codified at Hawai'i Revised Statutes section 453-2(c) (also known as the "Healers' Law").¹⁹ Act 162 exempted the practice of Hawaiian healing arts from the general prohibition on unlicensed medical practice.²⁰ Testimony in support of the exemption

Stat. 2916.

¹¹ Native Hawaiian Health Care Improvement Act of 1992 [hereinafter NHHCIA], 42 U.S.C. §§ 11701 - 11714 (2005).

¹² *Id.*

¹³ See MALCOLM NĀEA CHUN, IT MIGHT DO GOOD: THE LICENSING OF MEDICINAL KĀHUNA 1-41 (First Peoples' Productions 2009).

¹⁴ "Pre-Contact" refers to the period preceding the arrival of Captain Cook's vessels, which arrived in Hawai'i in 1778. BUSHNELL, *supra* note 9, at 38.

¹⁵ DAVIANNA POMAIIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE 3 (University of Hawai'i Press 2007).

¹⁶ SAMUEL MANAIKALANI KAMAKAU, RULING CHIEFS OF HAWAI'I 307-08, 322 (Rev. ed., Kamehameha Schools Press 1961) (1992).

¹⁷ CHUN, *supra* note 13.

¹⁸ *Hearings on S.B. 1946*, 19th Leg., Reg. Sess. (1998) [hereinafter *Hearings*] (testimony of Dr. Terry Shintani, President, Hawai'i Health Foundation).

¹⁹ HAW. REV. STAT. ANN. § 453-2(A) (Michie 2005).

²⁰ Act 162, § 3, 19th Leg. Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 608, 609-10.

conveyed a need to improve the health of Native Hawaiians by using traditional Hawaiian healing methods.²¹ Supporters of the legislation also expressed an urgent need to keep alive the healing arts, which were at risk of fading away with the elderly kāhuna, who were perishing at a rapid pace.²²

Under Act 162, Hawaiian healing practitioners had to go through a certification process to be exempted from Hawai'i's medical license laws.²³ Act 162, however, did not delineate what that certification process would be, and with subsequent feedback from the community, the law was amended several times in an attempt to create a culturally appropriate structure for certification. Today, the Healers' Law puts certification into the hands of the traditional Hawaiian healing community. Several councils across the State are able to determine their own criteria for certification.²⁴ This is in contrast to previous attempts at credentialing, which put the government in charge of determining standards.²⁵

In spite of its allowance for community self-governance, many in the Hawaiian healing community have condemned the current form of the Healers' Law.²⁶ Some who argue against the law maintain that rather than legitimize practitioners, it delegitimizes practices that are otherwise permissible under the Hawaiian traditional and customary rights provision of the Hawai'i State Constitution.²⁷ Another concern is whether the law actually preserves traditional Hawaiian healing practices, or changes those practices to something that is not traditional or authentic.²⁸ Additionally, the question of whether one must have Native Hawaiian ancestry to be a legitimate healing practitioner has been a contentious issue within the Hawaiian healing community.

²¹ *Hearings, supra* note 18, (testimony of Kauila Clark, President, Wai'anae Coast Comprehensive Health Center).

²² *Hearings, supra* note 18, (testimony of Dr. Terry Shintani, President, Hawai'i Health Foundation).

²³ Act 162, § 3, *reprinted in* 1998 Haw. Sess. Laws 608, 609-10.

²⁴ Act 153, § 3, 23d. Leg., Reg. Sess., *reprinted in* 2005 Haw. Sess. Laws 378, 379.

²⁵ CHUN, *supra* note 13.

²⁶ Interview with Hardy Spoehr, Executive Director, Papa Ola Lokahi, in Hon., Haw. (Feb. 16, 2010) (stating that he thinks the law should be repealed). *Accord* Interview with Babette Galang, Complementary Health Officer, Papa Ola Lokahi, in Hon., Haw. (Feb. 16, 2010); Interview with Erlene A. Greer, Kūpuna Council Member, Na Lei Hulu No Ke Ola Mamo, in Hon., Haw. (Apr. 1, 2010).

²⁷ HAW. CONST. ART. XII, § 7.

²⁸ Telephone interview with Gerald Lam, Vice Chairman, Ke Ola Mamo (Mar. 6, 2010).

This comment will examine the extent to which Act 162 has achieved its original intent to preserve traditional Hawaiian healing practices.²⁹ In order to make this assessment, this comment will be structured in the following way: first, it will discuss the health status of Native Hawaiians and the role of medicinal kāhuna in improving the health of Native Hawaiians. Then, it will delineate Hawai‘i’s previous attempts at licensure, their shortcomings, and outcomes. Following that, this comment will examine the events that led to the passage of Act 162 and the amendments that followed. Finally, this comment will discuss the benefits and the problems with the Healers’ Law in its current form, and propose suggestions for how the law can more effectively ensure the survival of traditional Hawaiian healing practices.

II. BACKGROUND

Much of the information regarding traditional Hawaiian healing is huna, or secret,³⁰ which practitioners do not share with the general public. Thus, some of the information about Hawaiian healing practices that is written in this comment is general, rather than specific. The comment was informed, however, by several sources that were generous enough to share their knowledge, opinions, and experiences with the writer.

A. Native Hawaiian Health and Kāhuna in the Pre-Contact Era

Pre-contact Hawai‘i was separated into a distinct hierarchy of classes.³¹ One of the higher classes was that of the kāhuna, who were agents of akua, or the gods, and were skilled in particular practices, including healing arts.³² Medical kāhuna were chosen based on genealogy, succession within the kāhuna lineage, the outward and inward purity of the healer, and the healer’s piety.³³ Order was maintained through the kapu system, which set prohibitions for the Hawaiian people to abide by, and sought to preserve a balance between people, the gods, and the environment.³⁴ The kapu system imposed a death penalty on anyone who fraudulently claimed to be a kahuna.³⁵

²⁹ Act 162, § 1, *reprinted in* 1998 Haw. Sess. Laws 608, 608-09.

³⁰ MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 91 (University of Hawai‘i Press 1986).

³¹ MCGREGOR, *supra* note 15, at 3.

³² Lam, *supra* note 28. A kahuna held a priesthood, or an agency of acting in the name of the gods. It was very clear to kāhuna that the gods were the real healers, while the kāhuna were just their agents. *Id.*

³³ Kawaikapuolkalani Hewett et al., *O Ke Aloha Ka Mea I Ho‘ola ‘Ai - Compassion is the Healer: an indigenous peoples healing conference*. October 2000, Hawai‘i, 8(2) PACIFIC HEALTH DIALOG 417, 419 (2001).

³⁴ BUSHNELL, *supra* note 9, at 64.

³⁵ Lam, *supra* note 28. Placement of the diacritical mark, the kahakō (-), over the

In Hawai‘i’s pre-contact era, the kāhuna were integral to the health of ancient Hawaiians. Hawaiians were well-known for their vigor and wellbeing in Hawai‘i’s pre-contact era.³⁶ For example, when Captain Cook arrived in the Hawaiian Islands in 1778, his crew reported that Hawaiians appeared strong, healthy, and statuesque.³⁷ Hawaiian health at the time revolved around a value system that put an emphasis on lōkahi, or the “harmony of body, mind, and spirit.”³⁸ To Hawaiians, illness befell a person who had fallen out of lōkahi, often times by doing evil acts, breaking promises, or violating kapu.³⁹ Hence, a kahuna’s initial step in treating a sick person was to pray and restore lōkahi.⁴⁰

B. *Native Hawaiian Health and Kāhuna after 1778*

There are various estimates of the size of the Native Hawaiian population at the time of Western contact,⁴¹ and these estimates span upward of one million persons.⁴² Western contact, however, brought diseases that nearly decimated the Hawaiian population.⁴³ Hawaiians

first “a” in “kāhuna” indicates the plural form of the word. “Kahuna” is the singular form of the word, and does not have a kahakō over the first “a.” PUKUI & ELBERT, *supra* note 30, at 114.

³⁶ Claire K. Hughes, *Uli‘eo Koa: Warrior Preparedness*, 8(2) PACIFIC HEALTH DIALOG 393, 394 (2001).

³⁷ *Id.*

³⁸ Judd, *supra* note 2, at 240.

³⁹ *Id.* Examples of kapu include “eating kapu fish or wearing kapu clothing.” *Id.*

⁴⁰ *Id.*

⁴¹ ELEANOR C. NORDYKE, *THE PEOPLING OF HAWAI‘I 17-18* (University of Hawai‘i 1989).

[Captain] Cook’s population totals varied from William Bligh’s figure of 242,000 to James King’s estimate of 400,000. Other early voyagers, as well as Pacific Island researchers, have presented estimates ranging from Norma McArthur’s 100,000; Peter Buck’s 100,000-150,000; George Dixon’s 200,000; Captain V. M. Golovinin’s 200,000 (for 1818); and David Stannard’s 635,000-875,000. Population scholars Romanzo Adams, Andrew Lind, Bernhard Hormann, and Robert Schmitt offer traditional thinking, giving a total of 250,000-300,000 persons residing in Hawai‘i during the period of first Western Contact.

Id. (internal citations omitted).

⁴² LILIKALĀ KAME‘ELEIHIWA, *NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? HOW SHALL WE LIVE IN HARMONY?* 81 (Bishop Museum Press 1992).

⁴³ Bradley E. Hope & Janette Harbottle Hope, *Native Hawaiian Health in Hawaii: Historical Highlights*, 1 CAL. J. HEALTH PROMOTION (SPECIAL ISSUE) 1, 2 (2003).

became infected with gonorrhea, tuberculosis, and syphilis, then pneumonia, influenza, measles, mumps, typhoid, diarrhea, smallpox, leprosy, plague, diphtheria, and streptococcus.⁴⁴

The impact of these diseases on the Hawaiian population was devastating. In 1823, missionaries counted 134,925 Native Hawaiians across the islands.⁴⁵ Missionaries later conducted censuses on Native Hawaiians in 1831-32 and 1835-36 that counted 130,313 and 108,579, respectively, reflecting a steady decline in the Native Hawaiian population.⁴⁶ The official government census taken in 1850 reported that the population had diminished to 84,165 Native Hawaiians, and by 1872, almost one hundred years after Western contact, there were only 53,900 Native Hawaiians living in Hawai'i.⁴⁷

The kāhuna were not equipped to handle all of the introduced diseases, to which the Hawaiian people had no immunity.⁴⁸ In 1819, during the wake of the Hawaiian population's devastation, King Kamehameha II abolished the kapu system.⁴⁹ Many ki'i, or images of gods,⁵⁰ and heiau, or places of worship,⁵¹ including the heiau where kāhuna practiced, were destroyed.⁵² Although there were many complex factors leading to Kamehameha II's decision to abolish the kapu, some scholars have postulated that the King had reasoned that the old religious belief system had failed and that abandoning the kapu system might counteract the diseases that had befallen his people.⁵³ Whatever Kamehameha II's precise motivation, abandoning the millennial kapu belief system left a void within the culture.

In 1820, less than a year after the kapu system was abolished, Protestant missionaries arrived in Hawai'i,⁵⁴ where Hawaiians were

⁴⁴ Blaisedell, *supra* note 1 (citing D. E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT (University of Hawai'i Press 1989); BUSHNELL, *supra* note 9).

