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Contents

DEDICATION

The editors wish to dedicate the first issue of the University of Hawaii Law Review to the late

DWIGHT MIYAUCHI,

entering class of 1976.

Ka 'ike nui, ka 'ike iki

In early Hawaii, when a skillful piece of work was completed, a feast was held at which the finished product was blessed. This blessing was essential, not for every product of the artisan, but for the first such work—the first mat, quilt, fish-net. The blessing accrued not only to the completed work but also to all future works by the artisan. The prayer given was composed to fit the occasion and addressed to the guardian spirit identified with the material used in the work. Traditionally, the prayer would contain the phrase:

Hō mai ka 'ike nui, ka 'ike iki.

Grant knowledge of the great things,
and of the little things.

Ka 'ike nui referred to knowledge of the work as a whole, while **ka 'ike iki** referred to knowledge of the details of the materials and technique which a good artisan should thoroughly understand.

This issue of the *University of Hawaii Law Review* is the first work published by the students and faculty of the University of Hawaii School of Law. It is a skillfully researched and well written product, a work which should be greeted with warmth and enthusiasm by the legal community. While a great feast has not been called to honor this first work, its publication must be viewed as a significant step in the development of the law school.

The tenor and nature of the law in Hawaii have change since statehood with the recognition that Hawaii's people can create, administer, and interpret their own laws and thereby guide and direct their own future. The University of Hawaii School of Law is an integral part of that change and was founded with the hope that the law school community, its students, its faculty, and especially its graduates, would help give form and substance to the people's combined vision of Hawaii's future.

The law review, like the law school itself, must play a major role in helping us to understand our laws and their effect upon that vision. It should encourage the thoughtful scrutiny and examination of local statutes and judicial decisions in light of our history and our present conditions. It should serve as a vehicle for analyzing our laws from the broader perspective of national and comparative law. It should focus study upon the environmental, social, and economic problems of our community and, based upon an understanding of the origins of our laws and their social context, propose needed reforms. While providing a means for gaining knowledge of the "greater things" the law review should also give students and faculty the opportunity to perfect their knowledge of the materials and techniques of our craft. Additionally, it should promote not only excellence in legal scholarship but also foster those qualities which best exemplify our profession—compassion and dedication. Finally, the law review should reflect the character and concerns of the law school, for whatever distinguishes this law school will also distinguish its law review.

On behalf of the legal community, I welcome this first issue of the *University of Hawaii Law Review* and give the traditional blessing, so that those who have

contributed to this first issue, those who will contribute to future issues, and those of us who will benefit by the existence of the law review, may be granted knowledge of the great things, and of the little things.

WILLIAM S. RICHARDSON
Chief Justice
Hawaii Supreme Court

THE SCOPE OF LIABILITY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: MAKING "THE PUNISHMENT FIT THE CRIME"

Richard S. Miller*

My object all sublime
I shall achieve in time—
To let the punishment fit the crime—
The punishment fit the crime.

GILBERT AND SULLIVAN, THE MIKADO

The difficulties that inhere in establishing the scope of liability[1] for harm-producing acts or omissions shiver the foundation of the House of Law. "Ad hocism" abounds.[2] Neither logic nor experience[3] furnishes much guidance for the resolution of scope of liability issues that grow out of new bases of liability[4] or new understandings of the causes and effects of harm.[5] Concepts that purport to resolve these issues are often so elastic as to be meaningless.[6] Of necessity the

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[1] By "scope of liability" I refer to the question of which persons who suffer adverse consequences as a result of another's actionable acts or omissions will be permitted to recover and for what. I prefer this phrase to "scope of duty," "proximate cause," or "legal cause" because it is sufficiently descriptive for my immediate purposes but does not include the implications for how the difficulties should be resolved that infect the latter terms.

[2] *See, e.g.*, Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (plaintiff fisherman permitted to recover prospective economic losses suffered as a result of defendant's alleged negligence in polluting the Santa Barbara Channel), and *compare* Petition of Kinsman Transit Co. (Kinsman No. 1), 308 F.2d 708 (2d Cir. 1964) *with* Petition of Kinsman Transit Co. (Kinsman No. 2), 388 F.2d 821 (2d Cir. 1968). (Plaintiffs in both cases sought damages for losses suffered in a bizarre series of events that followed when some defendants negligently allowed a ship to float downstream and defendant City of Buffalo negligently failed to raise a drawbridge, causing collisions and the jamming of the Buffalo River. In deciding that plaintiffs in *Kinsman No. 1* could recover but that plaintiffs in *Kinsman No. 2* could not, Judges Friendly and Kaufman, respectively, both ultimately took refuge in Judge Andrews' statement in *Palsgraf*: "It is all a question of expediency, . . . it is all a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." Palsgraf v. Long Island R. Co., 248 N.Y. 339, 354-55, 162 N.E. 99, 104 (1928) (Andrews, J., dissenting).

[3] The reference is, of course, to Holmes' famous statement:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. O. W. HOLMES, THE COMMON LAW 1 (1881).

[4] *See* Maleson, *Negligence is Dead but Its Doctrines Rule Us from the Grave: A Proposal to Limit Defendants' Responsibility in Strict Products Liability Actions without Resort to Proximate Cause*, 51 TEMP. L.Q. 1 (1978).

[5] *See* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971).

[6] *See* Chun v. Park, 51 Haw. 462, 466, 462 P.2d 905, 908 (1969), and cases there cited. *See*

torts process grinds out decisions, but they are based, usually, on ill-articulated conceptions of "practical politics" or "expediency" and do not necessarily comport with either equal justice or sound policy. Little wonder that the problem has become a favorite of law professors[7] and the *bête noire* of law students.

Nowhere has the problem of scope of liability been more clearly exposed than in the courts' treatment of negligently inflicted mental distress.[8] On the one hand, general principles of negligence law and the policy of compensating victims deemed to be "deserving" under those principles pull in the direction of expanded liability. On the other hand, visions of shockingly burdensome liability and lingering fears of feigned claims lead to the imposition of arbitary liability-limiting rules. An approach that would satisfy all of these conflicting concerns and comfortably resolve concrete cases has yet to be devised, notwithstanding the fact that the issues have been before American courts at least since 1890.[9]

Thus, for example, in 1970 the Hawaii Supreme Court, in *Rodrigues v. State*,[10] gave birth to a lusty new and independent cause of action for negligent infliction of emotional distress. Although it imposed a requirement that the distress (both that which was foreseeable to defendant and that which plaintiff actually suffered) be "serious," the court was satisfied to allow general principles of liability for negligence to determine who should recover and who should not. Thus the court moved beyond other American courts, which had long imposed arbitrary barriers upon the scope of liability, and, by imposing the seriousness requirements, seemingly arrived at a fair compromise of the competing concerns.

For a while the cause of action in Hawaii was allowed to flourish and grow along lines consistent with its bountiful origins.[11] Then, in 1975, in *Kelley v. Kokua Sales and Supply, Ltd.*,[12] the court stunted its growth by denying recovery to plaintiffs who, when they suffered the distress, were not "located within a reasonable distance from the scene of the accident."[13] Thus, the fear of imposing

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generally, W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §§42, 43 (4th ed. 1971) [hereinafter cited as PROSSER].

[7] "The importance of the proximate cause issue in most litigation is surprisingly small, but few topics have been so much the darling of the academic mind. Almost every tort scholar has tried at some time to make his peace with the issue, and its doctrinal fascination continues." C. GREGORY, H. KALVEN, R. EPSTEIN, CASES AND MATERIALS ON TORTS 250 (3rd ed. 1977) [hereinafter cited as GREGORY, KALVEN & EPSTEIN]. The major books and articles are cited *id.* at 250–51.

[8] *See id.* at 256; PROSSER, *supra* note 6, §54 at 327–35.

[9] *See* Hill v. Kimball, 13 S.W. 59 (Tex. 1890), discussed in Hallen, *Hill v. Kimball—A Milepost in the Law*, 12 TEX. L. REV. 1 (1933). The concerns were clearly identified in Spade v. Lynn & Boston R. Co., 168 Mass. 285, 47 N.E. 88 (1897), the leading case imposing the "impact" rule.

[10] 52 Haw. 156, 472 P.2d 509 (1970), facts stated in text *infra* at 6. Perceptive discussions of *Rodrigues* are contained in Koshiba, *Negligent Infliction of Mental Distress: Rodrigues v. State and Leong v. Takasaki*, 11 HAW. B.J. 29 (1974) and Brott, *Negligent Infliction of Emotional Harm*, 7 Id. 148 (1971).

[11] *See* Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974), facts stated in text *infra* at pp. 7–8 and discussed in Koshiba, *supra* note 10. *C.f.* Dold v. Outrigger Hotel, 54 Haw. 18, 22, 501 P.2d 368, 374 (1972) (plaintiff entitled to recover for mental distress "where a contract is breached in a wanton or reckless manner as to result in a tortious injury . . . . "), *and* Farrior v. Payton, 57 Haw. 620, 632, 562 P.2d 779, 787 (1977) (citing *Rodrigues* to support proposition that defendant who seriously frightens plaintiffs, causing them to suffer physical injuries, in the attempt to escape danger may have breached a duty to refrain from the negligent infliction of serious mental distress).

[12] 56 Haw. 204, 532 P.2d 673 (1975), facts stated in text *infra* at p. 9.

[13] *Id.*, 56 Haw. at 209, 532 P.2d at 676.

"an undue measure of responsibility upon those who are guilty only of unintentional negligence"[14] again manifested itself.

The question thus arises whether it is possible for the judicial process to produce an approach to recovery for mental-distress-without-impact that will satisfy the competing concerns of justice and policy. In my view, which I will develop in considerable detail in this article, the answer is "yes," but only if the courts are willing to couple the application of ordinary negligence principles for determining the issue of liability with a significant reduction in the damages available if liability is imposed. In this way the "punishment can be made to fit the crime" and other important policies will be served as well.

My analysis will proceed in the following way: In Part I[15] I will examine the general trend of decisions with respect to the negligent infliction of emotional distress and will engage in a fairly conventional analysis of the likely impact of *Rodrigues* and its progeny on future emotional distress cases in Hawaii. In Part II[16] I will explore the implications of the Hawaii cases in terms of relevant tort goals and public policy. In Part III[17] I will discuss issues of "legal process" raised by the majority opinion in *Kelley* and by the competing approaches—duty vs. proximate cause—of the majority and dissenting opinions. In Part IV[18] I will identify and describe the principal key to the search for a satisfactory solution—the need for proportionality, and in Part V[19] I will suggest and compare alternative approaches to dealing with the problem and set forth my own recommendation. In Part VI[20] I will suggest reasons why judicial decision-making is the appropriate way to implement my recommendation and in the conclusion[21] I will advance additional important reasons why the suggested reform should be undertaken.[22]

I. TRENDS OF DECISION

A. General

Except perhaps in cases where mental distress is unaccompanied by serious physical harm, the limitation of recovery for mental distress to cases where plaintiff suffers an impact no longer enjoys wide support among American courts.[23] On the other hand, most American courts limit recovery for negligent

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[14] Spade v. Lynn & Boston R. Co., 168 Mass. 285, 289, 47 N.E. 88, 89 (1897).

[15] *Infra*, pp. 3–16.

[16] *Infra*, pp. 16–28.

[17] *Infra*, pp. 28–33.

[18] *Infra*, pp. 33–36.

[19] *Infra*, pp. 36–43.

[20] *Infra*, pp. 43–44.

[21] *Infra*, pp. 44–47.

[22] I have focussed heavily on the Hawaii cases both because they are regarded as important by leading tort scholars and because they are well-suited to illuminate the general problem.

[23] GREGORY, KALVEN & EPSTEIN, *supra* note 7, at 957. *See generally* Annot., 29 A.L.R.3d 1337 (1970), and Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States*, 25 HASTINGS L.J. 1248 (1974). *But see* Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974) (no recovery for emotional distress in absence of impact unless defendant's conduct was wilful).

The English courts have long rejected the "impact" requirement. Hambrook v. Stokes Bros., [1925] 1 K.B. 141 (C.A. 1924). In its stead they have only required that plaintiff be within the foreseeable zone of mental shock. Boardman v. Sanderson, [1964] 1 W.L.R. 1317 (C.A. 1961). Mental distress suffered by "the ordinary frequenter of the streets" who witnesses an accident, however, has been held not to be reasonably foreseeable by a driver. Bourhill v. Young [1943] A.C. 92, 117 (H.L. 1942). A summary of the English cases is contained in Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between New York and California*, 51 ST. JOHN'S L. REV. 1, 17–22 (1976).

infliction of mental distress to plaintiffs who suffer distress as a consequence of fear for their own physical safety—plaintiffs located within the "zone of danger"[24]—and to cases in which the mental distress results in physical harm.[25]

In *Dillon v. Legg*,[26] however, the California Supreme Court was confronted with a situation in which the arbitrariness and unfairness of the zone of danger rule was palpable: A child within the zone of personal danger would have been allowed to recover for mental distress produced principally by witnessing the death of her sister, but her mother, only a few feet away but outside the zone of personal danger, would have been denied recovery for her own mental distress. In response, the court rejected the zone of danger rule and determined instead to apply "the general rules of tort law, including the concept of negligence, proximate cause, and foreseeability."[27]

Its intention aside, however, the court fell far short of creating an independent cause of action for mental distress based on general negligence principles: In the first place, the court indicated that plaintiff's right to recover was conditioned upon the liability of defendant for injury to the "primary" victim; the contributory negligence of the primary victim would thus defeat recovery by the plaintiff who suffered distress as a result of fear for the safety of the primary victim.[28] This requirement, of course, is inconsistent with general principles of causation.[29]

Secondly, the court confined its ruling to the cases in which plaintiff's shock results in "physical injury."[30] Widely accepted damage rules, applied in ordi-

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[24] *Id. Accord*, RESTATEMENT (SECOND) OF TORTS §436 at 166 (1966).

[25] PROSSER, *supra* note 6, §54 at 328–30; Annot., 29 A.L.R.3d 1337 (1970). *Accord*, RESTATEMENT (SECOND) OF TORTS §436A (1966).

[26] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[27] *Id.* at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.

[28] *Id.* at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76.

[29] The situation is analogous to that which occurs when plaintiff, a passenger in car A driven by driver A, is injured as a result of a collision produced by the combined negligence of driver A and driver B in car B. Even if plaintiff were precluded from recovering from driver A because of a host-guest statute or intrafamily immunity, he could still proceed to recover from driver B. (At least he could unless some mischievous and arguably erroneous application of the "both ways" test imputed the negligence of driver A to plaintiff and recovery was then barred by contributory negligence.) *See* Kalechman v. Drew Auto Rental, Inc., 33 N.Y.2d 397, 308 N.E.2d 886, 353 N.Y.S.2d 414 (1973), and *see generally* PROSSER, *supra* note 6, §74 at 488–91, and RESTATEMENT (SECOND) OF TORTS §§432, 433A(2), 439, comment b. If plaintiff is allowed to recover under "the general rules of tort law," he should be able to proceed against either the actor who negligently threatened the person the concern for whose safety gave rise to plaintiff's distress or the person whose safety was threatened if that person negligently exposed himself to danger, or both. *Id.*

Another variation from general principles is the implication in the *Dillon* court's language that plaintiff could not recover for her own mental distress unless the person for whose safety she was concerned actually suffered actionable injury: "In the absence of the primary liability of the tort-feasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties. The basis for such claims must be *adjudicated liability* and fault of defendant; that liability and fault must be the foundation for the tort-feasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma." 68 Cal.2d at 733, 441 P.2d at 916, 69 Cal. Rptr. at 76. (Emphasis added.) This requirement would seem to preclude recovery when defendant negligently creates a situation where plaintiff develops great concern for another's safety and consequently suffers serious distress, but the other somehow escapes injury.

Consistent with the general rules of negligence applicable in a jurisdiction adhering to the common law rule of contributory negligence, the court noted that plaintiff's contributory negligence would bar her recovery. *Id.* In a comparative negligence jurisdiction such as Hawaii, however, the negligence of the plaintiff should not entirely bar recovery unless plaintiff's negligence exceeds that of defendant, HAW. REV. STAT. §663–31 (1976).

[30] 68 Cal.2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. This limitation was affirmed in Krouse v. Graham, 19 Cal.3d 59, 75–76, 562 P.2d 1022, 1030, 137 Cal. Rptr. 863, 871 (1977). However, the

nary negligence cases where plaintiff suffers impact, comprehend no such limitation.[31]

Finally, the court in *Dillon* articulated a series of factors of a sort that the courts were to consider "on a case-to-case basis"[32] to determine whether the shock resulting in injury to plaintiff was reasonably foreseeable, *i.e.*, whether defendant owed a duty to plaintiff. These were:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it;
(2) Whether the shock was from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;
(3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[33]

While factors such as these seem clearly to be relevant to the determination of foreseeability under general principles of negligence, the fact is that, as subsequent California decisions make clear, these factors have tended to be converted into *requirements* of foreseeability, imposed with only slight flexibility and used to deny recovery as a matter of law in cases where, under ordinary negligence principles, a court could reasonably find that the risk of emotional shock to plaintiff was reasonably foreseeable.[34]

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court there held that physical injury includes a serious shock to the nervous system that produces physical manifestations such as gastric disturbance. *Accord*, Borer v. American Airlines, 19 Cal.3d 441, 450, 563 P.2d 858, 864–65, 138 Cal. Rptr. 302, 308–09 (1977) (rule extended to support denial of recovery for intangible injuries in action for loss of parental consortium). *See also* note 34 *infra*.

[31] That is, there is no requirement in such cases that plaintiff's pain and suffering, grief, humiliation, and the like produce physical consequences in order to be compensable.

[32] 68 Cal.2d at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[33] *Id.* at 740–41, 441 P.2d at 920, 69 Cal. Rptr. at 80. In D'Ambra v. United States, 354 F. Supp. 810 (D.R.I. 1973), *modified*, 481 F.2d 14 (1st Cir. 1973), the U. S. District Court, purporting to apply Rhode Island law, adopted the *Dillon* approach but added that the presence of plaintiff must also be foreseeable. Subsequently, the Supreme Court of Rhode Island, in responding to a question certified from the First Circuit Court of Appeals in an appeal from the District Court's decision, questioned the rationality and fairness of the requirement that plaintiff's presence be reasonably foreseeable to defendant. D'Ambra v. United States, 114 R.I. 643, 656 n.7, 338 A.2d 524, 531 n.7 (1975) (dictum).

[34] Thus, for example, recovery has been denied to a wife who first witnessed her paralyzed husband in the hospital emergency room but did not witness the accident that caused the paralysis, Deboe v. Horn, 16 Cal. App.3d 221, 94 Cal. Rptr. 77 (1971); to a mother who witnessed in the hospital the painful death of her child caused by a negligent diagnosis, Jansen v. Children's Hosp. Medical Center, 31 Cal. App.3d 22, 106 Cal. Rptr. 883 (1973); to a mother who arrived on the scene within five minutes of the collision that caused her son's injury, Arauz v. Gerhardt, 68 Cal. App.3d 937, 137 Cal. Rptr. 619 (1977); to fathers who witnessed the childbirths that resulted in the deaths of the infants but did not actually witness the deaths, Justus v. Atchison, 19 Cal.3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); and to parents who rounded a bend and came upon the scene of an accident in which their daughters were killed "before the dust had settled," Parsons v. Superior Court, 81 Cal. App.3d 506, 146 Cal. Rptr. 495 (1978).

In effect, the California courts have imposed a new "impact" requirement by turning the second listed factor, "direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident," into a requirement for recovery rather than an element to be considered. Thus, shock produced by learning from others of an accident's prior occurrence will not support an action under *Dillon* and, although recovery may be allowed where plaintiff does not actually see the accident, plaintiff must perceive the event through his or her senses—must be a "percipient witness." Justus v. Atchison, 19 Cal.3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Krouse v. Graham, 19 Cal.3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977). Furthermore, recovery will be limited to distress produced by the shock of sensing the accident and may not compensate for "such improper elements as grief, sorrow, anger and retribution." *Id.* at 78, 562 P.2d at 1032, 137 Cal. Rptr. at 873.

