NO. 23089

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

MARGOT C. TORRES, Plaintiff-Appellee

vs.

ALFRED TORRES, JR., Defendant

and

LOUAN TORRES, Successor-In-Interest/
Party-In-Interest-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 88-0178)

ORDER OF AMENDMENT
(By: Acoba, J.[1])

Appendix A, attached to the dissenting opinion of Acoba, J., that was filed with the majority opinion on December 17, 2002, is deleted and replaced with the attached Appendix A.

The Clerk of the Court is directed to incorporate the foregoing change in the original opinion and take all necessary steps to notify the publishing agencies of these changes.

DATED: Honolulu, Hawai'i, January 6, 2003.

Associate Justice

1/ The Honorable Mario R. Ramil, who joined the dissent, has resigned his position effective December 30, 2002.

APPENDIX A

The lack of published opinions of this court has been cited as a "problem" by the legal community. See Report of the [Hawai'i] AJS Committee Reviewing Unpublished Opinions at 4 [hereinafter, "the Report"] and discussion infra. Views regarding that issue have been largely relegated to unpublished opinions, which are generally unavailable. Accordingly, I have included the following discussion as part of my concurrence. See N.K. Shimamoto, Justice is Blind, But Should She be Mute?, 6 Hawai'i B.J. 6, 7 (2002) [hereinafter Justice is Blind] ("The publication debate is currently a catch-22 for some judges and justices: if a judge or justice believes that an opinion should be published, and it is, there is no dispute over publication; if, however, a judge or justice believes that an opinion should be published, *and the majority votes not to publish*, then the judge or justice's work product (including why that particular case should be published) is simply relegated to a dissent or concurrence in an *unpublished* opinion." (Italicized emphases in original.)).

I.

It is in the nature of stare decisis that, when this court in effect decides matters of first impression, we in fact establish precedent and, therefore, should publish our opinion. When we fail to publish, we depart from the established procedure which lends legitimacy to our decision-making process and also

neglect our responsibility to provide guidance to courts, attorneys, and parties. The import of such an act is to make law for one case only, singling it out from all others, a process that can only be described as arbitrary. When there are fundamental reasons for publishing and we are given the opportunity to do so but fail to, we also compel our trial courts and counsel to rely on and employ the precedent established in other jurisdictions when trying cases in our own state.

II.

Unless we publish questions presented to us, they will continue to go unaddressed in any authoritative manner, and error may compound in other, similar cases leaving counsel and the trial courts to guess at the law to apply. Therefore, the fact that a majority of the court votes not to publish should not be determinative of the publication question. It is in the order of case law development that discourse on issues not covered in any existing published opinion should be disseminated and made available for examination, consideration, and citation by those similarly affected or interested. Only in the light of open debate can the dialectic process take place, subject to the critique of the parties, the bar, the other branches of government, legal scholars, and future courts. The resulting process of analysis and critique hones legal theory, concept, and rule.

Consequently, it should not matter whether such discourse is set forth in a majority, concurring, or dissenting

opinion. Justice Ramil has suggested adoption of a rule like that of the First Circuit Court of Appeals that would require publication of a case (1) when the case is unanimously decided by a single opinion without a dissent, if, "[a]fter an exchange of views," any single justice votes for publication; or (2) with "a dissent or with more than one opinion[,] . . . unless all participating judges decide against publication." Doe v. Doe, 99 Hawai'i 1, 15, 52 P.3d 255, 269 (2002) (Ramil, J., dissenting, joined by Acoba, J.) (quoting United States Court of Appeals of the First Cir. R. 36(b)(2)). See, N.K. Shimamoto, Justice is Blind, supra at 12 (Adoption of a "'one justice publication' rule, unlike the 'majority rules' rule, faithfully abides by the premises upon which SDOs and memorandum opinions were based, promotes judicial accountability, and facilitates a judge or justice's role in the legal system -- without sacrificing judicial economy."). Similar rules have been adopted in other jurisdictions.[1]