⁴⁵ KAME'ELEIHIWA, *supra* note 42, at 81.

⁴⁶ NORDYKE, *supra* note 41, at 18.

⁴⁷ *Id.*

⁴⁸ Judd, *supra* note 2, at 239. Many kāhuna, who were also highly vulnerable to introduced diseases, died because they were exposed to the illnesses of those who they were trying to cure. NĀ MO'OLELO LOMILOMI: THE TRADITIONS OF HAWAIIAN MASSAGE AND HEALING 35 (Makana Risser Chai ed., Bishop Museum Press 2005) [hereinafter Chai].

⁴⁹ Hope & Hope, *supra* note 43, at 3.

⁵⁰ PUKUI & ELBERT, *supra* note 30, at 148.

⁵¹ *Id.* at 64.

⁵² KAME'ELEIHIWA, *supra* note 42, at 82.

⁵³ *Id.*

⁵⁴ McGregor, *supra* note 15, at 9.

increasingly dispossessed of land, health, and by then, a religious system. The missionaries converted many Hawaiians to Christianity and discouraged traditional Hawaiian practices that were linked to the kapu era.⁵⁵

Missionaries and their converts miscategorized all kāhuna, even medicinal kāhuna, as black magic sorcerers, or kāhuna ‘anā’anā,⁵⁶ and called their work “evil.”⁵⁷ Foreign physicians living in Hawai‘i also helped alienate the kāhuna by condemning the practices of their Native Hawaiian counterparts, although Western medicine at the time included practices such as bloodletting, leeching, surgery without anesthesia, and cauterization of severed flesh with burning-hot irons.⁵⁸ Hawaiians started to believe that Westerners had superior prestige and power, which led to a greater demand for Western medicine.⁵⁹ Within several years after the arrival of the missionaries, medicinal kāhuna practices were outlawed.⁶⁰

Kāhuna still practiced in secret,⁶¹ in spite of being marginalized by the increasing dominance of Western culture and the demonization of their arts.⁶² Their practices adjusted to the influx of Western influence, as many kāhuna adopted the use of non-native or Polynesian-introduced plants into their healing arts, and called upon the Christian God in their prayers.⁶³ Kāhuna continued to practice their healing arts underground, until the Hawaiian government enacted new laws later in the Nineteenth Century that enabled some of them to emerge.⁶⁴

C. *Medical Licensure and Kāhuna: 1865 - 1965*

General medical licensure in Hawai‘i began in 1865, under Hawaiian Kingdom law.⁶⁵ In that year, the government enacted legislation requiring any physician or surgeon accepting compensation or a reward

⁵⁵ Hope & Hope, *supra* note 43, at 3.

⁵⁶ Judd, *supra* note 2, at 239.

⁵⁷ BUSHNELL, *supra* note 9, at 119.

⁵⁸ *Id.* at 95.

⁵⁹ Darwin Chan, Kahuna Lā‘au Lapa‘au: Issues and Concerns Involved in Potential Licensure 9 (Aug. 1994) (unpublished, University of Hawaii School of Public Health) (on file with Papa Ola Lokahi).

⁶⁰ KAMAKAU, *supra* note 16, at 307-08, 322.

⁶¹ MALCOLM NĀEA CHUN, KA MO‘OLELO LAIKINI LĀ‘AU LAPA‘AU: THE HISTORY OF LICENSING TRADITIONAL NATIVE PRACTITIONERS 4 (Hawai‘i State Department of Health 1989) [hereinafter CHUN, KA MO‘OLELO].

⁶² BUSHNELL, *supra* note 9, at 19.

⁶³ Chan, *supra* note 59, at 9.

⁶⁴ CHUN, *supra* note 13.

⁶⁵ *Id.* at 1.

for services, to obtain certification from the Board of Health and a “license from the minister of the interior.”⁶⁶ While one of the purposes of this law was to protect the public from persons fraudulently claiming to be kāhuna, it also set up an obstacle for native healers, who then had to go through a licensing process to practice at all.⁶⁷ There is no record of the government issuing licenses to Hawaiian kāhuna at this time, and it was not until 1868 that the Legislature specifically addressed the issue of licensing traditional Hawaiian healing practices.⁶⁸

In 1868, the Hawai‘i Legislature established a Hawaiian Board of Health to examine Native Hawaiians’ fitness to practice medicine, including traditional Hawaiian medicine.⁶⁹ Between 1873 and 1878, fourteen Hawaiians passed the Board’s test and became licensed to practice traditional healing.⁷⁰ During his reign, from 1874 to 1891, King David Kalākaua made a concerted effort to revive Hawaiian traditions and culture, including traditional Hawaiian medicine.⁷¹ In 1886, King Kalākaua signed an Act to Regulate the Hawaiian Board of Hawai‘i, which created a board of five Native Hawaiians who oversaw the practice of traditional Hawaiian medicine.⁷² It is reported that during Kalākaua’s monarchy, 300 kāhuna received licenses.⁷³

The Hawaiian monarchy came to an abrupt end in 1893, when the Kingdom was overthrown and a new Republic formed in 1894.⁷⁴ The Republic created its own laws and repealed many of the Kingdom’s laws, including those concerning kāhuna and traditional healing.⁷⁵ As in the period between the outlaw of kāhuna after the missionaries arrived and 1868, this once again made kāhuna’s practices forbidden and forced them to work in secrecy.⁷⁶

⁶⁶ 2 CIV. CODE OF THE HAWAIIAN ISLANDS § 7(5)(278-9) (1865).

⁶⁷ CHUN, *supra* note 13, at 2.

⁶⁸ *Id.* at 3.

⁶⁹ *Id.* at 5 (citing HAWAIIAN GAZETTE, Jun. 24, 1868, at 1).

⁷⁰ *Id.* at 11. The applicants who received licenses between 1873 and 1878, as documented in Hawai‘i State Archives, included Kohai, Kauhalu, John Hālawa, Kawa‘akaukahi, Wahineali‘i, Daniel Nāpela, Kanakaokai, G. Nā‘ōnohi, Ka‘ao, Keola, and Kalili. *Id.* at 11-12.

⁷¹ *Id.* at 14-15.

⁷² KINGDOM LAWS OF HAW. ch. 29 (1886) *reprinted in* CHUN, *supra* note 13, at 48-51.

⁷³ CHUN, *supra* note 13, at 14.

⁷⁴ *Id.* at 15.

⁷⁵ *Id.*

⁷⁶ CHUN, KA MO‘OLELO, *supra* note 61, at 4 (“[N]ative peoples have continued to maintain their healing practices . . . in secrecy.”).

The practice of traditional Hawaiian medicine remained prohibited until Hawai'i was annexed to the United States and was governed by a Territorial Legislature.⁷⁷ In 1919, the Territorial Legislature passed a bill allowing traditional healers to practice medicine once they received a license from the Board of Health.⁷⁸ By the 1940s, the Board of Health created a Board of Examiners that required applicants to pass a test to be eligible for licensure.⁷⁹

Unfortunately, the Board of Examiners lacked knowledge of traditional Hawaiian healing methods, and did not understand the traditional healing community. Only one of the three board members was Hawaiian.⁸⁰ Additionally, in spite of the fact that traditional healing was taught outside of a Western classroom setting, and instead was transmitted orally from one generation of Native Hawaiians to another, the test for licensure required applicants to know the Latin names of the plants they used for *lā'au lapa'au*.⁸¹ This prevented *kāhuna* that were reputable practitioners in the Hawaiian community from being able to obtain a medical license.⁸²

An example of a Native Hawaiian traditional healer who was renowned in the community for her healing abilities but could not obtain a medical license was Luka Kinolau, of Kohala, Hawai'i.⁸³ Ms. Kinolau was born circa 1887 and was raised by her grandparents.⁸⁴ Her grandmother, a *kauka lapa'au*, or "herbal doctor," taught Kinolau *hāhā*, or "diagnosis."⁸⁵ In 1948, Kinolau, who wanted recognition for her medical skill, went before the Board of Examiners to become licensed as a Hawaiian healer.⁸⁶ Kinolau spoke only Hawaiian, and although the Board had a translator present, one of the three parts of the examination required that Kinolau know the Latin names of the Hawaiian plants that she used for medicine.⁸⁷ Kinolau failed her examination, having received a "0" for the Latin part of the exam.⁸⁸ Kinolau appealed the Board's decision and challenged the

⁷⁷ CHUN, *supra* note 13, at 16.

⁷⁸ Blaisedell, *supra* note 1 (citing CHUN, KA MO'OLELO, *supra* note 61).

⁷⁹ CHUN, *supra* note 13, at 21, 23.

⁸⁰ Blaisedell, *supra* note 1.

⁸¹ CHUN, *supra* note 13, at 27.

⁸² *Id.* at 23.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 27.

⁸⁷ *Id.* at 27-28.

⁸⁸ *Id.*

nature of the examination, but the Board upheld its decision to deny Kinolau a license.⁸⁹

By the time Hawai'i became a State in 1959, the law permitting the practice of Hawaiian medicine was considered "obsolete."⁹⁰ During the 1965 State Legislative session, a bill was introduced to "[repeal] certain chapters, parts of chapters, sections and subsections of the Revised Laws of Hawai'i 1955, containing obsolete laws."⁹¹ The 1919 law, codified as Chapter 65, which licensed Hawaiian medicinal practices, was repealed.⁹² Thereafter, it was only possible to get a license to practice lomilomi through the State's massage licensing law and it was not possible to obtain a license to practice any other type of traditional Hawaiian healing.⁹³

D. Native Hawaiian Health Plight Leads to Recognition of Kāhuna

Native Hawaiians suffer the highest rate of morbidity in the State of Hawai'i.⁹⁴ A 2000 study by the Hawai'i Department of Health showed that Native Hawaiians, as compared to non-Native Hawaiians in the State of Hawai'i, suffer from a higher prevalence of asthma and diabetes.⁹⁵ As compared with other ethnic groups in the State, Native Hawaiians also have a lower than average life expectancy,⁹⁶ have the highest rate of mortality,⁹⁷ and also suffer from high incidences of cancer.⁹⁸

⁸⁹ *Id.* at 30.

⁹⁰ *Id.* at 32.

⁹¹ Act 153, § 1(c), 3d. Leg., Reg. Sess., reprinted in 1965 Haw. Sess. Laws 193, 193 (repealing Revised Laws of Hawaii 1955, Chapter 65, entitled "Medicinal Use of Hawaiian Herbs and Plants").

⁹² CHUN, *supra* note 13, at 32.

⁹³ *Id.*

⁹⁴ David B. Johnson, Neil Oyama, & Loic Le Marchand, *Papa Ola Lokahi Hawaiian Health Update: Mortality, Morbidity and Behavioral Risks*, 5(2) PACIFIC HEALTH DIALOG 297, 303 (1998).

⁹⁵ Bradley E. Hope, *Native Hawaiian Health: A Review*, ASSOCIATED CONTENT, (Jul. 3, 2006), http://www.associatedcontent.com/article/43225/native_hawaiian_health_a_review.html?cat=5 (citing HAWAI'I STATE DEP'T OF HEALTH, OFFICE OF HEALTH STATUS MONITORING Table 4.7 (2000)).