In short, the promise of *Dillon*, except in cases virtually on all fours with its facts, is as dead as

The Hawaii Supreme Court, although believed by some commentators to have "adopted" the rule of *Dillon v. Legg*,[35] took a much bolder approach. In *Rodrigues v. State*[36] plaintiffs had won an award in the trial court for property damage and mental suffering produced by the negligent failure of state employees to prevent flooding that damaged plaintiffs' new home.[37] On defendant's appeal, the court sustained the right of the plaintiffs to seek damages for the mental distress produced by the injury to their home. Rejecting the opportunity to hold that such damages would be allowed if "parasitic" to an actionable claim for negligent injury to property,[38] the court instead decided to give "independent legal protection" to "the interest in freedom from negligent infliction of serious mental distress" and to recognize the separate existence of a duty to refrain from such infliction.[39] "[T]he question of whether the defendant is liable to the plaintiff in any particular case," the court stated, "will be solved most justly by the application of general tort principles."[40]

The concerns about fraudulent claims and unlimited liability that had been expressed by other courts, as well as the dissenters' "disagreement with the policy of recognizing emotional ties to material objects" and concern about

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the hopes of the many plaintiffs whose claims have been rejected. The California cases are collected and discussed in Parsons v. Superior Court, 81 Cal. App.3d 506, 146 Cal. Rptr. 495 (1978).

[35] *E.g.*, GREGORY, KALVEN & EPSTEIN, *supra* note 7, at 970.

[36] 52 Haw. 156, 472 P.2d 509 (1970).

[37] Plaintiffs had planned to move into their new home on the same day that the flooding occurred. The supreme court described the circumstances that produced the mental distress as follows:

> The Rodrigues' home was flooded to a height of six inches, the water causing extensive damage to the house and furnishings. Mr. Rodrigues reported that he was "heartbroken" and "couldn't stand to look at it" and Mrs. Rodrigues testified that she was "shocked" and cried because they had waited fifteen years to build their own home.
>
> In addition to other repairs they made on their home, the Rodriqueses spent approximately six weeks scraping damaged rubber carpets off the floor of the house with razor blades. The Rodrigueses took out a loan to pay for repairs and incurred interest charges on the loan as an additional expense.

Id. at 159–60, 472 P.2d at 513.

The negligence found to exist by the supreme court was the negligent failure of the state to inspect and clear its culverts of sand in violation of its duty to prevent unreasonable interference to neighboring lands when taking measures to protect its highways from the hazards of surface waters. *Id.* at 162–67, 472 P.2d at 515–17.

[38] *Id.* at 171, 472 P.2d at 519. The court noted that allowing recovery for mental distress only when it is associated with another actionable wrong represents "law in a developing stage," *quoting* STREET, I FOUNDATIONS OF LEGAL LIABILITY 470 (1906). It then expressed disapproval of the unevenness and inconsistency of the current scheme for protection against negligently inflicted emotional distress, stating: "We find little virtue in such a scheme." *Id.*

This portion of the court's opinion raises the interesting question whether the court was including within its disapproval the *entire* current scheme of awarding damages for mental distress (including shock, grief, anxiety, humiliation, and perhaps even physical pain and suffering) *even when associated with negligently inflicted physical injuries.* If so, the logical next step would have been to treat such claims as independent of the claim for physical injuries and to impose the same requirements of foreseeability and seriousness as the court imposed in the *Rodrigues* situation and in the pure mental distress cases. *See* text at notes 42 and 43 *infra*. Such an approach might tend to reduce significantly or even eliminate general damages in many cases where they are now routinely allowed. However, there has been no further indication since the decision in *Rodrigues* that the court intended to make such a revolutionary change in the well-accepted rule that, as to pain and suffering and other psychic effects, we "take our victims as we find them" and award damages accordingly. PROSSER, *supra* note 6, §43 at 261–63.

[39] 52 Haw. at 174, 472 P.2d at 520. The court remanded the question of damages for mental distress to the trial court to allow it to apply the rule newly announced. It further instructed the trial court to exclude from damages any award for future "disruption of home and family life" or for "etc.," both of which had been erroneously included in the award below. *Id.* at 175, 472 P.2d at 521.

[40] *Id.* at 174, 472 P.2d at 520.

"vast potential for abuse inherent in such a theory of recovery,"[41] were met, first, by imposing a requirement of seriousness: Serious mental distress to the plaintiff must have been "a reasonably foreseeable consequence of the defendant's act"[42] and recovery was to be limited to cases "where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[43]

Secondly, the court shifted to the trier of fact, in its function of applying the "ability to cope" test, the responsibility for determining whether any of these concerns should limit liability in a particular case.[44] In regard to mental distress occasioned by negligent injury to property, the court expressed its faith that "the jury, representing a cross section of the community is in a better position to consider under what particular circumstances society should or should not recognize recovery for mental distress."[45]

Subsequently, in *Leong v. Takasaki*,[46] the Hawaii Supreme Court reaffirmed both the general principles set forth in *Rodrigues*[47] and the independence of its approach from that of the Supreme Court of California. In *Leong*, the ten-year-

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[41] *Id.* at 178, 472 P.2d at 522.

[42] *Id.* at 174, 472 P.2d at 521.

[43] *Id.* at 173, 472 P.2d at 520. In adopting this requirement the court adopted a standard similar to that applied to actions for intentional infliction of mental distress. *Id. See* RESTATEMENT (SECOND) OF TORTS §46, comment j (1965).

[44] 52 Haw. at 173, 472 P.2d at 520.

[45] *Id.* at 175, n.8, 472 P.2d at 521, n.8.

[46] 55 Haw. 398, 520 P.2d 758 (1974).

[47] The holding in *Leong* differed somewhat from that of *Rodrigues* but the full significance of the difference is not entirely clear. In *Rodrigues* the court had required that serious mental distress to plaintiffs be reasonably foreseeable and also held "that serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." 52 Haw. at 173, 174, 472 P.2d at 520. This latter requirement seemed to require a *post hoc* judgment based on the actual facts of the case as they turned out. In *Leong*, however, the court stated, after repeating the foreseeability test of *Rodrigues*: "However, our analysis in that case also focused on the foreseeability of the plaintiff's reaction. We now hold that when a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered by such circumstances, the trial court should conclude that defendant's conduct is the proximate cause of plaintiff's injury and impose liability on the defendant for any damages arising from the consequences of his negligent act." 55 Haw. at 399, 520 P.2d at 758–59.

It is not clear whether the court was merely compressing the foreseeability-of-serious-mental-distress test and the ability-to-cope test of *Rodrigues* into a single foreseeability test, or whether, in addition, the court was adding the requirement that plaintiff must have been a witness to the accident.

The likely answer is that the court was merely trying to clarify the somewhat vague relationship between the two tests of *Rodrigues*. In *Leong* the court expressly stated: "[T]he standard of duty established in *Rodrigues* should be applied in the instant case on remand to determine defendant's liability." *Id.* The court's reference to a "plaintiff-witness" merely reflected the fact that in *Leong* itself the plaintiff was a witness to the accident. The lengthy discussion of the history of the mental-distress-without-impact cases, and the relevant policy concerns, which seemed to repeat the reasoning of *Rodrigues*, was probably a response to the comment by Justice Levinson in his dissent in *Rodrigues* that since the majority in that case was composed of only one regular supreme court justice and two circuit judges sitting as substitutes, while the dissent was the product of two regular justices, the law of the case in *Rodrigues* would remain uncertain "until the full court sits and rules on another case of this nature." 52 Haw. at 180, 472 P.2d at 523 (Levinson, J., dissenting). The opinion in *Leong* had the concurrence of the five regular justices.

Finally, the court's somewhat confusing references to proximate cause in connection with the foreseeability issue seem to have been included for the purpose of preventing the trial courts from doing what the trial court did in *Leong* itself and what California courts are now doing: Treating the factors in *Dillon* as *requirements* for recovery and dismissing claims for mental-distress-without-impact when one of the factors is missing, rather than merely taking these factors into account along with other circumstances in the case to determine whether the required degree of serious distress was reasonably foreseeable.

old plaintiff, apparently not personally within the zone of danger, witnessed the negligent running-down and killing of his step-grandmother.[48] Plaintiff alleged nervous shock and permanent injury to his psyche, but no physical injuries.[49] On appeal from a summary judgment for defendant, the supreme court reversed. The court asserted its disapproval of the requirement of physical injury "as yet another of the artificial devices to guarantee the genuineness of the claim"[50] and held that plaintiff could recover for mental distress alone, at least if evidence of medical or psychiatric witnesses were produced to support the claim.[51] In addition, the court made clear that factors such as those set forth in *Dillon v. Legg* to determine foreseeability and duty[52] were not to be used by the trial court to bar recovery, but would be relevant only to determine the degree of mental stress suffered for the purpose of determining whether the amount of stress engendered was beyond that with which a reasonable person could be expected to cope.[53]

While only a small minority of courts have followed *Dillon* or *Rodrigues*,[54] and most continue to apply the zone of physical danger limitation in cases where plaintiff claims mental suffering produced by negligently caused physical injury to third persons,[55] courts seem to be less reticent to permit recovery in cases where defendant's negligence occurs when dealing directly with plaintiff. Such cases seem consistent with two recognized exceptions to the old rule that denied recovery for mental suffering in the absence of impact: negligence in transmitting a telegraph message that, on its face, gave warning that mental distress was especially likely, and negligent mishandling of a corpse.[56]

Thus, for example, in *Johnson v. State*,[57] the Court of Appeals of New York, which had refused in *Tobin v. Grossman*[58] to expand liability by adopting

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[48] The court expressly rejected the requirement that there be a blood relationship between the victim and the plaintiff: "[T]he plaintiff should be permitted to prove the nature of his relationship to the victim and the extent of damages he has suffered because of this relationship." *Id.* at 411, 520 P.2d at 766. *Cf.*, Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976) (foster mother allowed to recover for mental distress caused by witnessing injury to foster child).

[49] Plaintiff claimed that his grades in school dropped immediately after the accident and that he thought about the accident at times. 55 Haw. at 401, 520 P.2d at 761.

[50] *Id.* at 404, 520 P.2d at 763.

[51] *Id.* at 413, 520 P.2d at 767.

[52] *See* text p. 5 *supra*.

[53] 55 Haw. at 410, 520 P.2d at 765–66. The court also included the foreseeability of the plaintiff's and the victim's presence to the defendant as one of these factors. In D'Ambra v. United States, 354 F. Supp. 810 (D.R.I. 1973), *modified*, 481 F.2d 14 (1st Cir. 1973), the District Court added this factor to the factors listed in *Dillon*. The U. S. Court of Appeals certified the question of liability to the Rhode Island Supreme Court. That court, in turn, expressed disapproval of the requirement that the presence of plaintiff-mother who witnessed the death of her child be foreseeable. D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975). In its opinion, the Rhode Island Supreme Court quoted *Rodrigues* approvingly. *Id.* at 652, 338 A.2d at 529.

[54] *See, e.g.*, Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976) (citing *Rodrigues* and *Leong* with approval). *See generally* Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute between California and New York*, 51 ST. JOHN'S L. REV. 1, 29–32 (1976) (reporting the decisions that approved *Dillon*. Unfortunately, the author credited the Hawaii Supreme Court with adopting the "requirement" of the foreseeability of plaintiff's presence that had been adopted by the U. S. District Court in *D'Ambra*, *see* note 53 *supra*, but had only been mentioned as a factor for determining the degree of mental distress suffered in *Leong*).

[55] *See generally* Annot., 29 A.L.R.3d 1337 (1970).

[56] See PROSSER, *supra* note 6, §54 at 328–30. "What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from special circumstances, which serves as a guarantee that the claim is not spurious." *Id.* at 330.

[57] 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

[58] 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (mother denied recovery for her own mental distress produced when her two-year-old son was seriously injured in an automobile

Dillon,[59] nevertheless allowed plaintiff to recover for mental suffering occasioned when defendant's hospital erroneously informed her by telegram that her mother had died. Though the court of appeals distinguished *Tobin* on the ground that a bystander to an accident was only injured "indirectly," while the recipient of the telegram in *Johnson* was "directly" injured, it is likely that the more important difference was that the potential scope of liability—the number of plaintiffs—was limited in *Johnson*, but not in *Tobin*, to a pre-identified plaintiff.[60] There was thus significantly less danger of unlimited liability in the situation posed in *Johnson*.

B. Kelley v. Kokua Sales and Supply, Ltd.

Based upon *Rodrigues* and *Leong*, the facts alleged by plaintiffs in *Kelley v. Kokua Sales and Supply, Ltd.*[61] presented a most appealing case for recovery: Plaintiffs' decedent, Mr. Kelley, suffered a heart attack and died shortly after being informed of the tragic deaths of his daughter and granddaughter and critical injuries to another granddaughter resulting from a collision between the automobile in which they were riding and a trailer truck. The fatal collision occurred when the truck's brakes failed and the driver was unable to stop the speeding vehicle on the Likelike Highway, a mountain road, as the truck was being driven towards Honolulu. Plaintiffs alleged that the various defendants[62] were negligent in manufacturing, maintaining, repairing, and inspecting the truck and its braking system, in issuing a safety sticker, in driving the truck, and in licensing the driver.

Though plaintiffs' decedent suffered no impact from the collision, he allegedly suffered serious mental distress produced by shock in learning of the deaths and critical injury of his own close blood relatives. Indeed, that distress allegedly produced his heart attack and death.

On the other hand, although decedent learned of the accident on the day it occurred, he learned of it by telephone while he was present and residing in California. Thus, he did not witness the accident, he was not within the zone of personal physical danger from the collision, and he never personally saw the accident's gory consequences.

Based on these facts, however, plaintiffs would seem to have stated a good cause of action under *Rodrigues* and *Leong*. If any of the defendants, by their

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accident occurring out of mother's presence but only a few feet away). Justice Breitel's opinion refusing to extend the scope of liability is an extremely articulate and well-reasoned expression of the difficulties involved in allowing recovery in such a case.

[59] Although the mother did not actually see the accident in *Tobin*, she would probably have been allowed to recover under *Dillon*. *See* Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969).

[60] "[Plaintiff] was the one to whom a duty was directly owed by the hospital, and the one who was directly injured by the hospital's breach of that duty. Thus, the rationale underlying the *Tobin* case, namely, the real danger of extending recovery for harm to others than those directly involved, is inapplicable to the instant case . . . ." Johnson v. State, 37 N.Y.2d 378, 383, 334 N.E.2d 590, 593, 372 N.Y.S. 2d 638, 643 (1975).

[61] 56 Haw. 204, 532 P.2d 664 (1975).

[62] Defendants were the owner and operator of the truck, the manufacturer of the truck, the lessor of the truck's trailer, the mechanic for the truck, the estate of the deceased truck driver, a company on whose business the truck was involved, the owner of the service station that inspected the truck and issued a safety sticker, and the City and County of Honolulu and the State of Hawaii who issued the driver a license to operate the type of truck involved. *Id.* at 205, 532 P.2d at 674.

actionable negligence, had created an unreasonable and foreseeable risk of collision between the trailer truck and a passenger automobile under the circumstances alleged, it would seem to follow that such defendants could also be found to have created an unreasonable and foreseeable risk of serious mental distress, of a sort with which normally constituted persons would not be able to cope, to the very close relatives of victims who might be mangled in such a collision.[63] At the very least, the facts as alleged seemed to present an issue for the trier of fact. The absence of plaintiffs' decedent from the scene of the accident seemed more than balanced by the high degree and serious nature of the risk foreseeably created.[64]

The court, however, chose to impose an additional limitation on recovery for emotional distress. It held "[T]he duty of care enunciated in *Rodrigues* and *Leong*. . .applies to plaintiffs meeting the standards stated in said cases, *and who were located within a reasonable distance from the scene of the accident.*"[65]

Since Mr. Kelly was more than 2,500 miles from the scene of the accident, plaintiffs could not recover. Summary judgments for defendants were therefore affirmed.

Because "reasonable distance from the scene of the accident" is expressly stated to be the only new requirement for recovery added by the court in *Kelley*, it behooves us to inquire what effect that requirement will have on future cases. "Reasonableness" is an overworked and nebulous concept. Like the Shadow, it has "the power to cloud men's minds." When used to determine whether a person's conduct has been negligent, its meaning and utility are pretty well understood: It is a measure by which the trier of fact can prescribe an appropriate standard of conduct. In that familiar context, reasonableness is measured by reference to a specific quality, prudence, which we all have a right

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[63] *See* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In denying liability to a mother who witnesses the negligently caused death of a child, Justice Breitel said: "[F]oreseeability, once recognized, is not so easily limited. Relatives, other than the mother, such as fathers and grandparents, or even other caretakers, equally sensitive and as easily harmed, may be just as foreseeably affected." *Id.* 24 N.Y.2d at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558. With respect to the difficulty of circumscribing liability "within tolerable limits of public policy," he stated: "Every parent who loses a child or whose child of any age suffers an injury is likely to sustain grievous psychological trauma, with the added risk of consequential serious harm. Any rule based solely on eyewitnessing the accident could stand only until the first case comes along in which the parent is in the immediate vicinity but did not see the accident. Moreover, the instant advice that one's child has been killed or injured, by telephone, word of mouth, or by whatever means, even if delayed, will have in most cases the same impact. The sight of gore and exposed bones is not necessary to provide special impact on a parent. Again, the logical difficulty of excluding the grandparent, the relatives, or others *in loco parentis*, and even the conscientious and sensitive caretaker, from a right to recover, if in fact the accident had the grave consequences claimed, raises subtle and elusive hazards in devising a sound rule in this field." *Id.* at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

[64] *Id.*

[65] 56 Haw. at 209, 532 P.2d at 676. (Emphasis added.) The court held that defendants did not owe a duty to plaintiffs' decedent and stated: "[W]e hold that the appellees could not reasonably foresee the consequences to Mr. Kelley. Clearly, Mr. Kelley's location from the scene of the accident was too remote." *Id.*

The court also stated: "We further conclude, based on the facts of the case, that the proper law applicable herein is Hawaii law." *Id.* It seems unfortunate that in deciding the interesting conflict of laws issue the court did not further elucidate its reasons for applying the forum's substantive law rather than California's, or cite any authority to support its decision. It is by no means clear that application of Hawaii law was called for in a case like this under current approaches to conflict of laws. *Cf.* RESTATEMENT (SECOND) CONFLICT OF LAWS §146, 175–80 (1971) *and* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 219–24 (1971).

to expect from one another when we engage in activities that have a potential for causing harm.[66]

In the absence of a reference point capable of being ascertained or established, however, reasonableness becomes an unworkable standard: Reasonable in relation to what? This, of course, is the difficulty with the court's "reasonable distance from the scene of the accident" requirement.[67] Against what criterion will the reasonableness of the plaintiff's distance from the accident be measured? If 2,500 miles is unreasonable, will one, two, or ten miles be reasonable? All other factors being equal, a person who witnesses an accident may suffer greater emotional distress than one who does not, but for those who do not witness the accident or its immediate aftermath, there seems to be no significant difference between 2,500 miles and 250 feet.[68]

Thus, the import of the "reasonable distance from the scene of the accident" requirement, and indeed the impact of *Kelley* on future cases, can only be determined by reference to the court's purpose in imposing the new limitation on the scope of duty. That purpose, as the court made clear, was to avoid "unmanageable, unbearable and totally unpredictable liability" upon defendants.[69] Unfortunately, however, *any* restriction on the scope of liability permitted by *Rodrigues* and *Leong* will tend to serve that vague purpose; and the shorter the distance deemed reasonable, the greater the likelihood that the defendant-protective objective will be served. On the other hand, the court in *Kelley* explicitly reaffirmed the independent duty of care it had created in *Rodrigues* and *Leong*, subject only to the newly imposed distance limitation.[70] A fair conclusion is that the court is not inclined to reimpose restrictions, with respect to distance or other factors, that it has already specifically rejected based upon the facts of those cases.[71] At least, the court will probably not do so unless it determines that other limitations are insufficient to achieve its defendant-protective objective.