1/ See, e.g., 6th Cir. R. 206 ("The following criteria shall be considered by panels in determining whether a decision will be designated for publication in the Federal Reporter: . . . (4) whether it is accompanied by a concurring or dissenting opinion . . . . An opinion or order shall be designated for publication upon the request of any member of the panel."); 8th Cir., App. I, 28 U.S.C.A. ("The Court or a panel will determine which of its opinions are to be published, except that a judge may make any of his [or her] opinions available for publication."); 9th Cir. R. 36-2 ("A written, reasoned disposition shall be designated as an OPINION only if it: . . . [i]s accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression." (Capitalization in original.)); Ala. R. App. P. 53 ("[I]f in a 'No Opinion' case a Justice or Judge writes a special opinion, either concurring with or dissenting from the action of the court, the reporter of decisions shall publish that special opinion, along with a statement indicating the action to which the special opinion is addressed."); Ariz. Sup. Ct. R. 111(b)(4) ("Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine[s] that it involves a legal or factual issue of unique interest or substantial public importance, or if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the

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III.

Justice Ramil and I have agreed and will continue to agree to any recommendation by any of the other justices to publish a case even if the majority will not adhere to such a policy. We do so because we support and respect the opinion of any one of our colleagues that a decision warrants publication and that the views raised in the opinion should be disseminated. This is not an automatic and blind decision, but, instead, the recognition that every member of the judiciary, chosen to sit on the bench because of his or her expertise, has distinct and valuable viewpoints to offer in each case. Simply put, disagreement with a justice should not be a reason to limit the reach of that justice's comments. See N.K. Shimamoto, Justice is Blind, supra, at 7 ("A glance back through time reminds us that not only is this a country founded on the belief that we can voice our opinions against the majority, but that we have on numerous occasions embraced those opinions in the wisdom of a future day.")

IV.

By contrast with the "one justice" rule suggested by

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decision shall be by opinion." (Internal section numbering omitted.)); N.D. Sup. Ct. Admin. R. 27, § 14(c) ("The opinion may be published only if one of the three judges participating in the decision determines that one of the standards set out in this rule is satisfied. The published opinion must include concurrences and dissents." (Emphasis added.)). For these, as well as other jurisdictions' rules, see Doe, 99 Hawai'i at 15 n.6, 52 P.3d at 269 n.6 (Ramil, J., dissenting, joined by Acoba, J.) (collecting similar rules in other jurisdictions).

Justice Ramil and which had once been the custom of this court,[2] the current "policy" in this court follows a "majority rules" approach, which the majority insists is the better course. The majority appears to assert that publication guidelines other than "majority rules" would result in our appellate process grinding to a halt. With all due respect, I submit that the majority's arguments against any one justice of this court calling for the publication of a particular case miss the mark.

We favor the use of summary disposition orders for the vast majority of cases in which they are currently appropriately utilized. Numerous such orders have been filed which we have signed. We also do not propose that every case in which a dissenting or concurring opinion is filed necessarily requires publication. A number of summary disposition orders have been filed with a separate opinion.[3] We did not urge that these cases be published, as we do here.[4]

2/ My understanding is that the majority rule regarding publication was recently adopted in 1996. As related by Justice Ramil, the custom of this court previously was to concur with a justice's recommendation to publish.

3/ See, e.g., State v. Irvine, No. 24193 (Hawai'i Jul. 12, 2002) (unpublished) (Acoba, J., dissenting); Saito v. Fuller, No. 23913 (Hawai'i Jun. 8, 2002) (unpublished) (Ramil, J., concurring; Acoba, J., dissenting); Ng. v. Miki, No. 24267 (Hawai'i May 28, 2002) (unpublished) (Moon, C.J. and Nakayama, J., dissenting); State v. Iha, Nos. 23083, 23156, 23157, 23158, 23161, 23177, 23178, 23189, 23190, 23191, 23192, 23193, 23213, 23234, 23235, 23236, 23237, 23238, 23239, 23240, 23242, 23253, 23254, 23255, 23256, 23257, 23258, 23259, 23260, 23274, 23326, 23327, 23328, 23329, 23330, 23347, 23359, 23363, 23364, 23365, 23366, 23371, 23436, 23437, 23438, 23452, 23453, 23561, 23596 (Hawai'i Aug. 27, 2001) (Nakayama, J., dissenting, joined by Ramil, J.).