⁹⁶ *Id.* (citing HAWAI'I STATE DEP'T OF HEALTH, 63 LIFE EXPECTANCY IN THE STATE OF HAWAII 1980 AND 1990 RESEARCH AND STATISTICS REPORT 18-33 (1996)).

⁹⁷ *Id.* (citing Braun K. L., Look M. A., Yang H. & Onaka A. T., Horiuchi B. Y., *Native Hawaiian Mortality 1980 and 1990*, 86(6) AM. J. PUB. HEALTH 888-89 (1996)).

⁹⁸ *Id.* (citing CANCER RESEARCH CENTER OF HAWAI'I, HAWAI'I TUMOR REGISTRY Tables 5, 12, 14, 16, 18, 21 (1995-2000), available at <http://www.hawaii.gov/health/statistics/other-reports/cancer2003-04.pdf>).

Native Hawaiian health gained heightened concern in the late Twentieth Century. In 1984, Alu Like, Inc., a non-profit organization that advances economic and social self-sufficiency for Native Hawaiians,⁹⁹ partnered with the U.S. Public Health Service to create the Native Hawaiian Health Research Consortium.¹⁰⁰ The Consortium conducted numerous studies on the health conditions of Native Hawaiians and published its findings and recommendations in a 1985 report entitled “E Ola Mau: The Native Hawaiian Health Needs Study.”¹⁰¹

The report’s findings presented a dismal picture of Native Hawaiian health.¹⁰² It showed that Native Hawaiians did not access health care in a timely fashion and did not practice preventative health measures. Contributing to this problem was their overall aversion and mistrust of hospitals.¹⁰³ Furthermore, the E Ola Mau report identified the lack of Native Hawaiians in the health profession.¹⁰⁴ Amongst its recommendations was the suggestion that incorporating traditional healing practices into Native Hawaiian health care would be an essential component in improving the health outlook for Native Hawaiians.¹⁰⁵

In 1988, Congress passed the Native Hawaiian Health Care Act,¹⁰⁶ later reauthorized as the Native Hawaiian Health Care Improvement Act of 1992 (hereinafter “NHHCIA”),¹⁰⁷ in which it expressed its commitment to improving the health status of Native Hawaiians.¹⁰⁸ The Act was significant in that it also recognized that traditional Hawaiian healers played an important role in maintaining the health of Native Hawaiians.¹⁰⁹ Additionally, the Act defined “traditional Native Hawaiian healer” as:

A practitioner . . . who . . . is of Hawaiian ancestry, and . . . has the knowledge, skills, and experience in direct personal health care of individuals, and . . . whose knowledge, skills and experience are based on a demonstrated learning of Native Hawaiian healing practices acquired by . . . direct

⁹⁹ Alu Like, <http://www.alulike.org/> (last visited Nov. 25, 2010).

¹⁰⁰ E OLA MAU: THE NATIVE HAWAIIAN HEALTH NEEDS STUDY iii (E OLA MAU) (1985).

¹⁰¹ *Id.* at 53-60.

¹⁰² *Id.* at 22-50.

¹⁰³ *Id.* at 45.

¹⁰⁴ *Id.* at 46-47.

¹⁰⁵ *Id.* at 56.

¹⁰⁶ Native Hawaiian Health Care Act of 1988, *supra* note 10.

¹⁰⁷ NHHCIA, *supra* note 11.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

practical association with Native Hawaiian elders, and . . . oral traditions transmitted from generation to generation.¹¹⁰

In addition, the Act provided for the creation of a central healthcare organization that would produce a master plan for the improvement of Native Hawaiian health, and also set up a system of health centers to carry out this goal.¹¹¹ As a result, Papa Ola Lokahi (hereinafter “POL”), a non-profit organization, was created in 1988 to serve as the umbrella organization for the implementation of a comprehensive plan to improve the health and wellness of Native Hawaiians.¹¹² POL would later play a central role in the certification of traditional Hawaiian healing practitioners by convening the councils that issue certificates, and also by serving as a direct liaison between the traditional Hawaiian healing community and the Hawai‘i Legislature.¹¹³

E. *Hawai‘i’s Medical Licensure Laws Restrict Kāhuna Recognition*

The NHHCIA recognized that traditional Hawaiian healers were an essential element of a plan to improve Native Hawaiian health.¹¹⁴ At the same time, however, this federal law did not necessarily enable kāhuna to practice in the open.¹¹⁵ The NHHCIA specifically provided, “Nothing in this chapter shall be construed to restrict the authority of the State of Hawaii to license health practitioners.”¹¹⁶

Similarly, State measures that seemed to recognize the role of kāhuna in the Native Hawaiian culture did not allow them to practice on the public.¹¹⁷ In 1978, the Constitution of Hawai‘i was amended to declare that the State would protect “all rights, traditionally exercised for subsistence, cultural and religious purposes” that are exercised by ahupua‘a¹¹⁸ tenants who are descendants of “native Hawaiians who

¹¹⁰ *Id.* § 11711(10).

¹¹¹ *Id.* §§ 11701 – 11714. In 2010, Congress passed the Patient Protection and Affordable Care Act, which reauthorized the NHHCIA through 2010. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 10221(a), 124 Stat. 119 (2010) (enacting the Indian Health Care Improvement Act, S. 1790, into law, which includes § 206202 of the Indian Health Care Improvement Act: Reauthorization of Native Hawaiian Health Programs).

¹¹² PAPA OLA LOKAHI, NANA I KA PONO NA MA: STRATEGIC PLAN 2007-2011 (2005), available at <http://www.papaolalokahi.org/pea/POLStrategicPlan2007-2011.pdf>.

¹¹³ Act 162, § 4, reprinted in 1998 Haw. Sess. Laws 608, 610.

¹¹⁴ NHHCIA, *supra* note 11, § 11705(c)(3) (stating that “[H]ealth care services . . . may be provided by traditional Native Hawaiian healers.”).

¹¹⁶ *See id.* § 11712.

¹¹⁶ *Id.* § 11712.

¹¹⁷ HAW. CONST. ART. XII, § 7.

¹¹⁸ PUKUI & ELBERT, *supra* note 30, at 9. Ahupua‘a is a:

inhabited the Hawaiian Islands prior to 1778.”¹¹⁹ Although there is no case law involving the use of this provision to exercise traditional Hawaiian healing arts, some contend that this provision can be extended to cover such practices.¹²⁰ Additionally, practitioners who have asserted gathering rights to enter private property for the purpose of collecting plants for lā‘au lapa‘ au have used this provision.¹²¹ As in the NHHCIA, a caveat to this constitutional provision, however, is that practitioners exercising their traditional and customary rights are still subject to State regulation.¹²²

State law has very strict rules governing the practice of medicine. Hawai‘i Revised Statutes section 453-2(a) prohibits any practice of medicine, either for free or for pay, without a “valid unrevoked license or a limited and temporary license obtained from the Hawai‘i [M]edical [B]oard.”¹²³ The definition of the practice of medicine, as given in section 453-1, is very broad, including “the use of drugs and medicines, water, electricity, hypnotism, osteopathic medicine, or any means or method, or any agent, either tangible or intangible, for the treatment of disease in the human subject.”¹²⁴ This expansive definition of the practice of medicine encompasses all forms of traditional Hawaiian healing.

While kāhuna could still practice their healing arts on family members under an exception in section 453-2(b)(2) allowing for the “domestic administration of family remedies;”¹²⁵ they could not legally use their healing practices on unrelated members of the public. Thus under State statute, traditional healing practices generally constituted unlicensed medical practice, which was prohibited until 1998.¹²⁶

Land division usually extending from the uplands to the sea, so called because the boundary was marked by a heap [or ahu] of stones surmounted by an image of a pig [or pua‘a], or because a pig or other tribute was laid on the altar as tax to the chief. The landlord or owner of an ahupua‘a might be a konohiki.

Id.

¹¹⁹ HAW. CONST. ART. XII, § 7.

¹²⁰ Spoehr, *supra* note 26.

¹²¹ See *Pele Defense Fund v. The Estate of James Campbell*, Civil No. 89-089 (Hilo) (2002) (upholding the rights of cultural practitioners to gather on private property for cultural, religious, and subsistence purposes, including Hawaiian medicine).

¹²² Haw. Const. Art. XII, § 7.

¹²³ HAW. REV. STAT. ANN. § 453-2(A) (Michie 2005).

¹²⁴ *Id.* § 453-1.

¹²⁵ *Id.* § 453-2(b)(2).

¹²⁶ *Id.* § 453-1.

F. Act 162 and its Amendments

In the 1980s, as part of the Hawaiian Renaissance and its revived interest in indigenous Hawaiian culture, the Hawaiian healing community began to ponder licensure once more.¹²⁷ By this time, the number of traditional Hawaiian healers had dwindled,¹²⁸ and many of the existing healers were in their seventies and eighties.¹²⁹ Recognizing the decline in the number of traditional healers, in the 1980s and 1990s, the traditional Hawaiian healing community had numerous conferences to discuss what could be done to keep traditional healing practices alive.¹³⁰

The community considered a State registry of healers,¹³¹ and renewed talk of licensure.¹³² Either of these options, however, would have given the State ultimate control over who could practice and the guidelines constricting practitioners.¹³³ Another possibility to legally permit traditional Hawaiian medicine was to create an exemption in Hawai'i's medical practice laws, which would circumvent State regulation but also allow practitioners to work in the open.¹³⁴ It was this idea of an exemption that shaped the current legislation regulating the practice of traditional Hawaiian medicine.¹³⁵

In 1998, State Senators Cal Kawamoto and Norman Mizuguchi introduced Senate Bill 1946 into the Hawai'i Legislature.¹³⁶ The bill passed both the Senate and the House and was signed into law on July 14, 1998, as Act 162.¹³⁷ In Act 162, the Legislature found that “[t]here is the

¹²⁷ Interview with Terry Shintani, Physician, President, Hawaii Health Foundation, in Hon., Haw. (Mar. 4, 2010).

¹²⁸ *Id.*

¹²⁹ Judd, *supra* note 2, at 239.

¹³⁰ PAPA OLA LOKAHI, CHRONOLOGY OF EVENTS RELATING TO TRADITIONAL HAWAIIAN HEALING PRACTICES SINCE 1985 (2008), available at http://www.papaolalokahi.org/coconut/news/pdf/POL_chronology.pdf.

¹³¹ Registration is a type of credentialing in which providers are required to “register their name, address, training, and practice with the state to receive a registration certificate or license.” MICHAEL H. COHEN, COMPLEMENTARY & ALTERNATIVE MEDICINE: LEGAL BOUNDARIES AND REGULATORY PERSPECTIVES 36 (The Johns Hopkins University Press 1998). With this type of credentialing, consumers would send complaints to a designated state agency that would then investigate the complaint and implement appropriate disciplinary measures. *Id.*

¹³² Shintani, *supra* note 127.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ S.B. 1946, 19th Leg., Reg. Sess. (1998).