It also seems highly unlikely that the court intended to have the question of what constitutes a reasonable distance from the scene of the accident turned

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[66] *See generally* PROSSER, *supra* note 6, §32 at 149–51.

[67] A similar problem may be discerned in the court's use of the phrase "reasonable man" in the test it set down to determine whether plaintiff might recover for mental distress: "[W]here a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Rodrigues v. State, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970). Here, "reasonable" obviously refers not to prudence but presumably to the degree of phlegm one possesses. Perhaps the better word would have been "ordinary" or "average." However, any confusion created seems to have been dispelled by the addition of the words "normally constituted." *See* Brott, *supra* note 10, at 151. *Cf.* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1257–58 (1971), where the author urges that defendant be liable "to a 'normal' plaintiff who possesses a reasonable degree of pre-existing susceptibility to injury."

[68] *See* note 63 *supra*. Where two plaintiffs each get the news by telephone, it is possible that the one who is more distant from the accident might suffer greater distress because the distance could prevent him from supervising the care of and providing comfort to the injured person. Thus, feelings of guilt and anxiety as well as grief, horror, and shock would be created.

[69] 56 Haw. at 209, 532 P.2d at 676.

[70] *Id.* The court's language is quoted at p. 10 *supra*. The court also indicated that in "the factual context" of *Rodrigues* and *Leong* allowing relief only for serious mental distress sufficiently limited defendant's liability. *Id.* at 208, 532 P.2d at 676.

[71] These include requirements that plaintiff suffer a physical impact, that plaintiff be within the zone of physical danger, that plaintiff suffer distress produced by fear for his own safety, that the distress be produced by concern for the safety of human beings rather than property, that plaintiff be related by blood to the victim, and that the distress produce physical harm.

over to the jury to decide on a case-by-case basis. In *Kelley* itself the court treated the question as one of policy to be decided by the court under the rubric of the duty issue. Moreover, the vagueness of the test provides no clue that would assist the jury in determining what considerations it should take into account in determining what distance is reasonable. And even if the court informed the jury of the purpose it intended to serve by imposing the reasonable distance requirement, it would be grossly unfair to allow the decision in each case to turn on the question of whether the jury believed that liability arising out of the particular accident might be unmanageable, unbearable, or greater than the defendant could have predicted. Outcomes would then turn on such irrelevant matters as the amount of damage suffered by the physical injury victims, the number of close relatives and witnesses who might claim mental distress, and the amount of mental distress damages claimed in the particular case. The greater the likely damages the accident in question might produce, the closer the distance that would be deemed unreasonable—a curious result, indeed.

Thus, it is inevitable that the reasonable distance rule will have to be clarified or changed by the supreme court if uniformity of application is to be achieved in the state's trial courts. Assuming the court continues to manipulate the distance requirement, rather than other factors, the clarified rule could extend recovery to plaintiffs located in Hawaii when the accident occurred within the state, at the most liberal extreme; could restrict recovery to plaintiffs close enough to the accident, or its immediate aftermath, to suffer a "contemporaneous impact upon the senses,"[72] at the most restrictive extreme; or could place the distance limit somewhere in between these extremes, as, for example, by requiring plaintiff to be present on the island on which the accident occurred or within a distance that would permit plaintiff to arrive at the accident scene before the wreckage was cleared away or the "dust had settled."[73]

The only clues provided by the court as to where it might draw the line are ambiguous, at best: In *Ajirogi v. State*,[74] the author of the *Kelley* majority opinion, explaining the court's handling of the duty question in the latter opinion, said: "In *Kelley*, if this court did not limit the 'scope of the duty of care,' the liability of the actor could have been premised *on a world-wide basis*."[75] This statement may suggest a geographical limitation such as requiring the plaintiff to be located within the state, although other interpretations are possible. In the *Kelley* opinion the court quoted Prosser with approval.[76]

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[72] The current California rule requires such an impact. Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977), and *see generally* note 34 *supra*. The attempt to translate this rule into a distance requirement demonstrates the anomalies produced by focusing on distance alone. For example, a deaf and blind plaintiff close enough to suffer a contemporaneous impact on his senses but who suffers none because of his condition would be eligible to recover under the suggested rule if he experiences serious distress when the facts of the accident are communicated to him hours later.

[73] Recovery has been denied in California in a case where plaintiffs did not arrive at the scene until after the accident but before the dust had settled. Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978).

[74] 59 Haw. 515, 583 P.2d 980 (1978).

[75] *Id.* at 532, 583 P.2d at 990 (Kobayashi, J., dissenting). (Emphasis added.) In *Kelley* itself the court expressed concern that language in *Leong* "could very well be construed to mean that the appellees owe a duty of care from [sic] the negligent infliction of serious mental distress upon a person located in any part of the world." 56 Haw. at 208, 532 P.2d at 676.

[76] 56 Haw. at 209, 532 P.2d at 676.

Perhaps this can be taken as an indication that the limitations suggested by Prosser,[77] which are unfortunately not confined to distance but include other factors such as relationship to the accident victim and the time it takes for the news of the accident to be brought home to plaintiff, are to be adapted to the distance requirement. Prosser's approach would seem consistent with the more restrictive rule, since he suggests that "it might be required that plaintiff be present at the time of the accident or peril, or at least that the shock be fairly contemporaneous with it. . . ."[78]

In view of the large number of tourists, armed services personnel, and recent in-migrants in Hawaii with close relatives overseas, limiting recovery for mental distress without impact to plaintiffs located within the state when the precipitating accident or event occurs here would substantially reduce the potential number of mental distress awards. While in practical effect such a rule would probably have a parochial and exclusive effect since it would tend to favor relatives of longer-term Hawaii residents whose entire families live within the state, it would nevertheless operate evenhandedly to protect both local and nonlocal defendants, to benefit nonresident close relatives of accident victims who happened to be present in the state when the precipitating accident occurred, and to deny recovery to Hawaii residents who happened to be overseas when their loved ones were injured or killed in Hawaii. Furthermore, the drawing of such a line might be justified on the ground that persons located within the state, even on islands other than the one on which the accident occurred, are ordinarily in a good position to get to the accident scene, to the hospital, or to the morgue within at least a few hours after the accident occurs, and are thus able to observe the carnage wrought by the accident or the immediate after-effects while the emergency is still fresh. Overseas relatives, on the other hand, would not ordinarily be able to reach Hawaii until community resources that deal with such tragedies already had been marshalled to conceal the more horrible aspects of the accident from view and to provide the spiritual comfort and psychological counselling designed to reduce or cushion the shock.

Unfortunately, however, this justification for the in-state/out-of-state dichotomy would not apply to specific factual situations where factors other than distance might affect the length of time it takes plaintiff to arrive at the scene of the accident nor take into account either the manner in which the facts of the accident are communicated to plaintiff or the shock-producing capacity of those facts. Consider, for example, the possibility of a negligently produced airplane crash involving an inter-island flight. Close relatives and loved ones of the passengers and crew might be located anywhere in the world. Of those outside of Hawaii, some, learning of the crash by radio or telephone, might secure transportation that would bring them to Hawaii within hours of the accident. Others might actually see the aftermath of the accident on television within hours of its occurrence. And still others might even have been en route to Hawaii by plane when the crash occurred and would thus receive the tragic news and witness the accident's effects shortly after landing. On the other hand, those relatives located in Hawaii might be inaccessible and not learn of the crash until days after it occurs; or they might be unable, for a variety of reasons, to travel to the crash scene or to observe the injured victim, or his remains, at

[77] *Supra* note 6, §55 at 335.
[78] *Id.*

all; or, like Mr. Kelley, they might die or become immobilized as the result of shock immediately after hearing the tragic news.

Thus, even assuming that a rule adopting the in-state/out-of-state dichotomy would, in the court's view, be sufficiently restrictive to avoid "unmanageable, unbearable and totally unpredictable liability," such a rule could only operate capriciously. The only "pure" distance rule that has any possibility of operating fairly and even-handedly in these cases would be one that requires distress-without-impact plaintiffs to be close enough to the accident to suffer a contemporaneous or near-contemporaneous impact upon their senses,[79] the more restrictive rule suggested by Prosser.

It would seem to follow, therefore, that if the court is really determined, as it said it is, to apply the duty of care set forth in *Rodrigues* and *Leong* to plaintiffs "meeting the standards stated in said cases," subject only to their being "located within a reasonable distance from the scene of the accident," and if the court wishes to avoid invidious and indefensible distinctions between plaintiffs, it can hardly avoid adopting a distance rule located at the more restrictive end of the continuum.

Indeed, the court will surely come to see that only a very restrictive approach—whether based upon distance alone or combined with other factors—is capable of achieving the court's objective of avoiding untrammeled liability. This recognition will follow because the potential for such liability exists in almost every case in which defendant negligently produces serious injury or death to accident victims. Where such serious consequences are reasonably foreseeable,[80] serious distress to all close relatives and loved ones of the victims,[81] to eyewitnesses,[82] and possibly even to rescuers is also foreseeable.[83] Even though in some cases the victim's close relatives and loved ones may be located outside the state, there are likely to be many cases where most or all of them will be present in Hawaii, perhaps even present on the island where the accident occurs and only minutes away from the scene. The prospect of extensive and excessive liability in these cases is produced by the likelihood that huge damages to the accident victim or victims will be combined with substantial awards to those who suffer serious distress and its attendant consequences.[84] Only by

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[79] *But see* note 72 *supra*.

[80] There will be cases in which the accident victims themselves will be allowed to recover for serious injuries even though the risk reasonably foreseeable to the defendant did not include injuries of such seriousness. *See, e.g.*, Pease v. Sinclair Refining Co., 104 F.2d 183 (2d Cir. 1939) (plaintiff teacher received from Sinclair an exhibit of petroleum products in which the bottle labeled kerosene actually contained water. Plaintiff suffered severe burns and lost an eye when, knowing that kerosene may be used to preserve raw sodium, he poured the contents of the bottle onto a piece of sodium metal). *Accord*, RESTATEMENT (SECOND) of TORTS §§435, 454 (1966). In these cases, risk of serious mental distress to third persons is arguably not reasonably foreseeable to defendants and, therefore, defendants will not be deemed to have breached their duty of care to third persons under the *Rodrigues* and *Leong* standards.

[81] *See* note 63 *supra*.

[82] *See, e.g.*, Chadwick v. British Railways Bd. [1967] 1 W.L.R. 912 (widow of man who suffered serious psychoneurotic symptoms as a result of his experience while serving as a rescuer at a gruesome train wreck permitted to recover).

[83] *Id. Also cf.* Wagner v. International Ry. Co., 232 N.Y. 176, 133 N.E. 437 (1921) ("Danger invites rescue."). In such cases, the court might invoke a doctrine analogous to assumption of risk to deny recovery. *See, e.g.*, Justus v. Atchison, 19 Cal. 3d 564, 585, 565 P.2d 122, 136, 139 Cal. Rptr. 97, 111 (1977), where the California Supreme Court suggested that only involuntary witnesses to an accident should be entitled to recover.

[84] Damages might include the following: (1) awards for reasonable medical, surgical, and hospital expenses and related costs, for lost earnings and earning capacity, and for pain and suffering to the

narrowly and arbitrarily limiting the number of plaintiffs able to qualify for mental distress awards in *all* cases can the court allay its principal concerns.[85]

However, in cases where defendant would be liable *only* for negligently inflicted mental distress and its consequences, the court has significantly less reason for concern.[86] In these cases recovery for mental distress would not be heaped upon primary recovery for other damages, and both the seriousness and the foreseeability requirements would narrowly limit the number of potential plaintiffs in all but the most unusual cases.[87] Thus, except where an independent liability-limiting policy is discerned,[88] the court should allow the plaintiffs in these cases to proceed on the general principles enunciated in *Rodrigues* and *Leong* without further restrictions produced by the concerns that moved the court to restrict the scope of liability in *Kelley*.

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physical-injury victims who survived; (2) awards to the estates and the wrongful-death-act beneficiaries of physical-injury victims who did not survive for damages permitted under the survival statute and wrongful death act, HAW. REV. STAT. §§663–3, 663–7, 663–8 (1976); (3) awards to the estates and to the wrongful-death-act beneficiaries of serious-mental-distress victims who, like Mr. Kelley, die from the shock engendered by the accident for damages permitted under the survival statute and the wrongful death act, *id.*; and, (4) awards to close surviving relatives and loved ones, such as spouses, fiances, caretakers, and those with whom the victims were living in intimate relation, of the physical-injury victims, as well as to bystander witnesses, for all the damages, as in (1), above, produced by their serious mental distress.

In Hawaii, where death ensues, the estate may recover the damages listed in (1), above, suffered by the decedent until the time of his death plus "the future earnings of the decedent in excess of the probable cost of the decedent's own maintenance and the provision decedent would have made for his or her actual or probable family and dependents during the period of time decedent would have likely lived but for the accident." HAW. REV. STAT. §663–8 (1976). In addition, the legal representative may recover the "reasonable expenses of the deceased's last illness and burial," and the wrongful death beneficiaries—the surviving spouse, children, father, mother, and any person wholly or partly dependent on the deceased person—may recover "fair and just compensation, with reference to the pecuniary injury and loss of love and affection," which includes items normally allowed in an action for loss of consortium as well as amounts that the beneficiaries would have received from the decedent during his lifetime. HAW. REV. STAT. §663–3 (1976).

[85] Unless an entirely different approach is taken. *See* Part V, pp. 36–43 *infra*.

[86] Such situations would include those where defendant's negligence consists of words or conduct that create fear for safety of self, *see, e.g.*, Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896) (plaintiff claimed to have suffered fright and subsequent miscarriage when defendant's driver of a horse-drawn car pulled up to her and, when the horses stopped, plaintiff found herself standing between them); fear for the lives or safety of loved ones, *see, e.g.*, Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975), *discussed* pp. 8–9 *supra*; concern for plaintiff's property or financial interests, *see, e.g.*, First Nat'l Bank v. Langley, 314 So. 2d 324 (Miss., 1975) (plaintiff suffered mental distress when defendant bank negligently delayed retrieving the deposit that plaintiff had placed in defendant's night depository and that had become stuck in the mechanism); or that threaten harm to other important interests of plaintiff, *see, e.g.*, Corrigal v. Ball and Dodd Funeral Home, Inc., 89 Wash. 2d 959, 577 P.2d 580 (1978) (defendant funeral home was alleged to have contracted with mother to deliver ashes of her son in an urn. Plaintiff received box from funeral home and opened it, expecting to find the urn containing the ashes. Instead, she found a package that seemed to contain packing material. She sifted through the material looking for the urn and then suddenly realized that the material was her son's ashes), but where the subject of plaintiff's concern suffers no actionable injury.

[87] Such as negligent conduct that causes a bus or theatre full of people to fear for their own safety, or where all the members of a large family receive erroneous information reporting serious harm to a loved one as a result of defendant's negligence in transmitting a message. Such situations could present the "hard cases," which might impel courts to make further inroads into the right to recover for emotional distress even in cases where there are no "primary" victims.

[88] It is unlikely that courts will allow the independent tort of negligent infliction of emotional distress to be used to circumvent requirements for, limitations to, or defenses against other torts where such requirements, limitations, or defenses are seen to serve important objectives. Thus, for example, aggrieved medical malpractice defendants have not succeeded in by-passing the stringent requirements of the tort of malicious prosecution, which serve the purpose of protecting honest litigants who are seeking justice, *see generally* PROSSER, *supra* note 6, at 851, by suing for negligent infliction of mental distress. See 3 PROF. LIAB. REP. 137 (1979) and authorities there cited. *See*

The *Rodrigues*-type situation, in which plaintiffs claim emotional distress occasioned by injury to property, presents an interesting hybrid. In general, the potential liability for property damage and for mental distress produced thereby is not nearly so great as in personal injury cases. Furthermore, the court's seriousness and foreseeability requirements would tend to impose significant limits on the number and range of plaintiffs who might recover for emotional distress produced by injury to property. Thus the potential for untrammeled and unreasonably burdensome liability in property damage cases is low compared to that in personal injury cases. Nevertheless, it would be surprising if the court in the future permits recovery for mental suffering occasioned by injury to property in situations where such recovery will not be allowed if occasioned by injury to the person. Were it to do so, the court might be perceived as giving *greater* protection to emotional attachment to property than to concern for human life.[89]

The post-*Kelley* prognosis, therefore, is that in cases of mental distress occasioned by injury to third persons and property, the Hawaii Supreme Court seems destined to adopt a more restrictive approach, similar to if not quite as limiting as California's "contemporaneous impact on the senses" rule, and thus to retreat further from the more principled and more generous approach of *Rodrigues* and *Leong*.

Whether such a retreat is either necessary or appropriate, however, remains to be seen.

II. Considerations of Logic, Fairness, and Policy

As many courts have noted—often when rejecting an expansion of liability—once an independent interest in freedom from negligently inflicted mental suffering is recognized, there is no logical stopping-place.[90] There seems not to

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generally Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 Ford L. Rev. 1003, 1066–74 (1977). Similarly, it is unlikely that defenses and burdens developed under the first amendment to protect the public media in the defamation and privacy area will be lightly set aside when plaintiff includes a claim for negligent infliction of mental distress. *Cf.*, Gertz v. Robert Welch, Inc., 418 U. S. 323 (1974) (defamation), and Time, Inc. v. Hill, 385 U. S. 374 (1967) (privacy). There is an interesting question whether publication of a piece of news or a picture that neither defames nor invades the plaintiff's privacy when the publisher knew or should have known that there was an unreasonable risk of serious distress to some readers or viewers (as where a particularly gory accident is depicted and the victims are identified on television before the next of kin have been notified) should be privileged, but it is beyond the scope of this article.

The reaction of judges to claims that expansion of recovery for negligence be allowed to overcome restrictions on other pre-existing torts has never been more clearly expressed than by Justice Cardozo:

> If this action [for negligence] is well conceived, all these principles and distinctions [in actions for deceit], so nicely wrought and formulated, have been a waste of time and effort. They have been a snare, entrapping litigants and lawyers into an abandonment of the true remedy lying ready to call. The suitors thrown out of court because they proved negligence, and nothing else, in an action for deceit, might have ridden to triumphant victory if they had proved the selfsame facts, but had given the wrong another label . . . So to hold is near to saying that we have been paltering with justice." Ultramares Corp. v. Touche, 255 N.Y. 170, 186–87, 174 N.E. 441, 447 (1931).

[89] *Cf.*, Rodrigues v. State, 52 Haw. 156, 178–80, 472 P.2d 509, 522–23 (1970) (Levinson, J., dissenting).

[90] *See, e.g.*, Tobin v. Grossman, 24 N.Y.2d 609, 618, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969) ("Assuming there are cogent reasons for extending liability in favor of victims of shock resulting from injury to others, there appears to be no rational way to limit the scope of liability."),

be any scientific basis upon which to draw the lines adopted in *Kelley* and in the California cases subsequent to *Dillon v. Legg*: In view of the unpredictable range of human reactions,[91] it is not possible to assert with any certitude that a parent who witnesses the running down of a child will foreseeably suffer greater distress than a parent who comes upon the scene moments later, or, for that matter, than a Mr. Kelley, thousands of miles from the accident, who learns by phone that a daughter and granddaughter have been killed and another granddaughter critically injured. In each of these cases the degree of mental suffering is probably going to be very great indeed.[92] And in each of these cases the precise nature and degree of the effect, whether mere primary response or traumatic neuroses,[93] will depend on many factors,[94] including the circumstances of the accident, the age of the victims, the nature of the relationship between the victims and the plaintiff, and the character, personality, and constitution of the plaintiff. However, what is reasonably foreseeable to the reasonably prudent person in modern society is that if he or she produces serious physical harm or death to a victim, the victim's loved ones are likely to suffer mental distress of a serious nature. Thus, to limit arbitrarily the class of plaintiffs who recover to percipient witnesses, to those who are located near the scene of the accident, to close relatives of the victim, or to those who will be foreseeably present at the scene, unfairly deprives deserving plaintiffs of recovery on grounds that cannot be sustained by logical analysis. Furthermore, to hold that defendants cannot "reasonably foresee" that plaintiffs such as Mr. Kelley, who are deemed to fall outside these categories, will suffer serious mental distress[95] is to ignore reality.[96]

But even if it be conceded that language, logic, and symmetry may sometimes be sacrificed on the altar of policy, the question remains as to whether sound policy requires the adoption of arbitrary cut-off lines.