4/ The majority's refusal to address issues of first impression has little to do with numbers. See, e.g., State v. Bush, No. 24808 (Oct. 11, 2002) (SDO) (Acoba, J., dissenting); State v. Makalii, No. 24833 (Oct. 2, 2002) (SDO) (Ramil, J., dissenting, joined by Acoba, J.); State v. Lopes, No. 24187 (Sept. 6, 2002) (SDO) (Acoba, J., concurring, joined by Ramil, J.); State v. Hauanio, No. 23034 (Aug. 30, 2001) (SDO) (Acoba, J., dissenting). The majority's approach will likely engender more such cases.

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We believe that in some cases, however, a decision must be published. Guidance to litigants and the trial courts would be provided, where none exists. The analysis would be available by litigants for citation in pending or subsequent cases. The public and the legal community would be informed of the developing law in this area.

By ignoring, as it does, the views of other justices after a simple majority is obtained, the majority invites avoidable error. As we must all concede, error will occur under any system; the relevant inquiry is on which side error would weigh the least. I submit that there is more to be gained in a jurisprudential sense, and in the present legal milieu, from a policy which shares the decision to publish with each justice.

V.

Long-term dangers lurk in the silencing of discourse and debate. It has been found that unpublished opinions too easily hide hidden agendas or a lack of reasoning behind an opinion. See M.H. Weresh, The Unpublished, Non-Precedential Decision, 3 J. App. Prac. & Process 175, 181 (2001) ("The foremost [criticism of unpublished decisions] appears to be the arguable effect the practice has on judicial accountability."). Moreover, a rule that grants a majority of justices the power to determine that a case will not be published serves to quash the

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Moreover, as observed, from July 2000 through December 2000, "the Supreme Court wrote 106 opinions: 56 cases (52.8%) were disposed of via SDO, 20 cases (18.9%) by memorandum opinion, and 30 cases (28.3%) by published opinion." N.K. Shimamoto, Justice is Blind, supra, at 6. Thus, only 28.3% of Hawai'i Supreme Court cases were published during this time period.

alternative views expressed in a dissenting or concurring opinion. See M. Hannon, A Closer Look at Unpublished Opinions, 3 J. App. Prac. & Process 199, 221 (2001) ("[T]he existence of dissenting opinions in unpublished opinions cuts against the premise that unpublished opinions are used only in 'easy' cases. . . . [C]ases containing dissents and concurrences are, by definition, controversial[.]" (Internal quotation marks and citations omitted.)); S.L. Wasby, Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish, 3 J. App. Prac. & Process 325, 329 (2001) (discussing a 1989 report which reflected findings "that a significant portion of non-unanimous rulings [in the Eleventh Circuit] were not published, [and] that the ideology of judges . . . played a role in what got published" and which concluded that "publication of opinions in the Eleventh Circuit is much more subjective than the circuit courts would have us believe." (Internal quotation marks and citation omitted.)).

A majority's decision not to publish an opinion can be wielded as a punitive measure against those justices choosing to dissent, or who question the majority rule. See, e.g., People v. Para, No. CRA 15889, slip op. at 34 (Cal. Ct. App. Aug. 1979) (Jefferson, J., dissenting) (objecting to the majority's reversal of its earlier decision to publish a case after the dissenting opinion had been circulated). Such dangers are not hypothetical, but pose real threats to the integrity and efficacy of this court's institutional role in a democratic system.

VI.