¹³⁷ Act 162, reprinted in 1998 Haw. Sess. Laws 608.

current risk that this knowledge [of traditional Hawaiian healing practices] will cease because of the advancing age of the few surviving traditional Hawaiian healers and because of concerns that the performance of traditional Hawaiian healing practices may constitute the unauthorized practice of medicine under State law.”¹³⁸ The legislature also found that the public has an interest in creating a process that “will result in statutory clarification of the continued role of traditional Hawaiian healing practices,”¹³⁹ and that there is also an interest in an interim certification “by the Hawaiian health community to currently recognized traditional Hawaiian healers.”¹⁴⁰

To address these findings, Act 162 created an exception in the State medical practices law, allowing “traditional native Hawaiian healers” to practice their healing arts without a license, as long as they were “recognized and certified as such by [a] panel convened by [POL].”¹⁴¹ The Act adopted the definition of a “traditional native Hawaiian healer” from the NHHCIA, and placed POL in charge of convening a panel of Native Hawaiian healers, who would address the issue of certification and recommend to the Legislature how the Act should be permanently implemented.¹⁴²

The Act did not specify a certification process, however, and until the panel devised one, no certifications would take place.¹⁴³ The Act had a sunset date of July 1, 2000, and gave POL the duty to submit a final report to the Legislature based upon the input of the panel by that date.¹⁴⁴ It was unclear what the Legislature would do with this information, but it found the input of the panel essential to the endurance of the Healers’ Law.

Tasked with reporting to the Legislature, POL convened a panel of seven elders, regarded as master kāhuna in the healing community, who met from October 29 - 31, 1998, in Kailua-Kona on the island of Hawai‘i.¹⁴⁵ The kāhuna discussed the legislation for certification and on October 31, 1998, they produced their recommendations in a document entitled the “Kāhuna Statement.”¹⁴⁶ The Kāhuna Statement did not formalize a certification process and instead, rejected the idea of

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ FINAL REPORT TO THE STATE LEGISLATURE IN REGARDS TO ACT 162, RELATING TO THE PRACTICE OF MEDICINE (PAPA OLA LOKAHI) (1999).

¹⁴⁶ *Id.*

government credentialing of traditional Hawaiian medicine. In the Kāhuna Statement, “Papa” Henry Auwae, who represented the elders, declared, “while we are grateful that the Legislature has passed S.B. 1946, the blood quantum,¹⁴⁷ licensure, and certification issues raised in the legislation are inappropriate and culturally unacceptable for government to ascertain. These are the kuleana¹⁴⁸ of the Hawaiian community itself through kūpuna who are perpetuating these practices.”¹⁴⁹ POL submitted the Kāhuna Statement in a report to the 1999 Legislature. The Legislature, however, did not abandon its call for the certification of traditional healers and did not take immediate action to incorporate the desires expressed in the Kāhuna Statement into the law.¹⁵⁰

By the time of Act 162’s sunset date of July 1, 2000, a certification process was not in place.¹⁵¹ To allow more time for such a process to be devised, the Legislature passed Act 209, which extended Act 162’s sunset date to July 1, 2002.¹⁵²

¹⁴⁷ Papa Auwae, in his testimony for Senate Bill 1946, expressed concern that the definition of “traditional native Hawaiian healers” would restrict certification to practitioners who were at least fifty percent Hawaiian. *Hearings, supra* note 18 (testimony of “Papa” Henry A. Auwae, Master, Traditional Herbal Medicine). Other testimony for the bill also reflected concern over the blood quantum issue. *Id.* (testimony of Kathleen T. Kang-Kaulupali, Private Individual) (“Hawaiians and part-Hawaiians should all be recognized as Native Hawaiian healers when proper training and spiritual development are achieved. Blood quorum should not be the issue.”). The NHHCIA, however, did not include a blood quantum restriction in its definition of a “traditional native Hawaiian healer.” NHHCIA, *supra* note 11, § 11711(10). Attorney and Hawaiian healer Gerald Lam believed that Senate Bill 1946 did not restrict certification to practitioners who were fifty percent Hawaiian. *Id.* (testimony of Gerald Lam, Practitioner, Traditional Herbal Medicine) (“I interpret this Bill concerning the exemption of practitioners of native Hawaiian healing to also include practitioners trained by native Hawaiian elders expert in native Hawaiian healing which practitioners are not of a blood quantum of fifty percent or more.”).

¹⁴⁸ Defined as concern or responsibility. PUKUI & ELBERT, *supra* note 30, at 179.

¹⁴⁹ PAPA OLA LOKAHI, *supra* note 145, at 3 (providing a transcript of the Kāhuna Statement). Note that this is the third main point that was expressed in the Kāhuna Statement. The first two read:

- (1) That we are only instruments in the healing process and that the true Source of healing comes from the Almighty, known as Akua, ‘Io, or God. It is this Source that gives us our calling to practice;
- (2) That the Legislature of the state of Hawai‘i is not knowledgeable of the healing traditions of the Hawaiian people.

Id.

¹⁵⁰ CHUN, *supra* note 13, at 39.

¹⁵¹ Act 209, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 501, 501.

¹⁵² *Id.*

In 2001, the Legislature passed Act 304, which attempted to conform the Healers' Law to the wishes of the Kāhuna Statement.¹⁵³ The Act maintained that traditional Hawaiian healing practitioners were exempt from medical licensure.¹⁵⁴ The Act, however, also persisted in requiring certification for those wanting to practice while qualifying for the exemption.¹⁵⁵

Act 304 specified that POL would convene "at least one panel of traditional native Hawaiian Healers to address issues and recommend legislation relating to the permanent implementation of [the certification of traditional Hawaiian healers]."¹⁵⁶ The Act required the panels to have at least three Native Hawaiians whom POL determined were proficient in traditional Hawaiian healing methods.¹⁵⁷ The Act also allowed the panels to be self-perpetuating, stating that, "[o]nce a panel is established, subsequent members shall be chosen by a majority of the existing panel members."¹⁵⁸ Additionally, Act 304 contained language that released any "person or organization involved with the selection of panel members or the denial of certification of healers" from liability for any claim arising from their participation in the certification process.¹⁵⁹

In 2005, Act 153 amended previous versions of the Healers' Law in several ways. Although the Act did not mandate a specific process for certification, it addressed the composition of the certification panels and allowed the panels to determine their own criteria for certifying practitioners.¹⁶⁰ The Act eliminated the requirement that three members of the certification panels, now called "Kūpuna Councils," have Native Hawaiian ancestry.¹⁶¹ Furthermore, Act 153 gave the Kūpuna Councils more autonomy,¹⁶² creating guidelines that distinguished them from government entities. Act 153 stated that:

Each kupuna council shall: (1) Be independent; (2) Not be a component of any state branch; (3) Not be subject to chapters 91 and 92, Hawaii Revised Statutes [relating to

¹⁵³ CHUN, *supra* note 13, at 39.

¹⁵⁴ Act 304, § 1, 21st Leg., Reg. Sess. (2001), *reprinted in* 2001 Haw. Sess. Laws 883, 883.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Act 153, § 3, *reprinted in* 2005 Haw. Sess. Laws 378, 379.

¹⁶¹ *Id.*

¹⁶² *Id.*

public review of agency policies]; and (4) Develop its own policies, procedures, and rules necessary or appropriate to certify traditional Hawaiian healers.¹⁶³

The Act also added language stating, “Nothing in this chapter shall limit, alter, or otherwise adversely affect any rights of practice of traditional Native Hawaiian healing pursuant to the Constitution of the State of Hawai‘i.”¹⁶⁴ Gerald Lam, an attorney and traditional Hawaiian healer, was instrumental in the insertion of this language and explained that he sought to prevent the prosecution of traditional healers who did not want to go through a certification process in order to practice.¹⁶⁵ Because of the State’s right to regulate Native Hawaiian traditional and customary rights,¹⁶⁶ however, failure to comply with the State’s medical licensure laws could still subject uncertified practitioners to legal action.

It is likely that the State would override a claim to practice a traditional Hawaiian right in the name of public safety. While the State has made a commitment to protecting Native Hawaiian traditional and customary rights,¹⁶⁷ it also has a very strong interest in protecting public wellbeing by regulating the practice of medicine.¹⁶⁸ Every state in the country shares this interest, and their regulatory authority derives from their police power to ensure the health, safety, and welfare of their citizens.¹⁶⁹ The policy underlying a state’s policing of medical providers is to prevent unskilled and unqualified practitioners from causing physical and financial harm to its citizens.¹⁷⁰

Hawai‘i case law has yet to address the conflict between the State’s authority to regulate the practice of medicine and its commitment to preserving Native Hawaiian traditions and customs. Courts across the country, however, “have upheld the states’ police power in medical regulation against free exercise [of religion], due process, . . . privacy [and liberty] challenges by providers and patients.”¹⁷¹ Thus, it is likely that Hawai‘i courts would also adopt the stance that the State’s interest in maintaining public safety through medical licensure outweighs the

¹⁶³ *Id.*

¹⁶⁴ HAW. REV. STAT. ANN. § 453-2(C) (Michie 2005).

¹⁶⁵ Lam, *supra* note 28.

¹⁶⁶ HAW. CONST. ART. XII, § 7 (stating that Native Hawaiian traditional and customary rights are “subject to the right of the State to regulate such rights”).

¹⁶⁷ *Id.*

¹⁶⁸ COHEN, *supra* note 131, at 24.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 25.

constitutional interest in protecting Native Hawaiian traditional and customary rights.

Currently, if a Kūpuna Council wishes to gain authority to certify kāhuna under the Healers' Law, it must submit a request to POL.¹⁷² In this request, the council must include the names of its members and evidence showing that its members are good candidates for recognition.¹⁷³ Traditional healers must disclose the names of their teachers, information about the healers' families, and the traditional Hawaiian healing disciplines in which they are proficient.¹⁷⁴

Since 2005, six Kūpuna Councils, have been recognized by POL.¹⁷⁵ The first to be recognized was the council at the Wai'anae Coast Comprehensive Health Center, which now operates at the Native Hawaiian Traditional Healing Center (hereinafter "NHTHC") in Wai'anae.¹⁷⁶ The remaining five Kūpuna Councils are at the five health care systems under POL's umbrella: Ke Ola Mamo in Honolulu, Ho'ola Lāhui Hawai'i on Kaua'i, Na Pu'uwai on Moloka'i, Hui No Ke Ola Pono on Maui, and Hui Mālama Ola Na 'Ōiwi on Hawai'i Island.¹⁷⁷ Currently, Wai'anae's NHTHC is the only council with certification procedures, and it is the only council to have certified traditional healers.¹⁷⁸

III. ANALYSIS

The Healers' Law exempts traditional Hawaiian healers from State medical licensure requirements and allows them to practice on the public. The law is exceptional because it gives the Hawaiian healing community, rather than the government, power to control its own practices. Since enactment of the Healers' Law, however, certification of traditional Hawaiian healers has been a contentious issue in the community.¹⁷⁹ This section will discuss the benefits and problems of the Healers' Law, and propose some solutions to improve the law's effectiveness.

¹⁷² E-mail from Babette Galang, Complementary Health Officer, Papa Ola Lokahi (April 19, 2010, 11:37 HST) (on file with author).

¹⁷³ E-mail from Babette Galang, Complementary Health Officer, Papa Ola Lokahi (April 19, 2010, 13:13 HST) (on file with author).

¹⁷⁴ *Id.*

¹⁷⁵ Spoehr, *supra* note 26.

¹⁷⁶ Interview with Kamaki Kanahale, Director, Native Hawaiian Traditional Healing Center, in Wai'anae, Haw. (Feb. 26, 2010).