In *Kelley*, the loss occasioned by Mr. Kelley's distress-produced death was allowed to lie where it fell—on those plaintiffs, including his widow, who suffered pecuniary and other losses consequent upon his untimely demise. In refusing to shift the loss back to the defendants, the court implicitly gave primacy to the recognized tort objective of not discouraging useful enterprise by saddling it with unduly burdensome liability.[97] Unfortunately, it did not

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and Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935) ("[T]he liability imposed by such a doctrine [allowing plaintiff not within zone of physical danger to recover] would . . . enter a field that has no sensible or just stopping point.").

[91] *See* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1250 (1971).

[92] *See* the excerpts from Justice Breitel's opinon for the court in Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969), *quoted in* note 63, *supra*.

[93] *See* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L. REV. 1237, 1249–51 (1971).

[94] *Id.* at 1257, n. 114.

[95] Kelley v. Kokua Sales and Supply, Ltd., 56 Haw. 204, 209, 532 P.2d 673, 676 (1975).

[96] Indeed, the writer of the *Kelley* majority opinion subsequently stated: "In *Kelley* this court dealt with the matter of foreseeability only in connection with limiting 'the scope of the duty of care,' and *only incidentally* concluded that the consequence to Mr. Kelley was not foreseeable." Ajirogi v. State, 59 Haw. 515, 532, 583 P.2d 980, 990 (1978) (Kobayashi, J., dissenting) (emphasis added). He then went on to suggest that where there is no policy reason requiring a limitation on the scope of duty, and more than one inference can be drawn from the facts, foreseeability should be treated as a question of fact for the jury. *Id.* at 532, 583 P.2d at 990. *See also* note 171, *infra*.

[97] "[T]he courts frequently have been reluctant to saddle an industry with the entire burden of the harm it may cause, for fear that it may prove ruinously heavy. This is particularly true where

burden its conclusion that liability would be "unmanageable, unbearable and totally unpredictable" with any supporting arguments or data other than to quote a paragraph from Prosser[98] which is arguably inapposite to the facts of *Kelley*. It also failed to discuss other legitimate tort policies that might, on balance, have supported a different result. Although the court indicated that it had reevaluated "the various considerations pertinent to the question of an untrammeled liability,"[99] it did not expose the details of its reevaluation in its opinion. Its failure to do so is perhaps understandable:[100] Appellate courts are not as well-suited as legislative bodies to ferret out all the complex data that would provide the basis for rational policy-making in a case such as this.[101] Furthermore, gaps in the data, inconsistencies, and difficulties involved in assessing and balancing effects suggest that, ultimately, decisions such as this must necessarily be based less on rational analysis than on community attitudes and preferences—the felt needs of the times—as perceived by the justices.

Nevertheless, it will prove useful to consider whether other tort law objectives might have been served by allowing liability in *Kelley*, and, if so, whether they might have outweighed in importance the "negative" objective of not overburdening useful activity. These objectives include fairness in the distribution of losses, compensation to victims, and deterrence of accidents.

A. Fairness in the Distribution of Losses

If the line drawn to cut off Mr. Kelley's right to recover is arbitrary, as suggested above, then the goal of fairness in the distribution of losses was arguably ill-served by the decision. That is, that plaintiff's decedent was not located within a reasonable distance from the accident does not seem to be a satisfactory, principled answer to the question of why plaintiff Leong should be allowed to recover while Mr. Kelley and his beneficiaries should not. Recall that it was concern about unequal treatment of plaintiffs that led the California court, in *Dillon v. Legg*, to drop the requirement that plaintiff, in order to

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the liability may extend to an unlimited number of unknown persons, and is incapable of being estimated or insured against in advance." PROSSER, *supra* note 6, §4 at 22–23 (footnotes omitted).

[98] "It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, *including every bystander* shocked at an accident, and *every distant relative* of the person injured, as well as *his friends*." PROSSER, *supra* note 6, §54 at 334 (emphasis added), *quoted in* Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 209, 532 P.2d 673, 676 (1975). Mr. Kelley, of course, was not a mere bystander, a mere friend, or even a distant relative (although he was a relative some distance away). He was the grandfather of two and the father of one of the victims. Prosser would probably have supported a denial of recovery to Mr. Kelley, however, because Kelley learned of the accident some time after it had occurred, and because Prosser felt a line had to be drawn "somewhere short of undue liability." PROSSER, *supra* note 6, §54 at 335.

It is both interesting and suggestive to recall that similar concerns were expressed 137 years ago in another case involving the scope of liability for negligent conduct: "There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." Winterbottom v. Wright, 10 M. & W. 109 (Exch. 1842).

[99] 56 Haw. at 209, 532 P.2d at 676.

[100] *But see* note 249 *infra*.

[101] *But see* Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 308–09 (1963).

recover for mental distress, must personally be within the zone of danger of physical harm.[102] That California has subsequently imposed other arbitrary distinctions that tend to support the decision in *Kelley* does not satisfactorily dispose of the argument that plaintiffs in *Kelley* were denied fair and equal treatment vis-à-vis other equally deserving plaintiffs.[103]

On the other hand, if *Kelley* is viewed *in vaccuo*, it is possible that the denial of liability would coincide with the sense of rightness or justice[104] of a significant segment of the community. In the first place, those who are inclined to accept the vicissitudes of life—the inevitability of accidents and the vagaries of fate—may feel that "a certain toughening of the mental hide is a better protection than the law could ever be."[105] Such persons might deem it extravagant, unnecessary, and even unwise to seek to compensate victims of mental suffering, especially those whose injury does not result from direct sensory perception of the original tragedy. Their view would be supported, in the pure mental suffering cases, with findings of psychologists that the litigation itself and the possibility of recovery may actually contribute to and intensify the plaintiff's mental reaction.[106] However, this attitude would seem more appropriate to the facts of *Rodrigues* and *Leong*, where plaintiffs claimed only mental suffering without attendant physical injury, than to the facts of *Kelley*, where plaintiffs' decedent suffered a fatal heart attack.

Secondly, even those who are more sympathetic to compensating victims of mental distress may react negatively to the apparent disproportionality of damages in relation to defendant's blameworthiness. Negligence is merely substandard conduct. It is no part of plaintiff's case to prove that defendant was indifferent or inadvertent to consequences—that defendant possessed a negligent state of mind.[107] Thus, much of the behavior that is adjudged actionably negligent is merely the product of ordinary human fallibility—"deficiencies in knowledge, memory, observation, imagination, foresight, intelligence, judgment, quickness of reaction, deliberation, coolness, self-control, determination, courage or the like"—[108] in a complex and danger-laden environment. A defendant's actionable conduct, therefore, may or may not be blameworthy in a moral sense.[109] Allowing enormous damages to flow from

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[102] *See* p. 4 *supra*.

[103] *Cf.* G. CALABRESI, THE COSTS OF ACCIDENTS 294 (1970) (hereinafter cited as CALABRESI): "To the critic consistency, or apparent consistency, is not an absolute requirement ... within accident law.... For example, unjust pressures or undue costs might be necessary to achieve consistency. But apparently inconsistent treatment is not easily accepted by the public and must be explained both rationally and emotionally if a community sense of fairness is to be preserved."

[104] That is, the decision to deny recovery might be viewed as appropriate, fair, and consistent with community expectations.

[105] Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936). *See also* Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561–62 (1969): "The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable acts of others. This is the risk of living and bearing children," and Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 U. VA. L. REV. 193, 228 n. 128 (1944).

[106] *See* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1261 (1971), and authorities there cited.

[107] PROSSER, *supra* note 6, §31 at 145, 146.

[108] Edgerton, *Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 867 (1926).

[109] "It is now more or less generally recognized that the 'fault' upon which liability may rest is social fault, which may but does not necessarily coincide with personal immorality." PROSSER, *supra*

merely negligent conduct runs the risk of unfairly penalizing a morally innocent defendant and of being perceived as grossly disproportionate to defendant's fault. It is for this reason, among others, that certain items of damage, such as lost profits, have traditionally been disallowed in negligence actions.[110] And, indeed, it may be the excessiveness of the potential damages in relation to the defendants' fault, rather than the possible unmanageability, unbearability, and unpredictability of the liability, that is the principal reason for the court's liability-limiting decision in *Kelley*, and that would justify denial of recovery to otherwise deserving plaintiffs on grounds of fairness.[111]

Since I believe that disproportionality is the key to the problem of extending the scope of liability for mental disturbance, I will have more to say about how to deal with it in a later section of this article.[112] For the present, however, it should be noted that there may be cases in which the facts warrant or even compel an inference that defendant's negligent conduct was morally blameworthy, and *Kelley* may be one of them: Where defendant's activity engenders a great risk of serious physical harm or death, where defendant is clearly chargeable with knowledge of this risk, and where defendant clearly has had ample opportunity to consider the risk and to develop feasible means of avoiding it, a failure to avoid it would seem to justify an inference of lack of care, if not outright recklessness.[113] Thus, for example, if plaintiffs in *Kelley* could have proved that defendant truck manufacturer had been negligent in failing to provide a safer or even a fail-safe braking system for the truck and that this failure was a substantial factor in producing the accident, then it is difficult to avoid the conclusion that such proof would also have established a significant degree of moral fault. In that event, the added liability produced by recovery for mental distress might not have seemed excessively burdensome, disproportionate to the culpability, or unfair.[114] It would seem to follow, therefore, that if the court's legitimate concern was disproportionality of liability to culpability, then a more well-informed decision, and perhaps a fairer one,

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note 6, §4 at 18. Holmes would have agreed: "[T]he standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise." O.W. HOLMES, THE COMMON LAW 110 (1881).

[110] *See, e.g.*, Stevenson v. East Ohio Gas Co., 73 N.E. 2d 200 (Ohio App. 1946). *See also* James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43 (1972) and Note, *Negligent Interference with Economic Expectancy: The Case for Recovery*, 16 STAN. L. REV. 664 (1964).

[111] That is, the unfairness of denying recovery to a plaintiff on grounds that are arbitrary in terms of principle may be outweighed by the perceived unfairness of imposing a burden on defendant that seems much greater than his fault would justify. *See* Part IV *infra* at pp. 33–36.

[112] *Id.*

[113] Posner even suggests that defendants' acts may be deemed "intentional" in such situations: "Most accidental injuries are intentional in the sense that the injurer knew that he could have reduced the probability of the accident by taking additional precautions. The element of intention is unmistakable when the tortfeasor is an enterprise which can predict from past experience that it will inflict a certain number of accidental injuries every year." R. POSNER, ECONOMIC ANALYSIS OF LAW 66 (1972). Indeed, it appears that knowledge of the predictable risk plus deliberate failure to reduce it, in order to reduce costs, provided the basis for the jury's award of compensatory and punitive damages amounting to $128 million in the notorious California case involving the rupture and explosion of the fuel tank on a 1972 Pinto. *Why the Pinto Jury Felt Ford Deserved $125 Million Penalty*, Wall St. J., Feb. 14, 1978, at 1, 31.

[114] And conversely, the failure to impose such liability might be seen to result in total damages that are disproportionately low.

could have been made as to the scope of liability after the facts were developed at trial rather than after a summary judgment in favor of the defendants.

B. Compensation

While it has long been an article of faith that compensation for accident victims is a major objective of tort law,[115] commentators have recently pointed out that, since tort law does not compensate for all accidental injuries, its real objective "is to determine whether to compensate, and if so, how."[116] Under this view, "there is no presumptive injustice in the tort law solely because the plaintiff is denied compensation . . . ." [117] Rather, it becomes necessary, in order to determine whether justice has been served or disserved in any particular case in which compensation has been denied, to inquire whether other identifiable goals of tort law have themselves been served or disserved.

1. Compensation as a means of achieving economic efficiency. One such goal suggested by Judge Learned Hand's much-mooted formula for determining negligence[118] and further articulated by Professor Posner is, in the latter's words, "to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety."[119] If the costs of an accident are less than the costs of avoiding it, then the actor has no obligation to avoid it. Conversely, however, if the costs of an accident exceed the costs of avoiding it, the actor must pay for the accident. Under this theory the injured party is awarded his damages "as the price of enlisting [his] participation in the operation of the system."[120]

As Professor Posner points out, foreseeability plays an important role under this system:

> If negligence is a failure to take precautions against a type of accident whose cost, discounted by the frequency of its occurrence, exceeds the cost of the precautions, it makes sense to require no precautions against accidents that occur so rarely that the benefit of accident prevention approaches zero. The truly freak accident isn't worth spending money to prevent. Moreover, estimation of the benefits of accident prevention implies foreseeability.[121]

It would seem to follow, therefore, that the goal of economic efficiency is disserved if reasonably foreseeable costs of accidents are not included in the calculation. In such event, actors would not be motivated to consider the real but excluded costs in deciding whether the costs to victims exceeded the cost of precautions. Since the Hawaii Supreme Court had already recognized serious mental distress as a cost of accidents, disallowing recovery for such distress in

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[115] *See, e.g.* PROSSER, *supra* note 6, §2 at 6.

[116] R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 242 (1965), *quoted in* Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643, 644, n. 5 (1978).

[117] Epstein, *Products Liability: The Search for the Middle Ground*, *supra* note 116, at 645.

[118] "[I]f the probability [of the injury-producing event occurring] be called P; the [gravity of the resulting] injury, L; and the burden [of adequate precautions], B; liability depends upon whether B is less than L multiplied by P: *i.e.*, whether $B < PL$." United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[119] Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) [hereinafter cited as Posner].

[120] *Id.*

[121] *Id.* at 42.

Kelley when, policy considerations aside,[122] reasonable persons could have decided as a matter of fact that Mr. Kelley's distress was reasonably foreseeable, seems inconsistent with the efficiency goal.

This criticism, however, is probably not a very serious one. In the first place, the cases are legion in which courts have denied recovery for consequences that judges deemed, for a variety of reasons, to be too "remote,"[123] but that economic theorists like Posner might deem to be foreseeable and non-"freaky" costs of the accidents that produced them. Denial of recovery in such cases seems inconsistent with the objective of economic efficiency as a theory of negligence law.

In the second place, there is serious question, as I will discuss,[124] whether heaping recovery for mental-distress victims upon damages already recoverable by physical-injury victims is likely, as a practical matter, to produce greater efficiency in cases like *Kelley*.

Finally, it must be noted that Professor Posner deduced the efficiency goal from the "Hand formula" and then, with the benefit of hindsight, tested it on cases decided in an era, 1875–1905, when the goal was not well-recognized.[125] During most of that period the principal expositor of the objectives of tort law was Holmes, in *The Common Law*.[126] As Posner himself concluded: "Holmes left unclear what he conceived the dominant purpose of the fault system to be, if it was not compensation."[127] Unclear as Holmes' views may have been, they did not explicitly or implicitly include economic efficiency as a major purpose of negligence law.[128] It may therefore be argued that economic efficiency, like

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[122] *See* note 96 *supra*.

[123] *See, e.g.*, Ultramares Corp. v. Touche Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931) (plaintiffs who suffered losses from relying on financial statements negligently prepared by defendant for a client denied recovery); Ryan v. New York Central R.R. Co., 35 N.Y. 210, 91 Am. Dec. 49 (1866) (defendant who negligently starts fire on own premises not liable to owner of adjacent premises to which fire spreads).

Conversely, and even more destructive of Posner's thesis, is the likelihood, illustrated by the Pinto case, *supra* note 113, that a calculated attempt to engage in a cost-benefit analysis, comparing the economic value of predictable injuries to persons with the cost of safety measures designed to prevent the injuries, may result in liability for heavy punitive damages as well as compensatory damages if the analysis leads to a decision that adoption of the safety measures is too expensive and if, for that reason, the measures are not taken and injury results.

[124] *See* pp. 25–27 *infra*.

[125] *See* Posner, *supra* note 119, at 34–36. But *Cf.* R. POSNER, ECONOMIC ANALYSIS OF LAW 99 (1973) (Posner asserts that judges could hardly have failed to consider economic efficiency when searching for the standard of care).

[126] *Supra* note 3.

[127] Posner, *supra* note 119, at 31.

[128] *See, e.g.* O.W. HOLMES, THE COMMON LAW 108 (1881): "The standards of the law are standards of general application. . . . But a more satisfactory explanation [than the difficulties of measuring the capablities of individual persons] is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, *is necessary to the general welfare*." (Emphasis added.)

The manner in which Holmes says the law will protect the general welfare seems inconsistent with the objective of economic efficiency. When persons who are incapable of making or acting upon a reasonably accurate cost-benefit analysis cause an inefficient accident, the inefficiency will be compounded by shifting the loss to them: The transaction costs will have to be added on to the already inefficient costs of the accident and, by definition, such persons cannot be deterred from causing similarly inefficient accidents in the future. This problem may be considerably more serious today than it was in Holmes' day because of the vastly increased complexity of modern equipment and of the enviornment in which such equipment is used coupled with a practical inability to shift to safer alternatives. *See, e.g.*, D. KLEIN & J. WALLER, CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES 130–32, 140 (U. S. Dep't of Transportation, Auto. Ins. and Comp. Study, 1970).

compensation itself, is at best a salutory by-product of a system designed with still other purposes in mind.

2. Compensation as a conditional objective of tort law. Professor Posner's theory that compensation is not a goal of the fault system is not universally shared by legal scholars. Thus, for example, Professor Calabresi, in his monumental work, *The Costs of Accidents*, asserts that "compensation remains a fundamental aim of accident law."[129] Although the tort system does not purport to compensate victims of all accidents or all accident costs, the fact is that compensation produced by tort recoveries constitutes a major element in the total system our society has devised for reducing secondary costs[130] of accidents.[131] If the tort system were abolished, we would have to devise other systems to fill the gap in compensation left by its abolition. Therefore, it may be more accurate to say that compensation—shifting accident costs from accident causer to victim—is a "fundamental aim" of accident law where the victim can show, as by proving negligence or a defective product, that our sense of justice would not be offended by removing the loss from the victim and placing it on the accident causer. In short, compensation is a *conditional* objective of accident law.

Since the court in *Kelley* denied compensation to victims who might have proved that their losses were produced by defendants' fault, it is arguable that the conditional objective of tort law was disserved by the decision. It is evident, however, that the ability to prove negligence, causation, and damage does not exhaust the factors that are relevant to the question whether shifting the loss to defendants in this class of cases will offend our sense of justice. Considerations of fairness and considerations relating to other tort law goals, such as deterrence, that may be affected by the decision also seem to bear on the question. Nevertheless, assuming it is correct that compensation of victims is an important aim of tort law, if the victim is capable of establishing a prima facie case of negligence and causation under general principles of tort law, the court would seem to bear a heavy responsibility to explain convincingly why such a deserving victim should go uncompensated.

C. Deterrence of Accidents

The objective of reducing accident costs, in the language of the economists,[132] or of enhancing human dignity by reducing value deprivations occasioned by

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[129] CALABRESI, *supra* note 103, at 44.