But nothing highlights the inefficacy of the "majority rules" approach to publication or undermines the majority's rationalization of its position more than the proposal submitted to this court to amend HRAP Rule 35 to permit (1) citation to unpublished opinions as persuasive authority and (2) petitions for publication of unpublished cases. On June 14, 2002, the Hawai'i Chapter of the AJS submitted the Report to the justices of the Hawai'i Supreme Court for our consideration. The proposal recommends that this court adopt an amendment to HRAP Rule 35,[5] because "[t]here is a problem perceived by the legal community with the continued use of summary disposition orders and, particularly, the inability to cite memorandum opinions despite

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5/ The AJS recommendation, inter alia, suggests an amendment to HRAP Rule 35. See The Report at 18, 20. The suggested amendment adds a new subsection c and re-alphabetizes and supplements the current subsection c as follows:

> (c) Application for Publication. Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.
>
> [(c)] (d) Citation. A memorandum opinion or unpublished dispositional order shall not be considered nor shall be cited in any other action or proceeding as controlling authority, except when the opinion or unpublished dispositional order establishes the law of the pending case, re [sic] judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.
>
> In all other situations, a memorandum opinion or unpublished dispositional order may be cited in any other action or proceeding if the opinion or order has persuasive value. A party who cites a memorandum opinion or unpublished dispositional order shall attach a copy of the opinion or order to the document in which it is cited, as an appendix, and shall indicate any subsequent disposition of the opinion or order by the appellate courts known after diligent search. If an unpublished decision is cited at oral argument, the citing party shall provide a copy to the court and the other parties. When citing an unpublished opinion or order, a party must indicate the opinion's unpublished status.

The Report at 22 (underscoring, indicating additions, and brackets, indicating deletions, in original).

the fact that these opinions appear to be of substantial length and content and often cite other case law as precedent for the conclusions." The Report at 4 (emphasis added). The consequences of not publishing have thus become a concern to the bench and the bar. A core function of this court is to interpret the law, to set forth our analysis, and to announce it for the education and guidance of the public. We abandon that function when we take a crabbed view of publication.

VII.

The dissatisfaction with the number of unpublished opinions is also one reason why the State legislature was prompted to authorize two additional judges on the Intermediate Court of Appeals (ICA) level. The 1996 backlog is reflective of a fundamental lack of resources. In 2001, the legislature authorized two additional judges to be appointed to the ICA, in view of the appellate case load. See 2001 Haw. Sess. L. Act 248, § 1, at 646 (amending Hawai'i Revised Statutes (HRS) § 602-51 to indicate that the number of judges on the ICA would be increased by two). In considering whether such a measure was necessary, the legislature viewed the additional judges as one remedy for the burgeoning use of summary disposition orders, which apparently prompted some parties "to question whether [they were] getting due process[]":

> Attempts to deal with the appellate case load have evolved into procedures and processes that have been viewed as controversial, causing some litigants to question whether the parties are getting due process. For example, a large number of cases were decided by summary disposition orders instead of opinion, and oral argument has become rare. . . . [I]f the State is to maintain an effective appellate justice system that disposes of cases in a timely manner and

> provides litigants with a fair hearing process, the number of ICA judges must be increased.

Stand. Comm. Rep. No. 1460, in 2001 House Journal, at 1495 (emphasis added). The legislators further indicated that such a measure would "improve the functioning and efficiency of the appellate judicial process." Conf. Comm. Rep. No. 166, in 2001 House Journal, at 1129.

However, as for funding for the two ICA judicial positions, the legislature reported that "[t]he Judiciary also testified that no appropriation is needed for the 2001-2002 fiscal year." Conf. Comm. Rep. No. 166, in 2001 House Journal at 1129. "[T]his bill will allow the Judiciary to begin the process of recruiting two new judges for the ICA. It is the intent of your Committee that no new additional funds be provided for this purpose for fiscal year 2001-2002." Stand. Comm. Rep. No. 976, in House Journal at 1495. The determination of whether these two ICA positions could have been funded under past or present judiciary budgets or at what point requests for legislative appropriations should be made is obviously subject to the exercise of the judiciary administration's discretion.