¹⁷⁷ Spoehr, *supra* note 26.

¹⁷⁸ CHUN, *supra* note 13, at 41.

¹⁷⁹ Galang, *supra* note 26 (Feb. 16, 2010). *Accord* Greer *supra* note 26; Shintani, *supra* note 127.

A. Benefits of Certification

The benefits of certification as provided for by the Healers' Law are manifold. Certification, like other forms of credentialing, gives some level of protection so that unqualified or unscrupulous persons claiming to be healers do not harm the public.¹⁸⁰ Furthermore, because the Healers' Law gives the Hawaiian healing community power to decide who is fit to practice medicine, the community, rather than the government, can regulate itself.¹⁸¹ This allows for greater quality control of traditional Hawaiian medicine and protects the nuances of localized healing practices.

Additionally, the Healers' Law clarifies a process that allows healers to emerge and practice on the public, giving the Native Hawaiian community a means to use its own cultural practices to heal itself.¹⁸² Finally, certification could lead to more funding of traditional Hawaiian medicine,¹⁸³ which could give more Native Hawaiians the ability to seek kāhuna's services.

1. Protection for the Public

Traditional healing practices, like Western medical practices, are not always harmless and do not always benefit the patient.¹⁸⁴ For example, there are plants used in la'au lapa'au that could be deadly if administered incorrectly or at too high of a dosage.¹⁸⁵ Informal constraints, such as personal ethics and cultural norms ensure some level of quality service to a patient.¹⁸⁶ Indeed, a kahuna master will teach students a code of ethics to abide by,¹⁸⁷ to protect a patient's wellbeing. Without adherence to informal constraints, however, or formal constraints such as licensure, an unqualified or unscrupulous healer could seriously hurt a patient.¹⁸⁸

¹⁸⁰ Marcus Powlowski, *The Regulation of Traditional Practitioners: The Role of Law in Shaping Informal Constraints*, 32 N.C.J. Int'l L. & Com. Reg. 195, 217 (2006).

¹⁸¹ Shintani, *supra* note 127.

¹⁸² *Id.*

¹⁸³ COHEN, *supra* note 131, at 198 ("Providing access to licensed providers will be more palatable than reimbursing visits to unlicensed providers.").

¹⁸⁴ *Id.*

¹⁸⁵ Greer, *supra* note 26. Additionally, Hawaiian plants can induce serious adverse reactions if taken with other "herbs, medications, or supplements." Chai, *supra* note 48, at 18.

¹⁸⁶ Powlowski, *supra* note 180, at 217.

¹⁸⁷ Greer, *supra* note 26.

¹⁸⁸ In his article, *The Regulation of Traditional Practitioners: The Role of Law in Shaping Informal Constraints*, Marcus Powlowski gives numerous examples of medical mishaps by traditional healers in Africa. They include accidental poisoning, adverse outcomes resulting from procedures by traditional bonesetters, and permanent eye damage arising from the use of traditional medicine. Powlowski, *supra* note 180, at

In pre-European contact Hawai‘i, there were both formal and informal constraints that regulated the practices of Hawaiian healers. Not only did kāhuna have codes of practice, but the stratification of ancient Hawaiian society clearly demarcated the distinction between the kāhuna class and the other classes.¹⁸⁹ Although some from outside of the kāhuna class were able to learn healing arts, traditional Hawaiian medicine was more than just a trade that any individual could take up through schooling and apprenticeship.¹⁹⁰ The practice of traditional Hawaiian medicine was reserved to the successors of a genealogical lineage of healers,¹⁹¹ which was easily discoverable and known to the community. Persons falsely claiming to be kāhuna were subject to two types of punishment for their acts. They could suffer harsh governmental punishment for breaking kapu¹⁹² or kāhuna in the community could put various forms of death curses on them.¹⁹³

Today, the stratified Hawaiian societal system is long gone, and the average consumer does not inherently know whether those claiming to be healers are legitimate. It is possible that someone seeking medical care from a traditional healer could do research by asking around in their families or the community for referrals to legitimate healers.¹⁹⁴ Not everyone, however, has the ability, access, or means to conduct such a thorough investigation.

A license or similar device provides assurance to the public that the licensee holds the required qualifications to safely deliver healthcare.¹⁹⁵ Licensure, or some type of formal credentialing such as certification, could serve to protect members of the public from hazardously entrusting their health to someone who is less than qualified to deliver adequate care.¹⁹⁶ It also provides assurances to a consumer that the healthcare provider is a legitimate traditional Hawaiian healer, rather than a pretender or a “quack.”¹⁹⁷

205.

¹⁸⁹ MCGREGOR, *supra* note 15, at 3.

¹⁹⁰ Lam, *supra* note 28.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Greer, *supra* note 26.

¹⁹⁴ Telephone interview with Keola Chan, Executive Director, Hui Maui Ola (Apr. 9, 2010).

¹⁹⁵ Powlowski, *supra* note 180, at 198.

¹⁹⁶ *Id.* at 214-15.

¹⁹⁷ *Id.* at 201.

2. Community Self-Governance

An important benefit of the certification process, as delineated by the Healers' Law, is that because certification is granted by a Kūpuna Council rather than the State,¹⁹⁸ it gives members of the healing community the autonomous power to decide who is fit to practice traditional Hawaiian medicine.¹⁹⁹ This is important for several reasons, including quality control and the ability to create diverse, rather than strictly uniform, standards for certification.²⁰⁰

Quality Control

The ability of the Kūpuna Councils, rather than the government, to certify practitioners gives the traditional Hawaiian healing community the power to define traditional Hawaiian medicine and to control the quality of care.²⁰¹ This is important because members of the Kūpuna Councils are personally knowledgeable of traditional Hawaiian healing methods. This stands in contrast with older attempts at licensure, where the government exercised complete control over the licensure process.²⁰²

The government did not necessarily take measures in the past to ensure that licensure was in accordance with the actual traditional knowledge of practitioners. For example, the Board of Examiners that licensed applicants in the 1940s did not consist of traditional Hawaiian healers and was not educated about Hawaiian healing arts.²⁰³ The licensure requirements included the unreasonable mandate that applicants know the Latin names of plants they used for *lā'au lapa'au*.²⁰⁴ Under the Healers' Law, the Legislature gives power to the healing community itself, to determine the requirements proficient healers must have to receive certification.

a. Consideration of Localized Nature of Healing Practices

Another reason why it is important for the community, rather than the government, to decide who should be certified is that healing practices

¹⁹⁸ HAW. REV. STAT. ANN. § 453-2(C) (Michie 2005).

¹⁹⁹ Act 153, § 3, *reprinted in* 2005 Haw. Sess. Laws 378, 379.

²⁰⁰ Shintani, *supra* note 127.

²⁰¹ Act 153 states that Kūpuna Councils shall choose the subsequent members of their council, and that “[e]ach [kūpuna] council shall: (1) Be independent; (2) Not be a component of any state branch; (3) Not be subject to chapters 91 and 92, Hawaii Revised Statutes; and (4) Develop its own policies, procedures, and rules necessary or appropriate to certify traditional Hawaiian healers.” Act 153, § 3, *reprinted in* 2005 Haw. Sess. Laws 378, 379.

²⁰² CHUN, *supra* note 13, at 3-32.

²⁰³ Kekuni Blaisedell, *supra* note 1.

²⁰⁴ *Id.*

are highly localized.²⁰⁵ Kamaki Kanahale, Director of the NHTHC, was present at a conference that took place in Kona in the late 1980s, at which over one hundred traditional Hawaiian healers from across the State gathered to discuss the issue of certification.²⁰⁶ Kanahale explained that at the conference, healers sometimes disagreed over the appropriate healing protocols because “[there was] a huge range of practices, and each island healed differently using the same herb.”²⁰⁷ Thus, it became apparent to the healing community that methods vary by location.²⁰⁸

Governmental standards for credentialing medical practices are uniform for the entire State.²⁰⁹ Considering the diverse methods of traditional Hawaiian healing in different localities, however, it follows that a standardized certification process would not be culturally appropriate. Such a process would not recognize the nuances of localized healing practices, and could cause the healing protocols of one locality to dominate the practices of the entire State. This would undermine Act 162’s original intent to preserve the traditional Hawaiian healing arts.²¹⁰

Thus, rather than have a central body administer a standardized examination to determine whether an applicant should be licensed, it is more fitting for councils in different areas of the State to determine whether applicants from those areas adequately know local healing protocols.²¹¹ The Healers’ Law provides for this recognition of local healing protocols.²¹²

3. Clarity of the Law

Between 1965, when the State Legislature abandoned the licensure law for traditional Hawaiian healers,²¹³ and 1998, when Act 162 was passed, it was unclear whether the medical licensure laws applied to Hawaiian healers.²¹⁴ Indeed, in 1998, even members of the Hawai’i Board of Medical Examiners were under the impression that traditional Hawaiian

²⁰⁵ Kanahale, *supra* note 176.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See HAW. REV. STAT. ANN. §§ 442 (licensing standards for chiropractors), 452 (licensing standards for massage therapists), 452 (licensing standards for medical doctors and surgeons), 453D (licensing standards for mental health professionals), 455 (licensing standards for naturopaths) (Michie 2005).

²¹⁰ Act 162, § 1, *reprinted in* 1998 Haw. Sess. Laws 608, 608-09.

²¹¹ Galang, *supra* note 26 (Apr. 13, 2010).

²¹² Spoehr, *supra* note 26.

²¹³ CHUN, *supra* note 13, at 32.

²¹⁴ Act 162, § 1, *reprinted in* 1998 Haw. Sess. Laws 608, 608-09.

healers could practice medicine without a license.²¹⁵ Patricia Blanchett, M.D., Board member and Legislative Liaison for the Board of Medical Examiners, submitted testimony in support of Senate Bill 1946 stating, “In discussing this bill last year, the Board thought it to be unnecessary as it believed traditional native Hawaiian healers were already able to offer their services.”²¹⁶

This confusion may have resulted from the conflict between the traditional and customary rights provision of the State Constitution and State medical licensure laws.²¹⁷ Because of the uncertainty about which law applies to the medical kahunas’ ability to practice, legislative findings for Act 162 acknowledged that “statutory clarification” of the role of traditional Hawaiian healers in the “recognized and authorized medical arts” would be in the public interest.²¹⁸ Act 162 opened the door for traditional healers to practice after receiving certification, and subsequent amendments established that independent Kūpuna Councils would issue certification.²¹⁹

4. Native Hawaiian Self-Healing

Since the Hawaiian Renaissance of the 1970s, there has been a resurrected interest in traditional Hawaiian culture and Native Hawaiian self-governance.²²⁰ This interest has been manifested in the Hawaiian sovereignty movement and the Native Hawaiian Government Reorganization Act of 2010.²²¹ In spite of advances in Native Hawaiian self-governance, however, the Native Hawaiian people suffer disproportionately from a multitude of health problems.²²² Thus, if Hawaiians continue to experience the devastating effects of poor health, this will diminish the benefits of Native Hawaiian self-governance.²²³

²¹⁵ *Hearings, supra* note 18 (testimony of Dr. Patricia Blanchett, Board Member and Legislative Liaison, Hawai‘i Board of Medical Examiners).