[130] Calabresi has divided accident cost reduction into three categories: Primary cost reduction is reduction in the number and severity of accidents, *i.e.*, prevention of accidents or mitigation of their severity. Secondary cost reduction is concerned with reducing the societal costs produced by accidents, *i.e.*, compensation, loss spreading, rehabilitation, and the like. And tertiary cost reduction involves reduction of the administrative costs of primary and secondary cost reduction. CALABRESI, *supra* note 103, at 27–28.

[131] Thus, for example, a study of recovery of losses suffered by persons injured in automobile accidents in the Washington, D. C., metropolitan area from April 1, 1964, through March 31, 1965, revealed that of a total economic loss of $22,448,908, $9,624,799, or 42.9 percent, was recovered from automobile insurance. U. S. DEP'T OF TRANSPORTATION, COMPENSATION FOR MOTOR VEHICLE ACCIDENT LOSSES IN THE METROPOLITAN AREA OF WASHINGTON, D.C. 29, Table 14 (AUTO. INS: AND COMPENSATION STUDY 1970). While some of the losses recovered may have come from nonliability, first-party automobile insurance, it is fair to assume that the greatest proportion of the $9,624,799 was paid as a result of liability insurance.

[132] *See* CALABRESI, *supra* note 103.

accidents, in the language of "policy-oriented" scholars,[133] is clearly a major feature of community policy in the United States today. The recent development of an enormous body of statutory law directly regulating accident-causing behavior[134] and the rapid growth of liability for injury produced by defective products[135] are obviously reflective of such policy.

Thus, to the extent that serious mental distress is legitimately included as an accident cost and considered as a deprivation of well-being, community policy would seem to support special efforts by the courts to deter the events that produce it.

Imposing liability for mental distress on those who negligently produce it may achieve deterrence in two ways: First, it would create fear of the consequences of liability—*e.g.*, a civil suit and its attendant effects, a large judgment, an increase in insurance premiums or perhaps being rendered uninsurable (direct deterrence), and, second, it would raise the price of the distress-producing activity and thus encourage those engaged in it, or those using its product, to shift to less expensive alternatives through the operation of market forces (indirect deterrence).[136] Realistically, direct and indirect deterrence are not likely to be enhanced by imposing liability for mental distress unless certain conditions are present:

Direct deterrence: In order to be deterred effectively by fear of the consequences of liability, the actor obviously must be aware of those consequences[137] and the consequences must be perceived as adding significantly to the negative consequences already perceived to follow in the absence of such liability. Thus, for example, the driver of the truck in *Kelley*, who is not likely to understand fully the extent of his liability for negligence and who presumably already has sufficiently strong reasons for avoiding accidents—the preservation of his own

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[133] *See generally* McDougal, *Jurisprudence for a Free Society*, 1 GEO. L. REV. 1, 15–16 (1966). An effort to compare the Calabresian approach, the law, science, and policy approach, and the conventional approach to judicial decisionmaking to the resolution of a hypothetical case is set forth in McClellan, *Clarification of Tort Policy: A Comparison of the Common Law, Calabresian, and Lasswell-McDougal Approaches to the Resolution of Tort Claims*, 23 WAYNE L. REV. 995 (1977).

[134] *See, e.g.*, Consumer Prod. Safety Act, 15 U.S.C. §§2051–81 (Supp. II 1972); Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§1381–431 (1970); and Occ. Safety & Health Act, 29 U.S.C. §§651–78 (1970). *See also* SPEC. COMM. ON AUTOMOBILE INSURANCE LEGISLATION, AMERICAN BAR ASS'N, AUTOMOBILE NO-FAULT INSURANCE 22-25 (1978).

[135] *See generally Symposium on Products Liability Law: The Need for Statutory Reform*, 56 N.C. L. REV. 623 (1978); Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960).

[136] For the purposes of realistically examining the deterrent effects of specific scope of liability rules, I believe a distinction between "direct" and "indirect" deterrence, as set forth in the text, is more useful than the distinction between "specific" and "general" deterrence used by Calabresi to describe the two approaches society uses to control the level of accidents. By specific deterrence Calabresi meant "collective" decisions as to "the degree to which we want any given activity, who should participate in it, and how we want it done.... The collective decisions are enforced by penalties on those who violate them." CALABRESI, *supra* note 103, at 68–69. Collective decisions would include regulatory schemes like OSHA and liability rules of courts. By general deterrence Calabresi meant "letting the *market* determine the degree to which, and the ways in which, activities are desired....The general deterrence approach would let the free market or price system tally the choices." *Id.* at 69.

Both direct and indirect deterrence, as I have defined them, would seem to fall within Calabresi's definition of general deterrence since even an actor's "direct" fear of liability or of increases in insurance premiums involves an estimate of consequences that have an economic "cost" that would produce a market decision. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 3–4 (1973). This is true even though the cost itself is imposed collectively, by the legislature or the courts. *See* CALABRESI, *supra* note 103, at 95.

[137] *See* J. HENDERSON & R. PEARSON, THE TORTS PROCESS 85 (1975).

life and possibly the loss of his job if he survives and is found guilty of negligent behavior—is not likely to be further deterred to a significant degree by the imposition of liability for third persons' mental suffering. He will probably not be made to pay the judgment and whatever fear of the economic consequences to his employer that may be generated is probably exhausted by his awareness that his employer will be liable for negligently produced physical injuries.

On the other hand, the enterprisers who are involved—the truck manufacturer, the owner of the truck, the lessor of the trailer, the company charged with the truck's maintenance and repair, the driver's employer, the city and state that licensed the driver, and possibly the service station that inspected the truck—are, in varying degrees, more likely to have access to legal advice and are thus more likely to be aware of the expanded consequences of their negligence and to take greater precautions to avoid them.

Realistically, however, it is probably only the larger corporate defendants, such as the manufacturer and lessors of the truck and trailer, who will see the danger of extended liability as of sufficient importance to increase their efforts to guard against future brake failure. The other defendants, if they are potentially liable at all,[138] are likely to realize that they have little ability, by increasing their safety precautions to avoid added liability for mental distress, to influence their own insurance rates. And it is even questionable whether the large manufacturer or lessor will be influenced, since its potential liability for negligence and for strict liability to physical injury victims is already enormous.[139] If the fear of that liability and its potential consequences has not already driven it to develop a fail-safe braking system, it is hard to see how the addition of liability for mental suffering could motivate it to do more.

The lesson may be that extending liability to include third-persons' mental suffering, where the actor is already subject to heavy liability for negligently caused physical injuries, is not likely to be very effective in achieving direct deterrence.

Indirect deterrence. In economic theory, loading the costs of accidents on the activities that produce them will raise the prices of those activities and affect market decisions about whether and how to engage in them.[140] So-called "market deterrence" will be produced when rational consumers choose cheaper and, presumably, safer alternatives.[141]

In theory, therefore, adding the cost of third persons' mental suffering to the liability of negligent defendants ought to result in considerable deterrence since virtually every negligently caused serious or fatal accident is likely to produce

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[138] It is not settled whether the city or state could be held liable to third persons for negligently issuing a driver's license to the truck driver or whether the service station operator who issued a safety sticker for the truck could be held liable for his negligence. *Cf.* M. SHAPO, THE DUTY TO ACT: TORT LAW, POWER, AND PUBLIC POLICY 34–37, 95–96 (1977).

[139] The recent much-publicized $128 million verdict against Ford Motor Company in the Pinto case, *supra* note 113, is illustrative, even though the trial judge deemed the verdict excessive and ordered a new trial unless plaintiff accepted a judgment of $6.6 million. *See* J. HENDERSON & R. PEARSON, THE TORTS PROCESS 7–8 (Supp. 1978).

[140] *See generally* CALABRESI, *supra* note 103. For a skeptical view of the relevance of theoretical economic analysis of risk allocation, *see* Gilmore, *Products Liability: A Commentary* 38 U. CHI. L. REV. 103 (1970).

[141] This description of the theory articulated by Professor Calabresi is grossly oversimplified but should suffice for the purposes of this analysis. For a more comprehensive description of his theory, *see* Ross, Book Review (G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970)), 84 HARV. L. REV. 1322 (1971).

one or more close relatives or bystanders who can legitimately claim damages for serious mental distress.[142] The costs of activities that negligently cause such accidents should therefore increase appreciably and this increase, in a rational market, should produce more "decisions for safety."

Theory aside, however, there is serious doubt whether a decision to impose liability in a *Kelley*-type situation would achieve sufficient market deterrence to be worth considering. The ability of a single small state such as Hawaii, by expanding liability, to influence market decisions in any significant way with respect to the products of a major national manufacturer or the goods and services of a multinational corporation is, to say the least, questionable. Unless other states were to join with Hawaii—and the trend is clearly running in the other direction—[143] the general market effect of Hawaii's action likely would be de minimis.

It is true, of course, that the potential of having to pay larger judgments in Hawaii courts might lead to higher costs *in Hawaii* for all activities potentially subject to expanded liability. Large self-insurers might increase their prices or try to reduce their activities in Hawaii. For the smaller companies, casualty insurance rate-making is not fine-tuned to reflect with accuracy the safety records or accident potential of each insured. Rather, it is usually based on past experience of an entire class of insureds and adjusted for trends as to claim frequency and size. Specific rules of tort law and their potential effects are not separately factored into the computation of rates.[144] But where the frequency and size of future claims cannot be predicted, either because of the relatively small size of the universe for statistical purposes or because of expansion of liability into uncharted areas, the actuaries may hedge their bets by adopting trend factors produced by statistics drawn from other states, often those with a higher incidence of accidents than Hawaii.[145] Thus it is to be expected that expanding the scope of liability to include plaintiffs such as Mr. Kelley will eventually produce higher casualty insurance rates throughout the state and that these rates are likely to result in premiums that exceed the actual increased cost of accidents.

Ultimately, these costs will be paid for by the Hawaii consumer, either through increased automobile insurance rates or through the increases in the prices of goods and services that result when enterprisers pass on their increased costs through the pricing mechanism. Whereas in theory this increased cost should produce market deterrence—more perhaps than would be justified if the actual rather than the actuarially inflated costs of accidents were passed on—in fact the short range effect within Hawaii would probably be merely to inflate prices further without effecting shifts to safer activities. This unfortunate consequence would seem to follow because as to many of the affected enterprises there do not seem to be in Hawaii viable safer alternatives and the functions performed by these enterprises are essential. For example, in the foreseeable

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[142] *See* p. 14 *supra*.

[143] *See* Part I, pp. 3–16, *supra*.

[144] *See* Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 560–74 (1961).

[145] This is what occurred in Hawaii with respect to the setting of rates for medical malpractice liability insurance. *See* DEP'T OF REGULATORY AGENCIES, STATE OF HAWAII, MEDICAL MALPRACTICE: ISSUES, DISCUSSIONS AND PROPOSALS FOR CHANGE 117–36 (1976). *See also* Morris, *supra* note 144, at 567, n. 37.

future truck transportation will undoubtedly continue to be the only practical means of moving goods within each island; shifting to rail or plane or barge or moving sources of supply closer to the market, within each island, is not practicable. Further, demand for passenger car transportation seems to be relatively inelastic and not noticeably responsive to rising insurance costs.

Internalizing the costs of negligently inflicted mental distress is therefore not likely to achieve desired marked deterrence within the state in the short run but might produce undesirable effects by further increasing the prices of goods and services produced or sold in Hawaii and by putting Hawaii enterprises competing for mainland markets at a competitive disadvantage beyond that which they already suffer.[146]

While the competitive disadvantage cannot be avoided unless, contrary to the trend, a parallel expansion of liability occurs in other states, increases in passenger car insurance rates resulting from expansion of liability in Hawaii could at some future point combine with higher fuel prices generated by energy shortages and higher auto prices generated by inflation to hasten the day when Hawaii citizens, in spite of their strong preference for the passenger car, would be compelled to shift to cheaper and safer modes of public transportation.[147] Thus some long-range market deterrence might be served by expanding liability, but the significance of this factor, when compared with general inflation and energy shortages, seems marginal at best.

D. Summary

The foregoing analysis has yielded conflicting answers to the question whether recovery for mental distress should be granted in cases like *Kelley*.

Fairness, in the sense of equal treatment for those plaintiffs who cannot be distinguished on logical grounds from others who could recover for mental distress, argues in favor of recovery.

In addition, the "conditional" tort law objective of compensation seems to have been disserved by refusal to allow recovery, since plaintiffs might have established the existence of the conditions—negligence, causation, and serious injury—on which it is premised. On the other hand, it is arguable—though the argument is weak where the mental distress victim dies of shock produced by the distress—that the sense of justice of a significant segment of the community would be offended by giving effect to the compensation objective and saddling the defendant with liability for mental distress in a case like *Kelley*. Of course, we really do not know what the community reaction to allowing recovery would be. In the absence of such knowledge, it would seem preferable to allow

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[146] This competitive disadvantage is the result of high shipping costs plus generally higher costs for labor and land use in Hawaii than on the mainland.

Since liability insurance premiums, compensatory damage awards, and related legal fees are deductible business expenses, however, at least a portion of the costs shifted to enterprisers by increased liability will be "externalized," *i.e.*, it will be passed on to general taxpayers and shared through the federal and state income tax. *See* I.R.C. 26 U.S.C. §172 (b) (1954), as amended by Revenue Act of 1978, Pub. L. No. 95-600, §371, 92 Stat. 2859.

[147] *See Car to Take Back Seat to Other Transport*, Honolulu Star-Bulletin & Advertiser, Mar. 11, 1979, at A-1, col. 2 (final ed.) (reporting conclusions of report of the Office of Technology Assessment that energy shortages, highway carnage, and rising costs will start to restrict America's reliance on the private automobile).

compensation when the general principles of tort law, which are already presumed to incorporate the general sense of justice of the community, would require it. That is, compensation should be allowed unless other policies, more important than fairness and compensation, clearly call for a different result.

Applied from a perspective of pure theory, policies favoring economic efficiency and deterrence of accidents would also seem to favor recovery. When viewed more realistically, however, giving due weight to the limits of Hawaii's ability to affect large national and international enterprises or to find safer alternatives as well as to the fact that we are dealing with a situation in which potential defendants are already at risk of enormous liability for negligence or strict liability in tort to the primary accident victims, it appears that not much by way of economic efficiency, direct deterrence, or indirect deterrence will be added by holding defendants liable for mental distress in the *Kelley* situation. On the contrary, it is arguable that imposing liability could cause enterprisers and insurers to overreact and to impose higher prices for goods and insurance in Hawaii than the increase in liability would warrant. The practical result for the state, at least in the short run, could be to exacerbate a difficult economic situation without significantly reducing accidents or accident costs.

III. Legal Process Considerations

The preceding analysis of the factors that are relevant to the question of how far the right to recover for negligently inflicted mental distress should extend does not yield a very clear answer to that question. The possible benefits and disadvantages of allowing or denying recovery are clarified but they cannot be evaluated or quantified and then placed on a scale that will automatically yield a satisfactory solution, *deus ex machina*. Although some limitation of liability seems justified, it is by no means clear that the "reasonable distance" rule of *Kelley* and the retreat to other arbitrary stopping places that seem likely to follow in *Kelley*'s wake[148] are appropriate ways to achieve the desired contraction.

In view of the difficulty of evaluating the various factors and arriving at a judicially imposed solution by objective criteria, might not the best solution be to treat the issue as a question of proximate cause in each case and send it to the jury? An otherwise "deserving" plaintiff[149] might more readily accept the rejection of his claim by his peers after having had his day in court than accept being barred from the courthouse entirely by fiat of the supreme court.

The solution of treating the issue as one of proximate cause lurks behind the approach originally taken in *Rodrigues* and *Leong* and urged upon the court by the dissenting justice in *Kelley* itself.[150] Indeed, the dissenter in *Kelley* charac-

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[148] *See* pp. 12–16 *supra*.

[149] *I.e.*, a plaintiff capable of proving that defendant's negligence was a substantial factor in producing plaintiff's serious mental distress.

[150] Taken at face value, the language of the court in *Rodrigues* and *Leong* and Chief Justice Richardson's dissent in *Kelley* seem to adopt the position that if the foreseeability test is satisfied (*i.e.*, that "serious mental distress to the plaintiff was a reasonably foreseeable consequence of defendant's act," Rodrigues v. State, 52 Haw. 156, 174, 472 P.2d 509, 521 (1970)), then the only remaining question is whether "a reasonable man, normally constituted, would be unable to adequately cope with the mental distress engendered by the circumstances of the case." *Id.* at 173, 472 P.2d at 520. Under this view, whatever policy reasons there may be for limiting liability of defendants for mental-distress-without-impact are satisfied by affirmative answers to both tests.

terized Justice Andrews' dissenting opinion in *Palsgraf*[151] as "the better reasoning" in that case.[152] Justice Andrews' view of proximate cause, it will be recalled, was:

> that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.

and

> It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account. . . . There is in truth little to guide us other than common sense.[153]

If the jury were invested with the task of deciding the scope of liability issue in each mental distress case, presumably they could achieve whatever contraction of liability their "rough sense of justice" would seem to require based both upon the facts of the particular case and the possible societal consequences of

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Presumably the only role left for a proximate cause analysis would be if defendant claimed there was a "superceding" cause. *See* RESTATEMENT (SECOND) OF TORTS §440 (1965).

Yet in each of the three opinions there are intimations that more than mere foreseeability of serious mental distress and the reasonable person's ability to cope adequately with the mental stress engendered by the circumstances are to be factored into the decision. Thus, in *Rodrigues*, the court stated that the compelling reasons for limiting recovery to claims of serious distress, including the policy that the law should not penalize the "prime mover," are to be taken into account by the jury and the court in applying the "ability to cope" test, 52 Haw. at 172–173, 472 P.2d at 520. With respect to the claim that injury to material possessions should not give rise to damages for mental distress, the court stated that "the jury, representing a cross section of the community is in a better position to consider under what particular circumstances society should or should not recognize recovery for mental distress." *Id.* at 175 n. 8, 472 P.2d at 521 n. 8 (1970). In *Leong* the court intimated that the issue is one of proximate cause, 55 Haw. at 410, 520 P.2d at 765. And in *Kelley*, the author of the earlier two opinions expressly approved the approach of Justice Andrews in *Palsgraf* which, as the excerpts quoted from Andrews' opinion clearly demonstrate (*See* p. 29, *infra.*), would bring a number of policy considerations into the test for proximate cause. 56 Haw. at 214, 532 P.2d at 679 (Richardson, C.J., dissenting).

Thus it is arguable that the real question in these cases is not whether a reasonable person would be able to cope, but whether plaintiff, for compelling reasons, *should be made to cope* with the mental distress. This is a typical proximate-cause-type issue.

[151] Palsgraf. v. Long Island R.R., 248 N.Y. 339, 347–56, 162 N.E. 99, 101–105 (1928) (Andrews, J., dissenting).

[152] 56 Haw. at 214, 532 P.2d at 679. Chief Justice Richardson's reaffirmation of the rules of *Rodrigues* and *Leong* in his dissent in *Kelley* seems, at first blush, inconsistent with his statement in that dissent that he concurs with the view of negligence espoused by Justice Andrews in *Palsgraf*, *id.* The *Rodrigues-Leong* approach seems more consistent with Justice Cardozo's approach in *Palsgraf*: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation: it is risk to another or to others within the range of apprehension." 248 N.Y. at 344, 162 N.E. at 100. By creating an independent duty to refrain from the negligent infliction of serious mental distress, the Hawaii Supreme Court had extended the right to recover to all whom defendant's negligence foreseeably exposed to such serious distress. Andrews, on the other hand, while not insisting that plaintiff be within the zone of foreseable danger, would have considered foreseeability, along with other factors such as *remoteness in time and space*, to determine whether it was "expedient" to allow recovery. 248 N.Y. at 354–56, 162 N.E. 104–105. It is by no means clear that Andrews would have permitted recovery in a case like *Kelley* where decedent's injury was so remote in time and space from defendant's negligent acts. On the other hand, the logic of Cardozo's position would have required recovery if decedent was found to be within the zone of foreseeable danger of serious mental distress.