The reports also indicate that "[t]estimony of the Judiciary on this measure in this session indicated that expansion of the intermediate court is preparatory for later reorganization of the appellate system, which could be the subject of bills for the 2002 Session." Conf. Comm. Rep. No. 166, in 2001 Senate Journal at 944. A search of the 2002 legislative bills has not revealed any such reorganization plan.

What is stated is from the public record and we certainly do not intend to misrepresent the record. We are not privy to internal administrative decisions made by the judiciary administration. Obviously, we wholeheartedly agree with any and all efforts made to expand the current number of judges on the ICA.

VIII.

Any implication that the adoption of a one-justice rule would have a far-reaching adverse impact in criminal cases, child custody and parental termination cases, and for business and property owners in civil cases, would be a decidedly exaggerated one. A one-justice rule would not result in a rash of publication requests or a significant delay. The "one justice" approach has been adopted and implemented in many jurisdictions. Taking into account the expertise of all members of this court regarding the necessity of clarifying the law in any area makes the best use of our collective judicial wisdom.

It is evident that the number of cases on appeal, and the resulting hardship faced by litigants, may be in part due to the lack of clear legal precedent in an area of practice. Non-meritorious appeals are pursued by litigants when the law is murky, because the result is unpredictable. Thus, by not publishing and clarifying the law when such need is evident, we contribute to the uncertainty, and, thus, contribute to our backlog.

IX.

The possibility of unintended consequences resulting from establishing precedent should not, in my view, alter publication when warranted. We cannot hide behind the fear that, in deciding a case, we may be creating precedent. That is the nature of our common law system. See Anastasoff v. United States, 223 F.3d 898, 904-05 (noting that the common law doctrine of precedent directed that all cases decided contributed to the common law, and, thus, retained precedential value, even if those cases were not "published" in official reporters), vacated as moot on other grounds, 235 F.3d 1054 (8th Cir. 2000) (en banc). Common law is developed through the accumulation of cases, allowing application of rules of law to varying factual situations. A rule of law changes and is refined as time and the circumstances warrant, or may be abandoned altogether. If a case is fraught with contingent problems, it is our job to see to it that our decisions have the clarity and foresight to convey the effect intended, not to take refuge in the expedient cover of an unpublished decision.

Furthermore, as the court of last resort in this state, we are duty bound to decide hard issues presented to us and to render our best judgment in all cases. To allow a concern for unintended consequences to govern our decisions is to abandon our common law tradition altogether. To remain silent because we are afraid of what we might say undermines our role as the highest state court and the reason that we are here.

X.

A.

The Judiciary's website, is not the answer, and the fallacy of arguing it is, is transparent. If the searcher knows the specific name and date of filing of the case, the case can be located among numerous dispositions, including orders, listed chronologically and grouped by year and month, by date of decision. See State of Hawai'i Judiciary, Hawai'i Appellate Court Opinions and Orders, at http://www.state.hi.us/jud/ctops.htm (last updated Aug. 14, 2002). However, researching is another matter, entirely. The research capabilities are extremely limited, if not practically non-existent. The Judiciary home page is a repository of our recent dispositions; it is not a research tool.

B.

In any event, the reality is that, primarily, only published opinions are considered by lawyers and judges in researching the law with respect to a point of law or a specific issue. Only those dispositions that are accessible via the seventeen established case law search engines, such as found in the reporter system, are used by this state's Judiciary. The "publication by majority" rule then, for all practical purposes, suppresses dissenting and concurring theories from that body of law that would be consulted in any serious inquiry.

C.

Additionally, because the current HRAP Rule 35 prohibits citation to unpublished opinions, when a majority of this court votes against publication of a case, the dissenting and concurring opinions in those cases cannot be cited as authority by attorneys who hope to urge a similar view or a reexamination of a majority position, or by attorneys and trial judges who consider the separate opinions helpful in deciding related issues. Ultimately, in those situations, the value of dissenting and concurring opinions to practitioners and judges is nil.