²¹⁶ *Id.*

²¹⁷ Haw. Const. Art. XII, § 7. *Contra* HAW. REV. STAT. ANN. §§ 453-1, 2(a) (Michie 2005).

²¹⁸ Act 162, § 1, *reprinted in* 1998 Haw. Sess. Laws 608-10.

²¹⁹ *Id.*

²²⁰ Shintani, *supra* note 127.

²²¹ H.R. 2314, 111th Cong. (as passed by the House of Representatives, Feb. 23, 2010). On November 15, 2010, Senators Daniel Akaka and Daniel Inouye introduced into the Senate a new version of the Native Hawaiian Government Reorganization Act. S. 3945, 111th Cong. (2d Sess. 2010).

²²² Hope, *supra* note 95 (citing HAWAI‘I STATE DEP’T OF HEALTH, OFFICE OF HEALTH STATUS MONITORING Table 4.7 (2000)).

²²³ Shintani, *supra* note 127.

The Healers' Law allows kāhuna to use traditional Hawaiian practices to address Native Hawaiian health needs. With certification, healers can provide their services to the public, and can work at the various community health centers around the islands that typically serve low-income patients and many Native Hawaiians.²²⁴ Wai'anae's NHTHC is an example of a fully operational facility providing traditional healing services. Since 2005, the center has treated over 11,000 patients, most of whom are Native Hawaiian.²²⁵

Some in the Native Hawaiian healing community maintain that even without certification, kāhuna will still practice by "going underground," as they have in the past.²²⁶ This, however, would limit the ability of the greater Native Hawaiian population to access their services.²²⁷ Rather than keep kāhuna's healing abilities shielded and out-of-reach, the Native Hawaiian community would benefit if healers practiced in the open, where they could offer their services to a larger portion of the Native Hawaiian population.²²⁸

By providing a means through which traditional healers can use Hawaiian medicine to heal the Native Hawaiian community, the Healers' Law is consistent with the idea of cultural self-sustenance.²²⁹ The law allows practitioners to emerge and provide their services to a greater number of Native Hawaiians, thus offering them a viable Hawaiian alternative to Western medicine.²³⁰ This would lead to more cultural self-

²²⁴ Kanahale, *supra* note 176.

²²⁵ *Id.* The NHTHC also maintains a garden of 164 plants that are commonly used in traditional healing. *Id.*

²²⁶ Spoehr, *supra* note 26.

²²⁷ *See* Chang, *supra* note 5, at 267. Interviews with twenty-five medical kāhuna revealed that most of their clients were of Hawaiian ancestry. *Id.*

²²⁸ A study comparing the responses of several patients from Native Hawaiian families to lā'au lapa'au and Western medicine showed that patients sought out lā'au lapa'au because of recommendations, personal values, interest in Hawaiian culture, and dissatisfaction with Western medicine. Natalie N. Young & Kathryn L. Braun, *Lā'au Lapa'au and Western Medicine in Hawai'i: Experiences and Perspectives of Patients Who Use Both* 66(7) HAW. MED. J. 176, 178 (2007), available at http://www.hawaiiimediicaljournal.org/HMJ_Jul07.pdf.

²²⁹ Several Native Hawaiians who have used lā'au lapa'au have reported that the use of Hawaiian medicine had a positive effect on their cultural identity. *Id.*

²³⁰ Patients who have used both lā'au lapa'au and Western medicine have noted that as compared with Western medicine, lā'au lapa'au is more personal, more holistic, and more spiritual and cultural. *Id.* Some patients expressed that they used lā'au lapa'au because they had medical problems that Western medicine did not address. *Id.* at 178. Additionally, they stated that lā'au lapa'au was more individualistic and effective for them than Western medicine, and that the primary reason they used Hawaiian medicine was "because it works." *Id.*

sustenance because Native Hawaiians would be able to use their ancestral traditions to address their healthcare needs.

5. Credibility for Insurance and Other Funding

Another benefit of certification is that it provides traditional Hawaiian healers with more credibility. This could sway insurance companies to cover traditional Hawaiian healing practices, if individuals were to pay for those services.²³¹ In the past, the Hawai'i Medical Service Association (HMSA), Hawai'i's largest insurance provider, has shown an interest in cooperating with traditional Hawaiian healers, if there were some established guidelines for practice.²³² Traditionally, kāhuna practiced independently, rather than as an organized and uniform professional group.²³³ Thus, setting standards applicable to every kāhuna might be difficult.²³⁴ Kūpuna Councils, however, would be more organized and uniform, perhaps making it easier for them to work toward coverage by HMSA.

Currently, one insurance provider in the State covers traditional Hawaiian healing practices.²³⁵ Aloha Care, Hawai'i's third largest insurance provider, covers some Native Hawaiian healing services under its health and wellness program.²³⁶ Aloha Care covers certain clinical health conditions²³⁷ and target issues such as "weight management, smoking cessation, fitness, and stress management."²³⁸ There are no

²³¹ Chan, *supra* note 59, at 15. Note, however, that traditionally, Hawaiian healers were strictly prohibited from collecting fees for their services. Instead, a patient could offer *ho'okupu*, or a gift made in gratitude. Hewett et al., *supra* note 33, at 419. Today, traditionalists believe that healing services should not be given in exchange for fees. In contrast, however, there are others who belong to a newer school of thought and believe that healers should be able to earn a living off of their healing services. Chan, *supra* note 59, at 14-15. This notion is in stark contrast to the traditional idea of healing for no charge, to which conventional practitioners still adhere. *Id.* at 15.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ PAPA OLA LOKAHI, CHRONOLOGY OF EVENTS RELATING TO TRADITIONAL HAWAIIAN HEALING PRACTICES SINCE 1985 (2008), available at http://www.papaolalokahi.org/coconut/news/pdf/POL_chronology.pdf.

²³⁶ Aloha Care, *Evidence of Coverage*, http://www.alohacare.org/userfiles/file/PDF/ACA%20Documents/aca_EOC2009.pdf (last visited Nov. 25, 2010). When a patient's primary care physician refers him or her, treatment by a Native Hawaiian practitioner is covered. *Id.*

²³⁷ *Id.* (stating that conditions that may be treated by traditional Hawaiian healing services include hypertension, cholesterol, asthma, and special diets).

²³⁸ *Id.*

copayments for an Aloha Care customer who is eligible for these services.²³⁹

Even for practitioners that do not make their livelihood from their healing practices, certification may still be useful to gain grants and other forms of funding for healing services.²⁴⁰ This can help practitioners provide their services to patients, without having to charge a fee. For example, the NHTHC in Wai‘anae is able to provide traditional Hawaiian medicine at no charge to its patients,²⁴¹ because it receives funding from its parent organization, the Wai‘anae Coast Comprehensive Health Center.²⁴² Additionally, because the NHTHC has legally certified practitioners who serve the Native Hawaiian community; organizations, governmental agencies, and individuals, have given the NHTHC grants to build its facilities and conduct cultural programs aimed at preserving Hawaiian healing arts.²⁴³

B. *Problems with Certification*

While it is true that there are many positive aspects of the Healers’ Law, there are also several problems associated with certifying traditional Hawaiian practitioners. One problem is that the law has caused a rift in the Hawaiian healing community.²⁴⁴ This is because many practitioners oppose the idea of certification,²⁴⁵ its allowance of non-Native Hawaiians into the practice traditional Hawaiian medicine,²⁴⁶ and the possibility of financial exploitation.²⁴⁷ Another worry is that certification could cause Hawaiian healing practices to devolve into the quick-paced, impersonal style of the Western health care delivery system.²⁴⁸ An additional problem is that only one Kūpuna Council has certified anyone so far, and the last certificate was issued in 2005.²⁴⁹ Hence, the Healers’ Law is not without criticism. Its problems, however, have solutions and do not outweigh the benefits of certification.

²³⁹ *Id.*

²⁴⁰ COHEN, *supra* note 131, at 98.

²⁴¹ Kanahale, *supra* note 176. The NHTHC does accept ho‘okupu, which is in keeping with traditional practices. Gifts are not required, however. *Id.*

²⁴² Telephone interview with Helen O’Connor, Traditional Hawaiian practitioner, Native Hawaiian Traditional Healing Center (Apr. 23, 2010).

²⁴³ *Id.*

²⁴⁴ Keola Chan, *supra* note 194.

²⁴⁵ Galang, *supra* note 26 (Feb. 16, 2010).

²⁴⁶ Greer, *supra* note 26.

²⁴⁷ Galang, *supra* note 26 (Apr. 13, 2010).

²⁴⁸ Greer, *supra* note 26.

²⁴⁹ Kanahale, *supra* note 176.

1. Division Regarding Certification Itself

The Hawaiian healing community is divided between those who think that certification is appropriate, and those who do not.²⁵⁰ The divisiveness stems from several issues. Some in the Hawaiian healing community think that certification is just a proxy for government licensure,²⁵¹ which is culturally inappropriate.²⁵² Others are concerned about certification opening the door for non-Native Hawaiians to legitimately practice traditional Hawaiian medicine.²⁵³ Additionally, some take issue with certification because it could facilitate the movement toward a pay-for-services model.²⁵⁴

a. Certification as a Proxy For Government Licensure

There are many in the Hawaiian healing community who believe that the certification process set forth in the Healers' Law is synonymous with government licensure.²⁵⁵ There is a good logical basis for this belief. Although the Healers' Law creates an exemption to the State licensing laws, it requires a certificate for healers to practice.²⁵⁶ Hence, a healer must still submit his or her application to a board or council and go through a process to prove fitness to practice traditional Hawaiian healing. In that sense, the Healers' Law is not very different than licensure laws.²⁵⁷

A key difference between certification under the Healers' Law and licensure of other medical disciplines, however, is that State law does not dictate the requirements for the certification of traditional Hawaiian healers.²⁵⁸ For example, Hawai'i law specifies which schools those seeking a naturopathy license can attend and the governor appoints the board that issues, revokes, suspends, and sets forth the standards for licensing.²⁵⁹ Naturopathy licensing laws also state that the board will be in charge of an exam, which all licensing candidates across the State must pass to obtain a license.²⁶⁰ This stands in contrast to the Kūpuna Council

²⁵⁰ Galang, *supra* note 26 (Feb. 16, 2010).

²⁵¹ Lam, *supra* note 28.

²⁵² PAPA OLA LOKAHI, *supra* note 145.

²⁵³ Greer, *supra* note 26.

²⁵⁴ *Id.*

²⁵⁵ Lam, *supra* note 28.

²⁵⁶ *Id.*

²⁵⁷ HAW. REV. STAT. ANN. § 453 (Michie 2005).

²⁵⁸ HAW. REV. STAT. ANN. § 453-2(c) (Michie 2005).

²⁵⁹ *Id.* § 455-2-3.

²⁶⁰ *Id.* § 455-4-5.

system, under which the councils are free from State imposition and can create certification guidelines as they see fit.