The apparent inconsistency may be explained by noting that the language from Andrews' dissenting opinion quoted with approval by Chief Justice Richardson, when viewed without reference to the rest of that opinion, seems to suggest that the geographical distance would not be a barrier to a recovery.

[153] Palsgraf v. Long Island R.R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1929) (Andrews, J., dissenting).

imposing liability. The jury, with its broad discretion to "adjust" damages to suit the justice of the case[154] as well as to deny liability altogether, could make the necessary Solomonic judgments on a case-by-case basis. When questions become too "political," too amorphous, and too open-ended to yield sensibly to arbitrary lines drawn by nonelected judges, is there not something to be said for permitting the democracy of the jury room to flourish?

Something, perhaps, but not much. In the first place, under the rule as set down in *Rodrigues* and *Leong* the difficult issues would be buried under the trappings of the "ability to cope" test, which focuses on only one aspect of the problem.[155] Even if the jury were specifically instructed that the issue was one of proximate cause, the usual instruction is so vague and obfuscatory as to leave the jury with no real understanding of what is at stake.[156] Under either this instruction or an ability-to-cope instruction, there is little assurance that the jury would understand what they were really being called upon to decide.

Then why not clarify the instructions? Why not read the jury a relevant excerpt or two from the Andrews' opinion or, even better, tell them precisely what the problem is, as well. For example:

> Ladies and gentlemen of the jury, this is a case where defendant's negligence may be found to have produced plaintiff's mental distress and its consequences, for which plaintiff is seeking damages. The question for you to decide is whether you, being representative of the wider community, believe defendant should pay plaintiff for those damages. In making your decision you should consider whether the distress suffered was so serious that a reasonable person, normally constituted, could not be expected adequately to cope with it and whether distress of such seriousness was reasonably foreseeable to a person in defendant's position. But that is not the end of your inquiry. In addition, you should consider whether the distress suffered by plaintiff was just a part and parcel of everyday life in our community, which each of us has to bear, and whether allowing plaintiffs to recover their damages in cases like this will impose unduly burdensome liability on defendants, discourage useful enterprise, raise liability insurance rates too much, add excessively to inflation, and the like. You, of course, are to decide how much weight, if any, to give each of these factors. As you engage in your deliberations, please keep in mind that all close relatives and friends of seriously injured accident victims, as well as the by-standers who witness gory accidents, may also sue to recover for their mental distress in this and other accident cases.[157]

The difficulties with this approach are evident: The jurors would be set adrift on a sea of complexity; their common sense would not help them to measure

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[154] "Allowing juries to reach general verdicts gives them wide latitude, especially in negligence cases, to apply their collective common sense, or popular prejudice, in reaching results." J. HENDERSON & R. PEARSON, THE TORTS PROCESS 302 (1975).

[155] *See* note 150 *supra.*

[156] *See, e.g.*, Stryker v. Queen's Medical Center, 60 Adv. 5866, n. 4, 587 P.2d 1229, 1231-32, n. 4 (1978): The trial court instructed: "The 'proximate cause' of an injury is that cause which in direct, unbroken sequence, produces the injury, and without which the injury would not have occurred.

"The law does not say that there can be only one proximate cause of an injury, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of more than one person, may operate either independently or together to cause injury; and in such [a] case, each may be a proximate cause of the injury."

[157] This instruction would follow instructions on duty, breach of duty, and cause in fact or the "substantial factor" test and likely would be followed by instruction on damages. Its relative clarity and candor seem preferable to the technicality of the usual proximate cause instruction. *See, e.g.*, note 156 *supra.* In this respect, it seems to be consistent with the popular movement, now incorporated in the Hawaii Constitution, HAW. CONST. art. XVI, §13, to translate technical "legalese" into common English.

and weigh the incommensurables. The court can tell the jury *what* to think about but, unlike the situation with respect to the issue of negligence itself, it cannot provide a workable model, such as the reasonably prudent person, to suggest *how* to think about it.[158]

Professor James Henderson has argued that complex issues of the kind involved here, produced by the desire of courts to "purify" the negligence principle, are beyond the limits of adjudication.[159] He defines adjudication as

> a social process of decisionmaking in which the affected parties are guaranteed the opportunity of presenting proofs and arguments to an impartial tribunal which is bound to find the relevant facts and to apply recognized rules to reach a reasoned result.... The dominant mood in which a judicial tribunal approaches its task of decision is that of seeking, in accordance with applicable rules, the single right result in each case.[160]

Allowing juries to decide "open-ended" or "polycentric" problems,[161] such as fashioning the scope of liability in a mental-distress case, Henderson argues, creates "decision-by-discretion" instead of "decision-by-rule."[162] While even "decision-by-rule" may require the exercise of some discretion,[163] allowing juries to resolve "problems which tend toward the extreme on the scale of open-ended polycentricity" will deny parties affected by the decision "the opportunity to participate meaningfully in the decision process."[164] Such a process, he believes, is "not adjudication, but an elaborate, expensive masquerade."[165] If courts persist in the folly of trying "to confront problems which are beyond their capacity to solve," the entire negligence system is in serious danger of being replaced by some other simpler and less expensive, but less just, method of compensating accident victims.[166]

Henderson asserts that in the run-of-the-mill negligence case, the polycentricity of the negligence issue and the proximate cause issue has not proved intolerable, but that "complicating factors," which are present in many situations in which courts have in recent years rejected formalistic rules and tried to apply the general principles of negligence law, have vested unacceptable levels of open-endedness or discretion in the jury.[167]

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[158] *See* text at note 155 *supra*.

[159] Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND L. J. 467 (1976) (hereinafter cited as Henderson).

[160] *Id.* at 469.

[161] *Id.* at 475. Henderson acknowledges that he borrowed the term "polycentric" from Professor Lon Fuller, who may have borrowed it from Michael Polanyi. *Id.* at 475 n. 23. Henderson uses the term to refer to decisions, such as planning the family vacation, that involve multiple factors and as to which no clear rules of decision are laid down. Appeals can be made to the head of the family by individual family members, but "in the end, bound by no legal rule of decision, [the head of the family] would be left to decide the case largely on his own, employing common sense, or instinct, or intuition." *Id.* at 472. "Instead of being arranged in an essentially linear manner, as are issues in a classically legal problem, the issues, or elements, in these problems are interrelated in such a way that sensible consideration of any issue, or element, requires the simultaneous consideration of most, or all, of the others." *Id.* at 471. *See also* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

[162] Henderson, *supra* note 159, at 476.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 477.

[166] *Id.* at 525.

[167] *Id.* at 479. The complicating factors fall within three categories: "(1) the evaluation of a particular defendant's conduct may require an unusually complex, highly technical analysis; (2) the parties may be in a special relationship which must be taken into account by modifying the duties

The complicating factor in the mental-distress-without-impact cases, he argues, is that "practical considerations may compel courts to place limits upon the extent of potential liability for certain types of conduct."[168] These considerations require the court "to plan social relations on a case-by-case basis," making "meaningful adversary argument . . . difficult, if not impossible."[169]

Because of these concerns, Henderson has been extremely critical of cases such as *Dillon*, *Rodrigues*, and *Leong*.[170] On the other hand, he sees *Kelley* as a ray of hope "that a more formal and manageable, albeit more liberal, limitation on liability in these cases will eventually be worked out."[171]

Henderson's criticism, I believe, deserves serious consideration. It hearkens back to Holmes' view that "any legal standard must, in theory, be one which would apply to all men, not specially excepted, under the same circumstances. It is not intended that the public force should fall upon an individual accidentally, *or at the whim of any body of men*."[172] However, the problem presented by open-endedness or jury whimsy in the mental-distress-without-impact cases does not seem to be as devastating to the objectives of the rule of law as it is in other areas of law.

We are not dealing primarily with cases, such as property or contract,[173] where ability to plan one's conduct and predict the legal consequences is crucial. And the issue is not *what* conduct is likely to engender liability—the standard of conduct is known in advance—but *how much* liability will be produced if an actor's conduct is of the sort that is likely to produce some liability if harm ensues. In view of the "thin-skull" rule[174] and the absence of a market for pain and suffering, personal injury damages have never been predictable by the individual defendant, but have traditionally been subject to chance and the sympathies and generosity of the jury.[175]

Yet it must be conceded that the scope-of-liability issue in the cases under

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each owes to the other; and (3) practical considerations may compel courts to place limits upon the extent of potential liability for certain types of conduct." *Id.*

[168] *Id.* at 515, 516.

[169] *Id.* at 479, 480.

[170] *Id.* at 518, n. 192, and 519. Henderson directed his main criticism at *Dillon v. Legg*, the California case, and erroneously treated *Rodrigues* and *Leong* as if they had followed *Dillon*. If, however, the decisions in *Rodrigues* and *Leong* are taken at face value, *see* note 150 *supra*, they do not seem to be excessively open-ended or polycentric at all; the question for the jury becomes a relatively straightforward one. Only if the "ability to cope" test conceals a variety of proximate-cause-type issues do the decisions become subject to criticism on the grounds urged by Henderson. *Id.*

On the other hand, *Kelley's* vague "reasonable distance from the scene of the accident" rule is expressly intended, in Henderson's words, to take into account "practical considerations" that "may compel the courts to place limits upon the extent of potential liability . . . . " Yet Henderson seems to approve of *Kelley* in spite of its obvious "polycentricity." *Id.* at 519, n. 195. One is therefore entitled to wonder whether Henderson's real concern is for the health of the "rule of law" or for the economic impact if defendants' liability is actually based on general principles of tort law.

[171] Henderson, *supra* note 159, at 519. Henderson adds: "I submit that the court is using foreseeability in some special, though as yet unarticulated, manner, and that several more cases should suffice to reveal the new limits on liability for fright without impact in that jurisdiction." *Id.* Compare my analysis *supra* at pp. 9–16.

[172] O.W. HOLMES, THE COMMON LAW 110 (1881) (emphasis added).

[173] But *cf.* Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d 368 (1972) (damages allowed for mental distress and disappointment where contract is breached in a wanton or reckless manner).

[174] *See* note 200 *infra*.

[175] Indeed, the setting of damages for pain and suffering and related psychic injuries bears some of the characteristics that Henderson would say attaches to polycentric decisions. *See* Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953).

discussion seems unsuitable for resolution by the usual techniques of the adversary system; the elaborate and expensive judicial machinery we have created to perform the function of application of law can contribute little to assure a reasonably sensible, even-handed, and fair resolution of the issue from one case to the next. The "legislative facts" that, as the earlier discussion of policy suggests,[176] are relevant to determination of the issue would rarely be presented, if they were presented at all, to the jury in a form they could comprehend and utilize. The opposing counsel would have to appeal to the jurors' sympathies, prejudices, and emotions, rather than to their reason as illuminated by the evidence. Indeed, the issue might as well be sent to the jury with just the admonition: "Consider everything! Be fair!"

Nevertheless, if the issue is sent to the jury, the dispute will be resolved and a decision will be made. The court can impose some control on totally untrammeled jury discretion through use of additur or remittitur or by granting a new trial. The other issues in the case—duty, breach of duty, and cause-in-fact—can be subjected to reasonable judicial control in the usual way. And the outcome will be a product of a judgment of the parties' peers, representing a community sense of justice, however visceral it may be.

In the interest of preserving the rule of law, however, Henderson would seem to prefer almost any judge-made formal rule, even if arbitrary, that will avoid polycentricity to open-ended jury discretion.[177] I confess to being unsure whether "equal *in*justice under law" is preferable to the "rule of jurors" and which of the two approaches is likely to bring the judicial system into greater disrepute. I do believe, however, that when faced with such an unsavory choice, courts bear an exceptionally heavy responsibility to engage systematically in a search for a response that will avoid, to the extent feasible, both horns of the dilemma.[178] This search entails a careful policy analysis designed to identify the concerns that must be satisfied and a willingness to engage in creative manipulation of strategies and sanctions that have the potential for satisfying those concerns.

That such a search can yield a satisfying, if not a perfect, solution, I will try to demonstrate in the next three parts of this article.

IV. Identifying the Problem: The Need for Proportionality

Professor Henderson is clearly correct when he asserts that the barrier to application of ordinary negligence principles in the mental-distress-without-impact cases is the complicating factor that "practical considerations may compel courts to place limits upon the extent of potential liability for certain types of conduct."[179] If a fair and durable solution to the problems presented by these cases is to be developed, however, a sophisticated analysis of just what

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[176] *See* pp. 25–27 *supra.*

[177] *See* Henderson, *supra* note 159, at 474.

[178] It seems to me that while the Hawaii Supreme Court in *Kelley* was trying to steer a course between "the Scylla of unlimited liability and the Charybdis of no liability," Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35. U. Chi. L. Rev. 512, 517 (1968), the compromise adopted—the "reasonable distance from the scene of the accident" rule—unnecessarily combined both arbitrariness and open-endedness.

[179] Henderson, *supra* note 168, at 515, 516.

these "practical considerations" really are seems essential; what the courts say they are cannot necessarily be taken at face value.

Some of the concerns that once led the courts to deny recovery can be excluded at the outset: Fears of fraudulent claims and opening the floodgates to litigation are today rejected as valid reasons for denying claims even by courts that refuse to extend liability beyond the zone-of-physical-danger rule.[180] Lingering doubts can be overcome by limiting liability to cases in which the distress produces physical injury[181] or by requiring medical evidence to prove the genuineness of the distress suffered.[182] Essentially, however, the courts deem it inappropriate to close the courthouse door on valid claims simply because some invalid ones may slip through or because the volume of claims might increase.[183]

Although concerns about allowing recovery for mental distress that is "part and parcel of everyday life in a community" and that might better be dealt with by "toughening the mental hide" may still remain,[184] they can adequately be met, as the Hawaii Supreme Court demonstrated in *Rodrigues*,[185] by imposing "seriousness" requirements with respect to the nature and degree of mental distress that must be foreseen and that must actually be suffered.

The remaining concerns, which can be taken to be the courts' genuine concerns as they see them, seem to fall within the categories described as "the potential of unlimited and indefinite liability..." and "the imposition of burdensome and disproportionate liability on the tortfeasor in relation to his culpability."[186]

While there is no reason to question the sincerity of courts that respond to these concerns by restricting liability, there is good reason to investigate an apparent inconsistency: Why do these concerns lead to denial or severe restriction of liability in the mental-distress-without-impact cases but do not do so in those cases where defendant negligently causes physical injury to the plaintiff? Does not the "thin-skull" rule as it is almost universally applied also generate great potential for unlimited, indefinite, and burdensome liability disproportionate to the tortfeasor's culpability?[187] In applying this rule, why do the courts focus upon the justice of requiring a negligent defendant to compensate an injured plaintiff for all his damages[188] while downplaying or ignoring these other concerns? One would assume that the same tort goals of justice, deterrence, and compensation, as well as the goal of not unduly burdening useful activity, should be applicable in both situations.

If it is assumed that there is a rational explanation for the different treatment, a likely answer, both interesting and potentially useful in the search for a

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[180] *See, e.g.*, Tobin v. Grossman, 24 N.Y.2d 609, 616, 249 N.E. 2d 419, 423, 301 N.Y.S.2d 554, 559 (1969).

[181] *Id.* at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

[182] *See, e.g.*, Leong v. Takasaki, 55 Haw. 398, 412–13, 520 P.2d 758, 767 (1974).

[183] *See* PROSSER, *supra* note 6, §54 at 328.

[184] *See, e.g.* Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E. 2d 419, 424, 301 N.Y.S.2d 554, 561–62 (1969).

[185] Rodrigues v. State, 52 Haw. 156, 172–73, 472 P.2d 509, 520 (1970).

[186] Leong v. Takasaki, 55 Haw. 398, 402, 520 P.2d 758, 761 (1974).

[187] *See* PROSSER, *supra* note 6, §43 at 260–63. The "thin skull" rule allows plaintiff to recover damages for unforeseeable consequences produced by interaction between defendant's negligent impact on plaintiff and plaintiff's peculiar susceptibility to loss. *Id.*

[188] *Id.* at 263.

solution, emerges: As was pointed out earlier,[189] it will often be the serious physical-injury cases that will generate independent claims for mental distress without impact. Because of the "thin-skull" rule, damages awarded to the physical-injury victims are likely to be enormously burdensome to defendant and disproportionate to defendant's fault, but full compensation to plaintiffs is tolerated in the interest of doing justice to them. The courts' reaction is best characterized by Prosser: "If the result is out of all proportion to the defendant's fault, it can be no less out of proportion to the plaintiff's entire innocence."[190] But the problem of undue burden and disproportionality would be compounded and increased enormously if recovery were also extended in the same cases to mental-distress-without-impact claimants who would also receive the benefit of the "thin-skull" rule. What would make such an increase in liability seem intolerable to the courts is their perception that the negative consequences of compounding the disproportionality would outweigh in importance the considerations of justice that would otherwise call for full recovery. These negative consequences would seem to be that the disproportionate recoveries, individually and in the aggregate, would be unfairly punitive and grossly overdeter useful, often nonblameworthy, enterprise.

Thus, the critical problem that seems to have prevented the courts from unloosing liability for mental distress without impact is their inability through rule or principle to match defendants' conduct—its dangerousness, its blameworthiness, and even its utility—with the consequences the law imposes or refuses to impose. The courts seem unable either in individual cases or in general to adjust "the punishment to fit the crime."

It is important to note, however, that when the overall scheme the courts have adopted is viewed from this perspective, the complete denial of recovery to any mental-distress-without-impact claimants who might otherwise recover under ordinary principles of negligence seems grossly unjust. That is, the considerations of justice that impel the courts to grant full recoveries to some claimants and to ignore disproportionality and overdeterrence in those cases are completely overlooked in those distress cases that are held to be outside the orbit of liability, regardless of the seriousness of plaintiff's injuries.

Furthermore, courts, by totally denying recovery to any class of mental-distress-without-impact claimants, run a serious risk of denying recovery to deserving plaintiffs even in cases where there need be no concern with disproportionality and consequent overdeterrence. For example, as was earlier suggested,[191] it is possible that in a case like *Kelley* proof that certain of the defendants were negligent might be tantamount to proof of considerable blameworthiness on their part. In such a case the danger that total damages to all claimants would be disproportional to defendant's culpability would be slight and, if the courts are to be at all consistent, should be held to be outweighed by the justice of allowing innocent plaintiffs to recover from blameworthy defendants.

Nevertheless, the problem produced by disproportionality and its consequences is a real one. And if recovery for mental distress without impact is also

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[189] *See* p. 14 *supra.*
[190] PROSSER, *supra* note 6, §43 at 257.
[191] *See* p. 20 *supra.*

extended to cases of strict liability,[192] the problem will be greatly increased. It is difficult enough to justify large awards for pain and suffering to the primary physically injured victims of defective products in cases in which defendant's negligence or other culpability has not been proven.[193] It would be much more difficult to rationalize huge damage awards based only upon mental distress and its effects.

The need to build proportionality into the system, therefore, seems essential if an independent right to recover for losses engendered by serious mental distress is to survive. In the next section I will explore the means by which more proportional outcomes might be achieved.

V. ALTERNATIVE APPROACHES

The failure of common law courts to recognize and utilize their ability to change procedural rules and to adjust remedies may contribute significantly to the difficulties they encounter when called upon to expand or contract substantive rights. In such situations they tend to act as if their only choice is between full recovery or none at all, with the burden of proof remaining the same as in most other civil actions. The effect may well be to retard needed reform, to prevent the courts from experimenting with techniques designed to allay fears of the catastrophes changes might bring, and sometimes, as in the case of *Rodrigues* and *Kelley*, to replace old problems with equally troubling new ones.[194]

With respect to the scope of liability for mental distress, however, it seems clear that unless the courts can adjust the process or the remedy in order to achieve proportionality, as discussed above, the problem, though it is clearly appropriate for judicial resolution,[195] will never be satisfactorily resolved. On the other hand, there are a number of alternative approaches that, when coupled with the requirement of foreseeability of serious distress and the application of general principles of negligence,[196] could assure more propor-

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[192] *See* Shepard v. Superior Court, 76 Cal. App.3d 16, 142 Cal. Rptr. 612 (1977), *discussed in Tuohy, Strict Liability for Emotional Distress*, 7 INCL BRIEF 24 (No. 4 Aug. 1978). *See also* GREGORY, KALVEN & EPSTEIN, *supra* note 7, at 972.