XI.

Limited resources and a backlog do not warrant summary disposition of cases that should be published. This concept was recently expressed by the Eighth Circuit Court of Appeals, which strongly objected to the over-use of non-published cases as a panacea for judicial backlog and emphasized our obligation to spend the time necessary to do a competent job on each case:

> It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.

Anastasoff, 223 F.3d at 904 (emphasis added). Also, as one Court of Appeals judge has noted with regard to various plans in response to a growing backlog in the federal courts,

> [t]he frequently noted solution of reducing our caseload could reverse a series of salutary developments. The heavier caseload in large part reflects better access to the courts and more legal protections and benefits for less-favored members of society. I resist any wholesale surrender of these hard-fought victories to "reformers" rallying under the banner of judicial efficiency.

Patricia M. Wald, Symposium, The Legacy of the New Deal: Problems and Possibilities in the Administrative State (Part 2) Bureaucracy and the Courts, 92 Yale L.J. 1478, 1478 (1983).

XII.

Cases which require focused review, especially those that deal with matters of first impression or which should be published on other grounds, are not susceptible to disposition according to limited time lines as may be determined by a majority. Not all cases present simple and previously decided questions of law. The critical examination and review necessary inevitably and inescapably requires time to accomplish. See Anastasoff, 223 F.3d at 904. Such examination and review spawn many instances where separate opinions and positions may result in major modifications and even reversals of original positions agreed to by a majority of this court. Insistence upon a contrary approach can only have a deleterious effect on the parties affected, the outcome of cases, and the development of case law.

Moreover, even the ultimate resolution of some apparently simple cases through summary disposition may take more time then initially estimated. Issues not initially raised or addressed by the majority may be pointed out by a dissent or concurrence. The "majority" may change several times as justices

grapple with the law and facts posed within a case, and with other considerations and compromises. The decision of whether the case should be published or not may also change several times during the course of consideration. Accordingly, the end result of a lengthy dissent or concurrence by a justice attached to a summary disposition order may have had an earlier incarnation as a majority published decision. See N.K. Shimamoto, Justice is Blind, supra, at 7 n.12 ("In the case of the Justice or Judge who pens the majority opinion but does not garner the votes for publication, the Judge or Justice may be forced to write a concurring [or dissenting] opinion to . . . express disagreement with the decision of the majority not to publish.")

Thus, a majority rule decision regarding publication does not necessarily mean that more time and resources are saved. That time and effort may already be invested. This is exemplified, as the AJS Hawaii Chapter points out, by the fact that unpublished opinions of this court have been "of substantial length and content." The Report at 4. Also, denying "publication does not somehow deposit that time and energy back into the pool of resources so that it can be used on other cases." N.K. Shimamoto, Justice is Blind, supra, at 11.

More importantly, the expenditure of the court's resources in filling out the analysis of what was previously thought an "easy case" cannot be labeled a waste of resources, when a justice believes that justice is not being served by a superficial treatment of an appeal. Thus, we do not operate as a "committee," and our views, while opposed by the other justices, is certainly not intended to impugn their integrity. Case counts

and statistics should not drive our disposition or deliberative process. In a conflict between the two, our primary duty lies in giving a case and the litigants involved the time they deserve. See Anastasoff, 223 F.3d at 904.

XIII.

The rallying cry for those who raise the specter of backlogs as the justification for the expedient disposition of cases is "justice delayed is justice denied." As one judge has noted, speedy disposition is not to be equated with justice:

> To suggest that justice delayed is justice denied is not the answer. Justice delayed is not always justice denied, and speedy justice is not always justice obtained. Increased pressures on the judiciary resulting from increased litigation because of increased use of the courts by our society is an increased burden which must be met by the judiciary alone, without sacrificing the quality of the justice dispensed. The resulting pressures should and must be assumed by the judiciary without complaint. . . . If justice delayed is justice denied, then justice without quality is also justice denied, a result for which the judiciary alone will be held accountable without reference to collateral pressures from whatever source.