The Kāhuna Statement also asserted that licensure and certification issues are the kuleana, or responsibility,²⁶¹ “of the Hawaiian community itself through kupuna who are perpetuating these practices.”²⁶² Certification under the Healers’ Law, however, *does* give the Hawaiian healing community the power to directly preside over certification. Several Kūpuna Councils can exist at once and each council has the ability to choose its own members. Hence while it is true that the government will recognize the certificates, the traditional Hawaiian healing community holds the power to determine how it will issue the certificates and the government does not have a hand in setting these standards.

b. Conflicting Beliefs About Legitimizing Non-Hawaiian Practitioners

The Hawaiian healing community does not unanimously accept non-Native Hawaiians as traditional Hawaiian healers. The language of Acts 162 and 304 reflect this sentiment, as both confined certification to healers of Hawaiian ancestry. The subsequent amendments to the Healers’ Law have omitted the requirement of Native Hawaiian ancestry for certification. This resulted from the testimony for Act 162 and its subsequent amendments, which expressed concern over the law’s exclusion of non-Native Hawaiians.²⁶³

Master lā‘au lapa‘au practitioner, Papa Auwae, wrote in his testimony regarding S.B. 1946 that he held classes to teach students his healing arts, and that the “selection [of students] was not based on ethnicity but rather on their spirituality.”²⁶⁴ Later in his testimony, Papa Auwae expressed concern about limiting traditional Hawaiian healing to Native Hawaiians, saying, “[M]any of my students who have graduated are not Hawaiians. Will they be excluded from practicing what I have taught and will continue to teach them?”²⁶⁵

In spite of Papa Auwae’s sponsorship of non-Native Hawaiians in the field of traditional Hawaiian medicine, some practitioners still believe that non-Native Hawaiians should not practice traditional Hawaiian healing.²⁶⁶ A positive aspect of the Healers’ Law is that Kūpuna Councils

²⁶¹ PUKUI & ELBERT, *supra* note 30, at 179.

²⁶² PAPA OLA LOKAHI, *supra* note 145.

²⁶³ *Hearings*, *supra* note 18 (testimony of “Papa” Henry A. Auwae, Master, Traditional Herbal Medicine).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Greer, *supra* note 26.

can determine for themselves whether it is pono, or right,²⁶⁷ to accept non-Native Hawaiians as practitioners. If many non-Native Hawaiians have been trained by master kahunas, however, it may be appropriate for the Kūpuna Councils to certify these practitioners, so that the teaching of the masters can survive through the practices of their students.²⁶⁸

c. Worries About Financial Exploitation

Division also exists in the healing community about whether practitioners should be able to charge for their services.²⁶⁹ The general consensus amongst older healers today is that it is not appropriate for practitioners to do so.²⁷⁰ This is in keeping with the traditional notion that healers should not be paid for their services but can accept ho‘okupu, or gifts,²⁷¹ for their work.²⁷² Many adherents to this traditional school of thought maintain second jobs for their subsistence, and offer their healing services at no cost.²⁷³

Other healers, however, have veered away from the traditional idea of “working for aloha,”²⁷⁴ and argue that they should be able to earn income for their practices.²⁷⁵ For these healers, who are often younger in age, certification would be desirable, since it would provide greater credibility and the possibility of insurance reimbursements.²⁷⁶

It is true that if practitioners earned a livable income from healing, they could possibly devote more time to providing their services, and could serve a greater number of Native Hawaiians.²⁷⁷ This is because they would not have to worry about seeking an alternate source of income to

²⁶⁷ PUKUI & ELBERT, *supra* note 30, at 340.

²⁶⁸ See *Hearings*, *supra* note 18 (testimony of “Papa” Henry A. Auwae, Master, Traditional Herbal Medicine).

²⁶⁹ Hewett et al., *supra* note 33, at 419.

²⁷⁰ PAPA OLA LOKAHI, *supra* note 145.

²⁷¹ PUKUI & ELBERT, *supra* note 30, at 186.

²⁷² Hewett et al., *supra* note 33, at 419. The idea behind not charging for services was to enable any person in the community to see a healer when they were sick. O’Connor, *supra* note 241 (Apr. 23, 2010).

²⁷³ Interview with Janice Keonaona Kalua, Kūpuna Council Head, Na Lei Hulu No Ke Ola Mamo, in Wai‘anae, Haw. (Feb. 26, 2010).

²⁷⁴ Kanahele, *supra* note 176.

²⁷⁵ Kalua, *supra* note 273. This stance has caused much disagreement in the healing community. There has been recent outrage at the publishing of a fee list by a group of non-certified healers that charges up to ten-thousand dollars for treatment. Galang, *supra* note 26 (Feb. 16, 2010). See Lā‘au Kāhea, *Herbal Treatment Fees*, <http://www.laaukaheahawaii.com/> (last visited Nov. 25, 2010).

²⁷⁶ Chan, *supra* note 59, at 15.

²⁷⁷ Keola Chan, *supra* note 194.

provide them with their basic needs.²⁷⁸ But as charging money for services is already a divergence from traditional healing practices,²⁷⁹ one would have to wonder what other compromises to tradition would result from the process of making traditional healing compatible to the realities of the modern world. One possible way to prevent financial exploitation by traditional Hawaiian healers is to institute revocation guidelines, which will be discussed in more detail later in this comment.

2. Possible Westernization of Healthcare Delivery

A concern that may be inhibiting certification is the fear that certification could open the door to the Westernization of healers' practices. There is currently no prohibition in the Healers' Law preventing certified kāhuna from charging for their services, and certification may eventually enable kāhuna to collect reimbursements from workers' compensation and insurance companies.²⁸⁰ It is natural for one to consider the ramifications of incorporating financing into Hawaiian medicine and the impact it has had on Western medical care.

a. *Will Managed Care Become a Reality for Traditional Hawaiian Medicine?*

If kāhuna are able to charge for their services and collect insurance reimbursements, there is a possibility that this could lead to the degradation in the quality of care. An observable example of this is the way Western medicine is currently delivered in the United States healthcare system, which uses managed care to control costs.²⁸¹ The result of this managed care system, however, is that primary care physicians have altered the way they provide care so that they can receive financial rewards or maintain standing within their healthcare institutions.²⁸² Since insurance reimbursement rates paid to physicians are relatively low, physicians have responded by treating a high volume of patients to remain profitable.²⁸³ This has compromised the quality of health care, however, and patients are now subjected to short and rushed appointments, with physicians focusing on disease treatment rather than prevention.²⁸⁴

²⁷⁸ *Id.*

²⁷⁹ Hewett et al., *supra* note 33, at 419.

²⁸⁰ COHEN, *supra* note 131, at 98.

²⁸¹ Gwendolyn Roberts Majette, *From Concierge Medicine to Patient-Centered Medical Homes: International Lessons & the Search for a Better Way to Deliver Primary Health Care in the U.S.*, 35 Am. J. L. and Med. 585, 587(2009).

²⁸² *Id.* at 589.

²⁸³ *Id.*

²⁸⁴ *Id.*

A managed care, volume-based approach to healthcare delivery is not compatible with traditional Hawaiian healing.²⁸⁵ Rushed appointments will not work for traditional Hawaiian medicine, which calls for an invested relationship between the patient and the healer, who treats a patient's body, mental state, and spirituality.²⁸⁶ Healers and their patients put much effort into building a trusting relationship with each other, and visits are often long and laborious. For instance, Bobby Alcain, a traditional Hawaiian healer on Moloka'i, worked together with two other kāhuna to treat a patient whom they all saw twice a week for nine months.²⁸⁷ Each visit lasted for over an hour,²⁸⁸ standing in contrast to a managed care physician's visit, which lasts, on average, for eighteen minutes.²⁸⁹ Thus, if there was pressure to focus on a large volume of appointments, the kāhuna could not follow their traditional healing protocols, and this would compromise the integrity of traditional Hawaiian medicine.

b. Will Healing Become a Luxury?

Certification also summons the question of whether, because of a possible requirement to pay for services, traditional Hawaiian healing practices will become a luxury for consumers.²⁹⁰ Aside from Native Hawaiians' historical distrust of hospitals, Native Hawaiians have also sought kāhuna because their services were more affordable than the services of a Western physician. Lomilomi, which for the last several decades has been the only legal method of traditional healing, is currently inaccessible to many in the Native Hawaiian community. Many lomilomi

²⁸⁵ Additionally, traditional Hawaiian medicine focuses more on long term treatment and the underlying cause of symptoms, rather than the reactive, end-stage treatment methods of Western medicine. Young & Braun, *supra* note 228, at 178.

²⁸⁶ Patients using both traditional Hawaiian medicine and Western medicine reported feeling closer to traditional Hawaiian medical practitioners because they took more time to diagnose and treat the patients, while their Western counterparts were restricted in time and relationship. *Id.* at 179. "[P]articipants said it was easier to explain symptoms to their healer than to their physician. They noted the rushed atmosphere about the physician, which precluded the chance for the patient to provide a full health background, inclusive of personal and cultural factors." *Id.*

²⁸⁷ Telephone interview with Bobby Alcain, Traditional Hawaiian Healing Practitioner (Apr. 13, 2010).

²⁸⁸ *Id.*

²⁸⁹ Rajesh Balkrishnan et al., *Capitation Payment, Length of Visit, and Preventive Services: Evidence from a National Sample of Outpatient Physicians*, 8(4) AM. J. MANAGED CARE 332, 335 (2002), available at <http://www.ajmc.com/issue/managed-care/2002>.

²⁹⁰ Users of both Hawaiian medicine and Western medicine have perceived Hawaiian medicine to cost "little or nothing," while they have described Western medicine as being "very expensive." Young & Braun, *supra* note 228, at 178.

practitioners, who are licensed under Hawai'i's massage licensing laws, charge excessive rates for their services. These rates are as high as \$80 per sixty-minute period.²⁹¹ Will traditional Hawaiian medicine follow the same fate as lomilomi?

The traditional method of administering lomilomi, like all other Hawaiian medicine, was to provide the services for free.²⁹² Massage licensing, however, contains no restriction on charging for services and practitioners can earn a living through their own practices.²⁹³ If practitioners who are certified in other traditional Hawaiian healing disciplines follow the same path as their fee-charging lomilomi counterparts, traditional Hawaiian medicine could become inaccessible to many Native Hawaiians. Hence, what was customarily free may become a luxury for many and may prevent Native Hawaiians from seeking the healthcare on which they had previously relied.

Concerns that certification will cause traditional Hawaiian medicine to mirror Western medicine in terms of quality or access should not prevent the traditional Hawaiian healing community from embracing certification. The Kūpuna Councils can require practitioners to work under their supervision.²⁹⁴ Furthermore, by partnering with other organizations for support, the Kūpuna Councils can foster a working environment that is appropriate for traditional healing.²⁹⁵

3. Lack of Issuance

Another major problem with certification is that very few healers have been certified. Currently, six Kūpuna Councils have been recognized by POL,²⁹⁶ but only the Kūpuna Council at the NHTHC has a process in place to test and approve applicants for certification.²⁹⁷ Even that Kūpuna Council, however, has not issued any certificates since 2005.²⁹⁸ None of

²⁹¹ *E.g.*, Hawaiian Lomilomi massage in Kailua-Kona, Big Island of Hawaii, <http://nakinikini.tripod.com> (last visited Nov. 25, 2010).

²⁹² Greer, *supra* note 26.

²⁹³ *See* HAW. REV. STAT. ANN. § 452 (Michie 2005).

²⁹⁴ Kanahale, *supra* note 176.