[193] *See* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965): "[O]nce adequate compensation for economic loss is assured [through enterprise liability or social insurance], consideration might well be given to establishing curbs on such inflationary damages as those for pain and suffering. Otherwise the cost of assured compensation could become prohibitive." (Citations omitted.)

[194] Another useful technique for mitigating the negative effects of changes in substantive law, often overlooked by courts, is prospective overruling. Legal scholars have long urged courts to utilize this device more creatively to avoid upsetting reliance interests. *See* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 486–93 (1962); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).

[195] *See* Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 308 (1963).

[196] That is, liability could be established, as in any other negligence case, by the conventional use of foreseeability to establish duty, by proof of breach of duty, and by fulfilling other requirements of legal or proximate cause, as where intervening factors are present, without using any of these concepts artificially to serve policy concerns created because the case is a mental-distress-without-impact case. The only concessions to the special nature of the case would be the requirement that "serious" mental distress be foreseeable and the damage limitations recommended *infra* in the text.

The requirement that plaintiff has been within the zone of risk of serious distress is necessary in order to avoid recoveries where the risk foreseeably created is only trivial. If "serious" is deemed

tional results. All involve a reduction in damages available either to mental-distress plaintiffs as a class or to individual mental-distress plaintiffs based on the facts of each case.

A. The Case-by-Case Approach

In each case involving the independent tort of mental distress, damages might be limited (1) to the serious distress and its effects that were reasonably foreseeable by defendant,[197] (2) to that distress and its effects that an average person could be expected to suffer under the circumstances,[198] or (3) to an amount that, when taken together with all the damages imposed upon the defendant, would not render the total award excessive in relation to the culpability of the conduct and the nature and magnitude of the risk that engendered liability.

All three approaches have a surface appeal. All three would permit the jury to participate in the decision and to bring their community sense of what is fair and just to bear, *sub rosa* in the first two cases and explicitly in the third, on their decision.[199] The first two approaches would, of course, encroach upon the general damages rule that "we take our victims as we find them."[200] If damages were limited, as in the first case, to mental-distress effects that were reasonably foreseeable to defendant, then a jury could find in a case like *Kelley* that though some distress and temporary consequences to Mr. Kelley were foreseeable, his death was not, and they could then award reduced damages. Under the second approach, if a successful plaintiff, because of abnormal sensitivity, suffered distress and consequent effects in excess of those a "reasonable person, normally constituted" would have suffered, the jury would not award damages for the excess. Again, in a case like *Kelley* the jury could find that Mr. Kelley's death was an abnormal reaction to the tragic accident that produced it, deny recovery for the death, and allow recovery only for what they find would have been a more "normal" reaction.

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too vague, it would not seem objectionable to require foreseeability of a degree of distress beyond that with which the average person should be expected to cope. Applying either test, the courts could be expected to find that a duty to very close relatives of accident victims, regardless of their location, exists in any case where defendant foreseeably created an unreasonable risk of death or serious bodily harm to such victims. *Cf.*, Leong v. Takasaki, 55 Haw. 398, 410–11, 520 P.2d 758, 765 (1974) (court held that requirements of proximate cause would be satisfied if plaintiff proved that it was "reasonably foreseeable that a reasonable plaintiff-witness to an accident would not be able to cope with the mental stress engendered by such circumstances. . . . "). Where foreseeability of such distress is unclear, as where plaintiff is a bystander, a close friend, or a not-so-close relative—*i.e.*, where "varying inferences" are possible—the duty issue should be sent to the jury. Palsgraf v. Long Island R. Co., 248 N.Y. 339, 345, 162 N.E. 99, 101 (1928).

[197] This approach may be best described by altering Cardozo's famous rule to read: "The risk reasonably to be perceived defines the damages to be paid." *Cf.* Palsgraf v. Long Island R. Co., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) ("The risk reasonably to be perceived defines the duty to be obeyed. . . . "). *See* Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 303 (1944) (questioning the merit of the general rule that would allow recovery for plaintiff's more extensive and idiosyncratic injuries where defendant's liability rests on creating a likelihood of causing "nervous shock" in a test person of average resistance).

[198] Or, in the language of the Hawaii Supreme Court in *Rodrigues*, "a reasonable man, normally constituted." Rodrigues v. State, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970).

[199] *See* pp. 19–20 *supra*.

[200] Also referred to as the "thin skull" or "eggshell skull" rule. *See* PROSSER, *supra* note 6, §43 at 260–63, and Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512, 519 n. 31 (1968).

The difficulty with both these approaches is not that they deviate from the "thin-skull" rule: While that rule may produce just results in cases involving physical injury, it is not so sacrosanct that it might not be sacrificed in order to yield greater justice in the mental-distress cases.[201] Rather, the difficulty is that the range of what is "foreseeable" and what is "normal" is so elastic that such rules would be difficult to apply and would turn the trial of the damages issue into even more of a guessing game than it now is, reducing the likelihood that a significant reduction in damages to achieve greater proportionality would be achieved.[202] Further, under the second approach the need for proof of what distress and what effects a normal person would suffer could produce an esoteric battle of experts on the effects of mental distress on normal persons, with an attendant increase in costs.[203]

The third alternative, explicitly charging the jury to produce a damage award proportioned to defendant's fault is fraught with even greater difficulties. Since jurors would have to be aware of defendant's total liability, serious problems of joinder and proof of related claims would arise in cases where all the claims arising out of a single accident were not consolidated for trial. But worse, the open-endedness of the task[204] and the absence of clear criteria for decision would raise justified objections to the "lawlessness" of the process even more serious than those raised by sending the scope of liability issue to the jury.[205] Those objections would not be satisfactorily answered by pointing out that on occasion juries, acting on their own, adjust damages to match defendant's conduct.[206]

B. General Limitation of Damages in Mental-Distress Cases

If the practical disadvantages of adjusting mental-distress-related damages by special rules on a case-by-case basis seem to be formidable, a simpler approach is available to assure the achievement of the goal of greater proportionality: Damages in mental-distress cases might simply be limited in a manner

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[201] Under Posner's economic efficiency rationale, it might be argued that defendants should not be made to pay for freaky and unforeseeable *results* of accidents. *See* Posner, *supra* note 119, at 42.

[202] However, neither using reasonable foreseeability of serious distress as a test to determine duty nor requiring that a normal person be unable to cope with the stress engendered by the circumstances as a condition of liability would seem to create as many problems as using either of them as a measure of damages; only a "yes" or "no" answer is required to resolve the issues of duty and liability.

[203] Such as expert witness fees, lawyers fees, and costs of administering the judicial system.

[204] Including the likelihood that in cases of multiple defendants, as in *Kelley*, the blameworthiness of different defendants would require individualized verdicts if the damages were to be made proportional to each defendant's fault. Such verdicts would create problems in the area of contribution among joint tortfeasors that would make the problems created by comparative negligence pale in comparison. *Cf.* HAW. REV. STAT. §§663-12, 663-17 (1976) (making provision for disproportionate fault in allowing contribution).

[205] *See* pp. 29-33 *supra.*

[206] There is here an instructive analogy to the criminal law process: Although most judges recognize that juries have the power, which they occasionally exercise, to nullify the criminal law by finding a defendant innocent in a case where on the proof he is guilty, and although many judges may applaud the existence of this escape valve from the rigors of the law in cases where justice cries out for its use, the suggestion that juries be explicitly instructed that they have the power to do justice by nullifying the law has evoked the most vociferous protests from the judiciary. *See* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 235-48 (1977).

that permits easy calculation. Thus, dollar limits might be imposed on total awards or upon amounts recoverable for pain and suffering; awards for pain and suffering could be limited by formula to a percentage of tangible economic losses; or pain and suffering in such cases might be disallowed entirely, leaving plaintiff to recover only for past and future out-of-pocket economic losses.[207] Except for limiting pain and suffering to a percentage of tangible losses,[208] each of the other approaches has in fact been tried in other contexts where limitation of damages seemed necessary.[209] If the courts themselves are to effect the limitation, however, then only the last solution—denying recovery for pain and suffering—is available; the others all involve drawing arbitrary lines involving dollar figures or percentages, clearly an inappropriate task for the judiciary. Furthermore, damage rules that disallow recovery for pain and suffering have a venerable common-law history, as in property damage cases, deceit cases, and contract actions.[210] Such rules may be out of step with modern trends but they seem preferable to fixed dollar limitations that unduly favor smaller claims or percentage formulas that assume a relationship between tangible losses and pain and suffering that does not necessarily exist.

Thus, among the various alternatives,[211] restricting damages to tangible losses in most mental-distress cases where plaintiff's claim sounds in negligence or strict liability seems to be the fairest[212] and most amenable to judicial adoption. It also seems to be the approach that has the strongest chance of resolving the problem of excessive and disproportionate damages in a durable way. The restriction would not merely reduce damages for negligent infliction of mental suffering in cases where recovery is now permitted, but would involve an

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[207] I use the phrase "pain and suffering" here to distinguish the element of damages that might be reduced or eliminated from damages that would otherwise be allowed if defendant were held liable for the tort of negligent infliction of mental distress. Pain and suffering includes shock, grief, anxiety, humiliation, and other mental disturbance, as well as physical pain, that would be compensable in a normal negligence action where plaintiff suffers physical impact. *See* PROSSER, *supra* note 6, §54 at 330; MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §88 (1935).

[208] Once recommended as a partial solution to the rising costs of automobile accident insurance. *See, e.g.*, AMERICAN INSURANCE ASS'N, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS 5 (1968).

[209] For example, dollar limits have been placed upon recoveries for wrongful death damages in somewhat less than one-third of the states' death acts, PROSSER, *supra* note 6, §127 at 910; *see also* IND. CODE ANN. §16-9.5-2-2(a) (Supp. 1978) (limiting liability in medical malpractice actions to $500,000); recovery for pain and suffering has been restricted in certain cases in states which have adopted no-fault laws, *see e.g.*, HAW. REV. STAT. §294-6 (1976) and *see generally* Alexander, *An Update: State and Federal No-Fault*, 3 INCL BRIEF, No. 2 (1973); and damages in actions such as deceit, contract, and negligent injury to property have generally been limited to tangible economic losses and benefits. *See* PROSSER, *supra* note 6, §110 at 733-36 (deceit); MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §145 at 592-98 (1935) (contract); *Id.*, §124 at 470-77, Annot., 28 A.L.R.2d 1070 (1953) (negligent injury to property).

[210] *See* authorities cited in note 209 *supra*.

[211] Eliminating the "thin-skull" rule, *i.e.*, limiting damages to those that are reasonably foreseeable, in all negligence actions might generally produce greater proportionality but discussion of the issues which would be raised if such a major change in tort law were contemplated is beyond the scope of this article. Reducing damages by eliminating the application of the collateral-source rule in mental-distress-without-impact cases is another possibility. In conjunction with the elimination of pain and suffering it might provide additional assurance to courts that the effect of allowing recovery for mental distress without impact would not be disproportionately burdensome. *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1343-54 (1956). However, discussion of the complicated issues involved in the abolition of the collateral source rule is also beyond the scope of this article. *See* Lambert, *The Case for the Collateral-Source Rule*, 3 TRIAL LAW. Q. 52 (1965).

[212] *Cf.* note 193 *supra*.

important tradeoff: The arbitrary barriers to liability imposed by cases such as *Kelley* and the California cases would be removed subject only to traditional scope-of-liability limitations applied in all negligence cases.[213] Predictably, many more victims of mental distress would be allowed to recover than are able to do so under existing restrictions,[214] but awards would likely be significantly lower than those now available.

It may smack of irony to suggest that plaintiff should go uncompensated for pure mental distress when that distress is the gravamen of his action, but the approach suggested here nevertheless seems justified on grounds of reason and policy.

Even though damages are restricted to economic losses, the action could still produce significant awards in many cases. Traumatic neurosis resulting from mental distress may produce temporary or permanent disability[215] resulting in loss of earnings and future earning capacity and the need for hospitalization, nursing care, psychiatric assistance, and special drugs. Even the primary response to mental distress, such as "fear, anger, grief, and shock,"[216] might produce inability to function and require psychiatric or other medical attention or, as *Kelley* dramatically illustrates, even cause death. All of the economic losses engendered by these conditions would be compensable. Thus, the justice of the view "that as between an innocent plaintiff and a negligent wrongdoer, ... the latter should bear the loss"[217] will be given reasonable, if not full, effect: No plaintiff qualified to recover under general principles of negligence will have to suffer the full brunt of economic losses produced by defendant's negligence.[218]

On the other hand, denial of recovery for the mental distress itself gives fair recognition to the concern, described earlier, that it is beyond the capacity of the law to protect us from all of the mental stress produced by the fateful occurrences of life in a complex mechanized society. But when in fact the stress turns out to be serious enough to prevent the plaintiff from adequately coping, the tangible economic losses thereby produced will be compensated. Such an approach will also serve to allay the fear of fraudulent claims, to the extent it

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[213] *See* note 196 *supra.*

[214] *See* Tobin v. Grossman, 24 N.Y.2d 609, 616, 249 N.E.2d 419, 423, 301 N.Y.S.2d 554, 559 (1969).

[215] *See* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO L.J. 1237, 1250 (1971) and authorities there cited.

[216] *Id.* at 1249. "In all instances this initial mental reaction is subjective in nature and of relatively short duration, although its precise form and seriousness will vary according to the individual and the particular traumatic stimulus." *Id.* at 1249–50 (footnotes omitted).

[217] Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 213, 532 P.2d 673, 678 (1975) (Richardson, C.J., dissenting). *See also* PROSSER, *supra* note 6, §43 at 263.

[218] Attorney's fees would have to be paid out of the award, just as they are when pain and suffering is allowed. Thus it might make sense to legislate an allowance for attorneys' fees in such cases (*Cf.* CAL. [CIV.] CODE §1717 (West) (1973) (provides that attorney's fees may be awarded "in any action on a contract")), or to pass a statute adopting the formula approach, suggested above, which would award plaintiffs a percentage of their economic losses, roughly equivalent to the going rate for contingent fees, to compensate for "pain and suffering." However, every increase in allowable damages beyond tangible economic losses would risk retriggering the courts' fear of disproportionate liability.

If mental-distress-without-impact claims arising out of motor vehicle accidents were covered by no fault insurance, as they well might be, *see, e.g.*, the Hawaii No-Fault Law, HAW. REV. STAT. §294–3, 294–4, 294–10 (1976), then the no-fault benefits would ordinarily not be diminished by attorney's fees. *Id.*, §294–30.

still exists, by requiring the plaintiff to prove tangible losses and by removing the added incentive that damages for pain and suffering might represent to an unscrupulous plaintiff. Mainly, of course, the limitation of damages will serve the purpose of permitting even-handed treatment of deserving plaintiffs while minimizing the chances that damages for mental distress plaintiffs, when combined with full damages for defendants' physical injury victims, will produce awards that are excessively burdensome and disproportionate to defendants' fault.

From a policy perspective the recommended solution also seems sound: Actors, in order to avoid liability for negligence, will have to take account of the foreseeable economic losses to mental-distress victims as well as the total losses to foreseeable physical-injury victims in determining how much safety to provide. Greater direct deterrence will thus be provided, but not more than is justified by considerations of economic efficiency. In addition, secondary accident costs will be reduced[219] if economic losses to mental-distress victims are restored in whole or in part and are spread through the insurance or pricing mechanism. Furthermore, although indirect deterrence will be served over the long run by increasing the costs of activities likely to produce serious mental distress, the increases are likely to be significantly lower than they would be if general damages were allowed. Inflationary and anticompetitive effects should be minimized since compensation for economic losses to victims who might not recover under existing doctrine is likely to be offset to a fair degree by a significant reduction in damages to mental-distress victims who are permitted to recover under present law. Finally, any residual anticompetitive effects of allowing recovery for mental distress upon an isolated or insular state such as Hawaii might be avoided if the state adopts the rule here recommended, which minimizes the concerns that have hitherto inhibited the expansion of the tort of negligent infliction of mental distress in other states, and if such other states follow suit.

Questions remain as to whether the restriction of damages in mental-distress cases to economic losses should apply to cases in which defendant's conduct only produces mental distress and does not also cause actionable physical injury through impact to persons or property, whether general damages should be allowed in mental-distress actions where defendant's conduct justifies punitive damages, and how the recommended limitation should apply in wrongful death cases such as *Kelley* or in actions for loss of consortium. I will try to set forth briefly some of the considerations pertinent to the resolution of these questions.

1. Cases in which plaintiff may seek recovery for mental distress but where no physical injury to person or property is associated with the claim may fall into two categories—those in which the mental distress is produced by conduct that endangers the safety of persons, including plaintiff himself,[220] or property but where the object of plaintiff's concern does not actually suffer injury through impact, and those in which the mental distress is produced by conduct, often mere words, either directed to plaintiff or of the kind that defendant

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[219] Importantly, the more serious effects of economic dislocations upon the families of mental-distress victims who die, become disabled, or require extensive psychiatric care will be mitigated. *Cf.*, CALABRESI, *supra* note 103, at 42–45 (noting the importance of avoiding adverse economic effects on a victim's family through secondary cost reduction).

[220] *See, e.g.*, Mitchell v. Rochester Ry. Co., 151 N.Y. 107, 45 N.E. 354 (1896).

knows will affect plaintiff or someone in his position. In the first category is the situation where defendant negligently allows his truck to roll down a hill toward plaintiff's children while plaintiff looks on helplessly, but where by some miracle the truck narrowly misses the children. In the second category are the "telegraph cases"[221] and cases like *Johnson v. State*[222] where defendant negligently sends erroneous distress-producing information to plaintiff. In neither category is there a danger of excessive and disproportionate damages produced by heaping damages for physical injuries to person or property upon mental-distress damages.[223] And in neither category will deterrence policies be served unless the mental-distress plaintiff is allowed to recover damages. Thus the factors that incline us to limit damages to economic losses in the cases that involve physical injuries seem less significant in these cases. Although general damages might therefore be allowed in the second category, to do so in the first category would create a serious anomaly: The plaintiff in the hypothetical, for example, would be allowed to recover pain and suffering if her children *were not* injured by defendant's conduct, but would not be allowed to recover such damage if her children *were* injured. While this anomaly might be justified on theoretical grounds, it would be terribly difficult to justify on grounds of fairness. For this reason it seems preferable to limit damages in cases in the first category to economic losses.

2. In cases in which defendant's conduct is reckless or wilful, thus justifying punitive damages,[224] or even where it is grossly negligent, the award of general damages to mental-distress plaintiffs seems less likely to result in total damages that will be excessive in relation to defendant's culpability. In cases such as these, mental-distress plaintiffs should therefore be deemed eligible to recover damages for pain and suffering as well as economic losses.[225]

3. In cases such as *Kelley* where distress produces death, existing wrongful death statutes may allow beneficiaries to recover for intangible losses as well as for pecuniary losses. Thus, for example, the Hawaii Wrongful Death Act allows compensation for:

> loss of love and affection, including loss of society, companionship, comfort, consortium, or protection, (2) loss of marital care, attention, advice, or counsel, (3) loss of filial care or attention, or (4) loss of parental care, training, guidance, or education, suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person.[226]

While such items of damage tend to embrace intangible losses rather than economic losses, they are of a quality different from pure pain and suffering.[227] On the other hand, they are losses suffered by third persons even more remote than the decedent in the chain of causation, and recovery by these people for such losses has as much, if not a greater, potential for expanding damages to disproportionally large amounts as does allowing pain-and-suffering damages to the immediate distress victim. A similar problem also exists if an action for

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[221] *See* PROSSER, *supra* note 6, §54 at 329 n. 47.
[222] 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).
[223] *See* pp. 14–15 *supra.*
[224] *See* PROSSER, *supra* note 6, §2 at 9.
[225] *See* p. 20 *supra.*
[226] HAW. REV. STAT. §663–3 (1976).
[227] *See* Borer v. American Airlines, Inc., 19 Cal.3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

loss of consortium is permitted by the spouse of a mental-distress victim. The appropriate response may be to exclude the intangible elements of such damages[228] except in those few cases, mentioned above, where a victim of mental distress would himself be entitled to recover pain and suffering. Secondary accident costs of an economic nature would thus be avoided but the possibility of disproportionate damages and the courts' related concerns would be minimized.