Graver v. Secretary of Health, Ed. & Welfare, 405 F. Supp. 631, 636-37 (E.D. Pa. 1975) (emphases added).

I agree that cases should be decided as promptly as possible. But there is no justice in a rush to judgment that is mandated by internal policies and procedures embracing summary decisions. Too often the administration of formulaic approaches for expediting cases becomes the focus of the time and energy of the court, which should otherwise be spent on our fundamental function of deciding cases. I see no virtue in a race to rubber stamp a circulating draft of a decision so that it may be issued quickly by the court. Such approaches detract the public's

attention from a prominent reason for such delays, that is, the lack of resources. See supra Section VII.

But other internal administrative obstacles cause inefficiencies that delay resolution of cases. Obstacles such as the lack of objective criteria as to whether an opinion should be published, see State v. Tauʻa, 98 Hawaiʻi 426, 441 n.1, 49 P.3d 1227, 1242 n.1 (2002) (Acoba, J., dissenting, joined by Ramil, J.) (opinions which depart from existing law should be published); Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawaiʻi 309, 326, 47 P.3d 1222, 1239 (2002) (Acoba, J., concurring) (opinions which apply new rules of law should be published), and disputes concerning the publishability of an opinion, would be easily resolved by the rule adopted in some jurisdictions that the vote of one justice is sufficient to mandate publication. See Doe, 99 Hawaiʻi at 15 n.6, 52 P.3d at 269 n.6 (Ramil, J., dissenting, joined by Acoba, J.) But even the adoption of objective criteria and alternative measures such as proposed by the Hawaiʻi AJS will not cure the lack of published opinions, inasmuch as a majority disfavoring publication in the first place is unlikely to actually change its position even in the face of such objective standards or alternative measures. Hence, in our view, a single justice rule is necessary.

XIV.

Moreover, although a case that should be published exacts deliberation and, thus, time to complete, over the long-term, publication has the effect of decreasing the backlog and saving ourselves, trial courts, and attorneys needless expense of

time, effort, and resources. When we do not publish and address the questions squarely presented to us, there are wide-ranging systemic effects.

Each party for whom the issue subsequently arises is faced anew with an error that is "novel," because we have not yet addressed it. Trial courts must guess at what law should be applied, further delaying the resolution of trials. Law clerks, judges, and justices must in effect "reinvent the wheel." See John v. State, 35 P.3d 53, 64 (Alaska Ct. App. 1989) (Manheim, J., concurring) ("[S]o many of our decisions are unpublished that, given enough time and enough change of personnel, the court 'forgets' we issued those decisions."). Appellants and appellees must do the same. Thus, over the long-term, publication will reduce our backlog, by removing issues from our appellate treadmill.

Failing to publish decisions that should be published has a substantial impact on the public. When this court postpones for an indefinite time the resolution of issues presented before it, the result is to leave parties -- whether they are prosecutors and defendants in criminal cases, parents and children in family court cases, business entities, government, or the public at large -- and their attorneys to guess at what the law is in this jurisdiction, at the risk of guessing wrong. By the time the matter is brought again to this court, much time and events may have passed. It is no wonder that representatives of both the bench and the bar recommend the recourse of citing to the only body of law oftentimes available to them -- unpublished opinions.

XV.

In our view, the balance is to be struck in the context of our role as the court of last resort in this state and the long range perspective we must take. The litigants in each case deserve the considered judgment of each justice. Our obligation to the rule of law is to apply it assiduously, evenly, and justly; expediency should play no part in the task in which we are engaged. In that regard, more, not less, authoritative guidance strikes the right balance in our present legal milieu. By satisfying our obligation in individual cases, we fulfill our duty as stewards of the judicial power, to all parties and to the public at large without favoring any one party or the interests of one litigant over another.