²⁹⁵ The NHTHC in Wai'anae has a good working relationship with its parent clinic, the Wai'anae Coast Comprehensive Health Center, which funds the NHTHC. The NHTHC has its own separate facilities and can see patients, without charging for services. Visits are relaxed, and thus, are in keeping with traditional protocols. O'Connor, *supra* note 241 (Apr. 13, 2010).

²⁹⁶ Galang, *supra* note 26 (Feb. 16, 2010). The six Kūpuna councils and their locations are the Native Hawaiian Traditional Healing Center (NHTHC) in Wai'anae, Ke Ola Mamo in Honolulu, O'ahu, Ho'ola Lāhui Hawai'i on Kaua'i, Na Pu'uwai on Moloka'i, Hui No Ke Ola Pono on Maui, and Hui Mālama Ola Na 'Ōiwi on Hawai'i. *Id.*

²⁹⁷ Kanahale, *supra* note 176.

²⁹⁸ *Id.* The NHTHC issued seven certificates in 2005, but has not issued any

the other Kūpuna Councils have certified a single person and all are struggling with setting workable certification procedures.²⁹⁹

Margaret Kalamau of Ke Ola Mamo explained that one of the reasons that most Kūpuna Councils have not yet certified practitioners is that the councils are new and their members are still creating guidelines.³⁰⁰ She also explained that most Kūpuna Council members have full time jobs taking up their time and energy.³⁰¹ Additionally, although elders are essential to keeping the Kūpuna Councils informed about traditional healing practices, some elders have not come forward to guide the Kūpuna Councils.³⁰² Some may not participate because they do not believe in certification and do not wish to be involved in the process.³⁰³

Hence, while the law is in place to allow for the legal credentialing of traditional Hawaiian healers, there have been very few individuals who have received certification.³⁰⁴ This calls into question whether those who are not formally certified will be seen as functioning illegally if they practice traditional healing without a certificate.³⁰⁵ It also raises questions of how long the certification process will be stalled due to administrative and procedural problems, and what ramifications the lack of certification will have on traditional healing practice.

If the Kūpuna Councils are not able to certify practitioners, then little will be achieved by the enactment of the Healers' Law, and Hawaiian healing arts will remain at a risk of being lost with the passing of traditional practitioners.³⁰⁶ The Kūpuna Councils could benefit from more administrative support so that they can focus on constructing workable, functioning certification procedures.³⁰⁷ Funding would help members of Kūpuna Councils devote more time to devising credentialing standards and certifying practitioners.³⁰⁸ Furthermore, funding could also help with programs that bring the Kūpuna Councils together with elders in the

since then. *Id.*

²⁹⁹ Kalua, *supra* note 273.

³⁰⁰ Telephone interview with Margaret Kalamau, Operations Administrator, Ke Ola Mamo (Apr. 12, 2010).

³⁰¹ *Id.*

³⁰² Alcaín, *supra* note 287.

³⁰³ *Id.*

³⁰⁴ Galang, *supra* note 26 (Feb. 16, 2010).

³⁰⁵ Lam, *supra* note 28.

³⁰⁶ *Hearings*, *supra* note 18 (testimony of Dr. Terry Shintani, President, Hawai'i Health Foundation).

³⁰⁷ Kalua, *supra* note 273.

³⁰⁸ *Id.*

Hawaiian healing community,³⁰⁹ so that the councils can ensure that their decisions reflect traditional healing protocols.

C. *Suggestions for the Implementation of the Healers' Law*

Within the last thirty years, the health plight of the Native Hawaiian people has been the catalyst for federal and State legislation recognizing traditional Hawaiian healers.³¹⁰ The Healers' Law was set up so that the traditional Hawaiian healing community itself could have autonomous power over the certification process for practitioners.³¹¹ Therefore, the impact of the Healers' Law on traditional Hawaiian medicine is ultimately up to the healing community and its Kūpuna Councils. Despite certifications' potential side-effects, there are ways the community can use the Healers' Law to its benefit.

1. Cooperation With Western Medical Institutions

Today, Western medical institutions are the dominant healthcare providers in society. In spite of the availability of both Western and traditional Hawaiian medicine, however, there does not need to be competition between the two.³¹² It is desirable for these healthcare systems to work together to best serve the community's healthcare needs.³¹³ For this to happen, practitioners in each field need to acknowledge the legitimacy of the others' healing methods.³¹⁴ At the Wai'anae Coast Comprehensive Health Center, for example, many of the doctors have accepted traditional Hawaiian medical practices, and will refer patients to the NHTHC for treatment.³¹⁵ This cooperation between the two centers provides patients with more treatment options.³¹⁶

Additionally, partnering with Western medical clinics may enable Hawaiian practitioners to provide services without charging their

³⁰⁹ The NHTHC in Wai'anae is currently working on several projects to compile information on traditional Hawaiian healing protocols from kūpuna around the State. The center is able to fund these projects with various grants. Kanahale, *supra* note 176; O'Connor, *supra* note 241 (Apr. 13, 2010).

³¹⁰ PAPA OLA LOKAHI, CHRONOLOGY OF EVENTS RELATING TO TRADITIONAL HAWAIIAN HEALING PRACTICES SINCE 1985 (2008).

³¹¹ Shintani, *supra* note 127.

³¹² In their conclusion, the authors of a study comparing patient responses to lā'au lapa'au "urge[d] Western and traditional practitioners to increase their awareness of each other's approach, and to work together to optimize healthcare provided to people of all backgrounds and cultures." Young & Braun, *supra* note 228, at 180.

³¹³ *Id.*

³¹⁴ O'Connor, *supra* note 241 (Apr. 13, 2010).

³¹⁵ *Id.*

³¹⁶ *Id.*

patients.³¹⁷ This could quell fears that traditional Hawaiian healers would succumb to the high patient turn-around pressures that plague physicians in the Western medical system. It would also help make traditional medicine available to more patients.

The NHTHC has achieved this through cooperation with its parent organization, the Wai‘anae Coast Comprehensive Health Center, which allots money within its budget to fund the NHTHC.³¹⁸ This financial assistance gives the Hawaiian healing practitioners at the NHTHC the ability to see patients while keeping within the traditional guideline of not charging patients for their work.³¹⁹ This also helps patients to access traditional Hawaiian healthcare, because they do not have to worry about the cost of those services.³²⁰

2. Revocation Clauses in Certificates

A last suggestion that would help maintain the quality of traditional Hawaiian medicine is for each Kūpuna Council to insert revocation clauses into their certificates to prevent practitioners from breaking certain guidelines. Some Kūpuna Councils have not certified any practitioners, in part, because of their concern that if they certify someone, that person could set up their own business and stray away from traditional Hawaiian medical practices.³²¹ For quality assurance purposes, the Kūpuna Councils wish to have certified practitioners work with the Kūpuna Councils or the healthcare institutions to which the councils are attached.³²² This way the councils can oversee the practices of those who they certify.³²³

To ensure compliance, Kūpuna Councils could insert revocation clauses into the certificates, invalidating them if any of the clauses are broken.³²⁴ Act 153 gave Kūpuna Councils the autonomy to “develop

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* The Wai‘anae Coast Comprehensive Health Center pays the administrative staff’s salary and the facility costs for NHTHC, but it does not compensate the practitioners. *Id.* (Apr. 23, 2010). The practitioners therefore stay within traditional guidelines of not charging patients for services, but do accept ho‘okupu for their work. *Id.* Additionally, the Wai‘anae Coast Comprehensive Health Center does not give the NHTHC any quotas for the numbers of patients that it must treat, *id.*, so the NHTHC is not harried by the need to maximize patient turn-around.

³²⁰ *Id.* (Apr. 13, 2010).

³²¹ Galang, *supra* note 26 (Apr. 13, 2010).

³²² Spoehr, *supra* note 26.

³²³ *Id.*

³²⁴ The NHTHC in Wai‘anae already has a policy where it reserves the right to revoke a practitioner’s license in certain instances. Kanahele, *supra* note 176.

[their] own policies, procedures, and rules necessary or appropriate to certify traditional Hawaiian healers.”³²⁵ If noncompliance with traditional practices is a hindrance to certification, then Kūpuna Councils should consider instituting revocation clauses into their certification policies.

This would be parallel to the power State law gives to various medical boards to revoke medical practitioners’ licenses. For example, Hawai‘i Revised Statutes section 453-8 delineates instances in which the Board of Medical Examiners can revoke a doctor’s license.³²⁶ Elements that justify revocation include “assuring a permanent cure for an incurable disease,”³²⁷ and, “[c]onduct or practice contrary to recognized standards of ethics of the medical profession as adopted by [various Hawai‘i and American Medical Associations].”³²⁸ The statutes governing the practice of podiatry even allow the Board of Medical Examiners to revoke a podiatrist’s license for “[w]illfully betraying a professional secret,”³²⁹ something that might be useful to kāhuna, who traditionally have had many professional secrets.

Hence, it is not unusual for credentialing guidelines to contain revocation provisions limiting practitioners’ acts. Since Kūpuna Councils have the ability to set their own certification guidelines, they should consider using revocation clauses to abate fears about quality control and to encourage certification.

IV. CONCLUSION

Act 162 paved the way for Western legalization of traditional Hawaiian healing practices. It appropriately allowed for a community-based, rather than governmental, identification of who will be able to practice traditional Hawaiian medicine and provide services to the general public. Perhaps the most important feature of the law is that it gives the Kūpuna Councils independence to certify traditional healers. Centralized regulation of the certification process would mirror State governance, which is inappropriate for a cultural art form that is highly localized, spiritual, and not uniform across the State.³³⁰

Traditional Hawaiian healing arts should be available to the Native Hawaiian people, who need those services to remedy their dire health situation. The Western healthcare system has not been able to solve many of the Native Hawaiian community’s health problems. Traditional Hawaiian medicine is a viable alternative to Western allopathic medicine,

³²⁵ Act 153, § 3, *reprinted in* 2005 Haw. Sess. Laws 378, 379.

³²⁶ HAW. REV. STAT. ANN. § 453-8 (Michie 2005).

³²⁷ *Id.* § 453-8(3)(B).

³²⁸ *Id.* § 453-8(9).

³²⁹ *Id.* § 453E-(6)(3).

³³⁰ *See* PAPA OLA LOKAHI, *supra* note 145. *See also* Kanahēle, *supra* note 176.

and it also empowers the Native Hawaiian community because of its cultural self-healing aspect. The ongoing debate over certification has caused division amongst Hawaiian healing practitioners and has distracted them from healing the community. As Keola Chan, a traditional Hawaiian healing practitioner, stated, “There is a great need for healers; their kuleana lies within helping the people.”³³¹ It is not for the author of this comment, or the government, to tell the Hawaiian healing community how to institute certification, or how to define traditional healing practices. Indeed, the challenges of fitting a traditional and spiritual practice within a Western framework are numerous. To the traditional Hawaiian healing community, however, the improvement of Native Hawaiian health should be a consideration that remains at the forefront of all deliberations.

Certification can be a useful instrument to engender a broader reach of traditional Hawaiian medicinal services. It is the author’s hope that the traditional Hawaiian healing community will embrace the opportunity to shape the standards for certification, so that they can bring more practitioners out into the open to help heal the Native Hawaiian people.

³³¹ Keola Chan, *supra* note 194.