VI. IMPLEMENTATION

Appellate courts clearly possess the authority to prescribe rules of damages for the remedies they create.[229] While in recent years the tendency has been to expand recovery to allow full tort-type damages, including pain and suffering, in cases in which the former remedy was limited to specified economic losses,[230] there seems to be no reason why recovery, in newly created causes of action at least, may not be limited to economic losses where such limitation is justified by reason and policy. Where, as in the case of negligent infliction of mental distress, the choice is between drawing a perpendicular line that arbitrarily and capriciously separates those who may recover from those who may not or drawing a horizontal line that evenhandedly allows all "deserving" plaintiffs to recover but limits their recovery, for good reason, to economic losses, the latter could hardly be faulted as exceeding the judicial prerogative or as an unconstitutional deprivation of property or as discrimination.[231]

While common law appellate courts possess the authority to adjust the remedies with respect to court-created rights, they have generally been reluctant to do so, especially when the effect is to modify the traditional "all-or-nothing" approach.[232] This reluctance may be understandable where, as has been the case with the adoption of comparative negligence, a variety of relatively complex approaches is available, no one approach is clearly preferable to the others, no common law precedent exists to guide choice,[233] and a change would necessarily leave a series of difficult questions to be answered by future

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[228] *Id. See generally* R. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1 (1978), discussing how courts should interpret statutes affecting tort law.

[229] *See generally* GREGORY, KALVEN & EPSTEIN, *supra* note 7, at Ch. 11.

[230] *See, e.g.*, Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d 368 (1972); Crisci v. Security Insurance Co., 66 Cal.2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). The expansion of damages is achieved in these cases by emphasizing the tort aspects of the case rather than the contract aspects. *See generally* Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103 (1970), for a description of how courts move between contract and tort theories to shift the law into conformity with current theories of risk allocation.

[231] *Cf.* Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971) (upholding constitutionality of Massachusetts no-fault law which deprives some injured persons compensation for pain and suffering). *But cf.* Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972) (holding Illinois no-fault statute unconstitutional because it denied pain and suffering both to persons required to have first-party protection and those not so required, thus denying equal protection to the latter group).

[232] *Compare* Maki v. Frelk, 40 Ill.2d 193, 239 N.E.2d 445 (1968) *with* Li v. Yellow Cab Co. of California, 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). *Cf.* Bissen v. Fujii, 51 Haw. 636, 466 P.2d 429 (1970) (court refused to apply comparative negligence to period before comparative negligence statute became effective). For a provocative discussion of the philosophical issues raised when the "all or nothing" rule is departed from by compromise, *see A Symposium on Philosophy from Law: Compromise and Decision Making in the Resolution of Controversies*, 58 N.W. L. REV. 731 (1964).

[233] Forms of comparative negligence had been judicially adopted at various times in different jurisdictions, *see generally* GREGORY, KALVEN & EPSTEIN, *supra* note 7, at 433–35, but they tended to be sufficiently different so that a court deciding whether to adopt some form of comparative

litigation.[234] But unwillingness to consider alternatives for which there is ample common law experience and that are not likely to generate confusion and litigation simply deprives the courts of the ability to mitigate the effect of the more serious misallocations that may occur when they create new substantive rights or decide to cut back on old ones. The United States Supreme Court, however, has exhibited no such reluctance to adjust remedies and even features of the trial process itself when to do so seems the best way to optimize important constitutional policies while preserving basic common law rights. Thus, for example, in order to make the law of defamation conform to the requirements of the first amendment, the Court has not just changed the substantive requirements for recovery but has adjusted the burden of proof and the rules of damages.[235] The Supreme Court's creativity stands as a model for state supreme courts when they feel the need to change the law to achieve objectives they deem important.[236]

Thus the change recommended in this article seems appropriate and ripe for judicial decisionmaking.[237]

VII. CONCLUSION

Whether and in what form the present negligence/strict liability/insurance system for dealing with personal-injury claims will survive the twentieth century

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negligence could not argue convincingly that it had arrived at the one "right" answer suggested by the precedents. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE §1.5, at 25 (1974).

[234] In this regard the Florida experience is instructive. *See* Hoffman v. Jones, 280 S.2d 431 (Fla. Sup. Ct. 1973) (judicially creating pure comparative negligence and requiring principles of set-off to apply to awards of injured parties held liable to each other) with Stuyvesant Ins. Co. v. Bournazian, 342 So. 2d 471 (Fla. Sup. Ct. 1977) (set-off not to apply to extent injured parties are covered by liability insurance). *See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).

[235] *See* Gertz v. Robert Welch, Inc., 418 U. S. 323 (1974); New York Times Co. v. Sullivan, 376 U. S. 254 (1964).

[236] The Supreme Court of Hawaii has demonstrated a willingness to adjust the burden of proof in order to serve important policy objectives. Medeiros v. Kondo, 55 Haw. 499, 522 P.2d 1269 (1974) (plaintiff must adduce "clear and convincing proof" of malice to recover against a public official charged with harassing a civil service employee into relinquishing his position).

It has been suggested that the burden of proof in cases of negligent infliction of mental distress should be increased by requiring plaintiff to prove his case by "more than a mere 'preponderance of the evidence.'" Koshiba, *Negligent Infliction of Mental Distress: Rodrigues v. State and Leong v. Takasaki*, 11 HAW. B.J. 29, 31 (1974). A more demanding burden of proof might provide greater protection against fraudulent claims and might also tend to reduce both the number of recoveries and the amounts awarded in settlement of doubtful cases.

[237] While the amendment to the wrongful death statutes suggested in the last section calls for legislative action, even here it may not be beyond the bounds of judicial competence to adjust the remedy without legislative action. Since recovery for negligently produced mental distress, in the absence of impact, was not permitted when most wrongful death statutes were passed, it is arguable that those statutes should not be interpreted to cover death produced by mental distress, absent impact, unless and until the legislature affirmatively acquiesces in the extension. *See* R. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, (1978), where Professor Keeton discusses the appropriate approach to judicial interpretation of statutes that deal with or affect tort law.

The effect of such interpretation in a state like Hawaii, if coupled with a judicial extension of the scope of liability in mental distress cases and limitation of damages in such cases to economic losses, likely would be to limit the estate of the deceased mental-distress victim to recovery of tangible economic losses in an action under the survival statute, HAW. REV. STAT. §663-7, 663-8 (1976)—somewhat less generous than the solution suggested above.

True, the survival statute was adopted before recovery for mental distress without impact was allowed. However, it may be argued that the statute was intended to be far more general in scope than the wrongful death act and that the legislature intended to permit broad categories of causes of actions, unless specifically excluded, to survive. *See* the illuminating discussion of the court's role in statutory interpretation in Yoshizaki v. Hilo Hospital, 50 Haw. 150, 433 P.2d 220 (1967).

is very much in doubt.[238] Powerful interests, such as product manufacturers and distributors, the medical profession, and the insurance industry, have added their considerable clout, manifested in well-organized propaganda and lobbying campaigns, to the ever-increasing volume of well-reasoned theoretical attacks on the existing system and recommendations for change propounded by scholars of high reputation and unquestioned probity and sincerity.[239] The public probably has great difficulty comprehending the more subtle aspects of the debate and is unusually susceptible because of inflationary conditions to real or imaginary "horribles" that purport to demonstrate how the existing system imposes excessively high transaction costs, increases insurance premiums and product costs, and, in the case of large judgments and settlements, inefficiently allocates scarce resources. The conditions that produced a "Proposition 13"[240] could also produce the overthrow of the liability system. True, the trial bar has so far been successful in defeating the most comprehensive proposals, such as complete replacement of the tort system in automobile accident cases by no-fault, but the tide clearly seems to be running in favor of the reformers.

The unspoken assumption of this article has been that, notwithstanding the need for improvement, the existing system of liability based upon negligence and strict responsibility for losses occasioned by defective products well serves important goals that would not be served in its absence. The system provides important incentives for safety in situations such as medical malpractice[241] where substitute incentives of even near-equal efficacy are not now available. Even in situations where the deterrence capability of the current system is questionable—as in the automobile accident context—[242] the liability system, when it functions as it should, fills important gaps in compensation, thus reducing secondary accident costs that would otherwise have to be borne by individual accident victims.[243] Furthermore, the system seems to establish behavior and performance standards for individuals and enterprises which, over time, are capable of being communicated to and internalized by the public at large.[244] It is by no means clear what the effects would be if compensation for injuries and standards for liability were dissociated. The need that led to the adoption of OSHA[245]—a full-blown scheme for regulating safety and health in the workplace—to operate in tandem with nonfault compensation for

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[238] *See* R. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, 2 (1978). Professor Keeton notes that proposals for legislative reforms of tort law have substantially increased since the decade of the sixties, that the activists seeking reform range across a wide spectrum of philosophies, and that the demand for reform is likely to continue to increase as we move toward the year 2000.

[239] *See, e.g.*, J. O'CONNELL & R. HENDERSON, TORT LAW, NO-FAULT AND BEYOND, Ch. V (1975).

[240] CAL. CONST. art. XIII A (limiting maximum ad valorem tax on real property to one percent of "full cash value" of the property).

[241] *See* Chittenden, The Designated Compensable Event in Medical Malpractice 4 (Speech prepared for presentation to the A.B.A. National Institute Program in Minneapolis on June 5, 1977) reprinted in A.B.A. NATIONAL INSTITUTE, THE TORT LIABILITY SYSTEM—IS IT TIME FOR CHANGE? (1977); Torrey, *Doctors Don't Police Own Ills: Unethical, Incompetent and Disabled Physicians Continue to Practice*, Wash. Post, July 9, 1978,) § B (Outlook), at 1; Halberstam, *The Doctor's New Dilemma—Will I Be Sued?*', N.Y. Times, Feb. 14, 1971, §6 (Magazine), at 8, 39.

[242] *See* Keeton, *The Case for No-Fault Insurance*, 44 MISS. L.J. 1, 12–13 (1973).

[243] *See* CALABRESI, *supra* note 103, at 45.

[244] "Rules may be said to affect behavior indirectly insofar as they help to reinforce the general moral climate in society which encourages people, unconsciously perhaps, to avoid socially destructive conduct." J. HENDERSON & R. PEARSON, THE TORTS PROCESS 85 n. 15 (1975).

[245] The Occupational Safety and Health Act of 1970, 29 U.S.C. §§651–78 (1970).

accidents under workers' compensation, however, does not inspire confidence that safety would be served by the separation.[246]

If the current system is to survive, however, its rules will have to be adjusted to insure that the results it produces can be defended as comporting with community views of fairness and as serving important social goals with reasonable efficiency.[247] I have attempted to show with respect to the negligent infliction of mental distress (which is, of course, a paradigm of the larger problem facing the tort system) that it is possible, without affronting the rule of law, for the courts to make such adjustments.

If courts are to respond with any degree of effectiveness to the challenges to the liability system they have fashioned, they must become more willing to engage in comprehensive policy analysis and to consider creative alternatives. The Hawaii Supreme Court in *Rodrigues*, like the California Supreme Court in *Dillon*, wrote a well-reasoned opinion that took current scientific understanding of the causes, effects, and manifestations of mental distress into account and focussed upon the victims' needs and equality of treatment. The opinion did not even come close to exceeding the limits of judicial propriety: The arbitrary limitations on liability imposed in other jurisdictions were seriously inconsistent with the requirements of justice, as demonstrated by the application of the "thin-skull" rule, in ordinary accident cases. Yet the opinion planted the seeds of its own destruction because it failed adequately to consider the effects of untrammeled liability for mental distress in cases where the potential for multiple recoveries could increase damages to shocking levels in relation to the conduct that produced them. When *Kelley* came along, the majority, now focussing primarily on the economic burden on defendants, responded in a predictable way by creating a new restriction nearly as arbitrary and unfair as the old ones. Unfortunately, since the court adopted a rule that on its face cannot be easily applied and also failed to articulate with reasonable clarity the considerations that are likely to govern its application, the effect was one of vacillation, unfairness, and uncertainty.

If judicial decisionmaking is to retain its viability as an expositor and interpreter of policy in the face of the present-day cynical attitude toward power, questioning of the courts, and demands for candor from public officials, the innovative prescriptions of appellate courts in cases like *Dillon, Rodrigues,* and *Kelley*, which "count for the future,"[248] should be accompanied by as sophisticated and imaginative a consideration of policy goals, relevant societal conditions, decisional trends, likely outcomes, wider effects, and alternative approaches as judicial ingenuity and resources will permit.[249]

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[246] *Cf.* Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 1974 LAW & CONTEMP. PROB. 612, 613: "The principal significance of the utilization by Congress of such a punitive system of deterrence [as OSHA] is that it constitutes another compelling piece of evidence of widespread recognition by policy-makers that systems which were designed to provide compensation or individual justice for accident victims have not provided adequate deterrence against accidents."

[247] *See generally*, SPECIAL COMMITTEE ON AUTOMOBILE INSURANCE LEGISLATION, AMERICAN BAR ASSOCIATION, AUTOMOBILE NO-FAULT INSURANCE (1978).

[248] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 165 (1921).

[249] *See* McDougal, *Jurisprudence for a Free Society*, 1 GEO. L. REV. 1, 9, 19 (1966). *Cf.* Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, 20 (1978): "When courts are engaged in the inevitable enterprise of filling gaps in statutes, the value choices they make as legitimate representatives of society will be wiser as they are better informed by advocacy addressed explicitly

What this article has tried to demonstrate is how, with respect to the scope of liability for negligently inflicted mental distress, a problem that has long defied sensible resolution by the courts, such analysis can yield a solution that has the potential for maximizing the achievement of conflicting policy goals while avoiding recurrent appeals to the court for clarification. The specific solution suggested here—allowing recovery for mental distress to extend to foreseeable victims of serious distress but limiting their damages in most cases to their tangible economic losses—seems to serve considerations of justice, policy, and the rule of law considerably better than retreating, step by step, back toward the arbitrary "zone of danger" rule.

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to the competing principles, policies, and values at stake *and as they are openly explained in judicial opinions.*" (Emphasis added.) Prof. Keeton suggests that the same approach should be taken in any case in which the courts "are engaged in value-laden choices," not just when statutes are being interpreted. *Id.* at 19. Also *cf.* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 497 (1962) (discussing the characteristics of a decision which can be examined to determine the "serviceability" of a doctrinal formulation set forth in the decision).

WHITHER HAWAII? LAND USE MANAGEMENT IN AN ISLAND STATE

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At no other place in the United States is the land management imperative as demanding as it is in the Hawaiian islands. A series of volcanic cones rising from the depths of the ocean floor, the islands cradle a growing population and a rising tourism industry that press heavily on its limited land resources. These pressures have prompted the enactment of an extensive state and local land use control system that may make Hawaii the most land-regulated domain in the entire world. This system has now been capped by legislative enactment of an extensive state plan, intended to provide policy and direction for land management activities at both the state and county level.[1]

Hawaii has created a system of land planning and control that does not yet provide the coherent land management system the state so desperately needs. Lines of authority between the state and the four counties remain unclear.[2] Different land management regimes apply in the narrowly defined coastal strip and in the rest of the islands. More fundamentally, the Hawaiian land management system incompletely resolves the conflicting demands of environmental protection, comprehensive planning, and the need for adequate decision-making procedures in the management of land resources.

This article is in two parts. In the first, the varying and sometimes conflicting elements of the Hawaii land management system are described. In the second, suggestions are offered that can help resolve these conflicts to provide better coherence and improved decision-making in the Hawaii system of land use control.

I. Problems and Policies in Land Use Planning and Control

The last decade has seen major innovations nationwide in methods for managing and controlling land resources. A "Quiet Revolution"[3] in land use

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[1] Haw. Rev. Stat. ch. 226 (Supp. 1978).

[2] Local government in Hawaii consists of four county governments. There are no incorporated municipalities. Each island is organized as a single county but some counties contain more than one island.

[3] *See* F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control (1971). The Hawaii Land Use Law is reviewed, *id.* at 5–53. *See also* Hess, *Institutionalizing the Revolution: Judicial Reaction to State Land-Use Laws*, 9 Urban Law. 183 (1977).

control, which began in Hawaii, has seen the increasing assumption of land use control powers at the state level. Mandatory planning is another major innovation. Especially at the local level, courts and legislatures increasingly have required the preparation and adoption of land use plans as the basis for exercising land use control powers.[4] Legislation authorizing state land use controls has not usually included a planning component, but this omission has been remedied in some states. Hawaii is one example.

The shift to greater state authority in land use regulation also reflects a greater awareness of environmental problems, including the need to protect critical and threatened environmental resource areas, such as wetlands and coastlines. Much state and some local land use control regulation provides specialized controls over environmental resource areas, usually separate from comprehensive state land use control legislation and not usually accompanied by a planning requirement.

A final change in land use control systems has focused on the procedures utilized to make land use decisions rather than the substance of land use policy. Court decisions are beginning to insist on more formalized adjudicatory procedures for making regulatory decisions affecting land use, compared to the informal procedures that usually characterize this process. These procedural changes have primarily affected land use regulation at the local level, but formalized decision-making procedures have also appeared in state land use regulation. Hawaii again provides an example. This shift to formalized decision-making is associated in some states with greater emphasis on the plan as the basis for land use policy and regulation.

Each of these trends in land use controls—reliance on planning, specialized environmental regulation, and formalized decision-making procedures—is reflected in the Hawaii land use control system in some form. Each will be considered in the discussion that follows.

A. The Role of Planning

Recent years have seen the sudden emergence of a planning requirement as a necessary condition to the exercise of land use controls. For many years dormant in the often ambiguous language contained in much early model legislation, the requirement for a mandatory land use plan has now been given binding legal effect by mainland state legislation and court decisions.[5] This issue has been somewhat irrelevant at the county level in Hawaii since all of the counties have prepared and adopted land use plans to guide their own development control processes. Planning has been a more controversial issue at the state level, where the early failure to require a land use plan as the basis for administering the state Land Use Law[6] left that land use control program

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[4] *See* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH L. REV. 899 (1976). Mandatory planning has been endorsed by the American Bar Association's Advisory Commission on Housing and Urban Growth. *See* HOUSING FOR ALL UNDER LAW 408–10 (R. Fishman ed. 1978). A thoughtful analysis of the role of comprehensive planning in land use control is contained in ROYAL COMM'N ON METROPOLITAN TORONTO, THE PLANNING PROCESS IN METROPOLITAN TORONTO (Background Rep. No. 3 1976). For an excellent analysis of this report, *see* J. CULLINGWORTH, ONTARIO PLANNING: NOTES ON THE COMAY REPORT ON THE ONTARIO PLANNING ACT (1978).

[5] *See* Mandelker, *supra* note 4.

[6] The state legislature did not accept a recommendation that the Land Use Law, enacted in

without direction. State land use plans were adopted later but did not really provide a land use policy that could be implemented through the Land Use Law.

The state legislature and the public at large have nonetheless viewed the adoption of a state land use plan as a necessary component in a state land use control system. This interest in a state land use plan surfaced at a time of considerable controversy over the role and purpose of a land use plan at the state level. To some extent, this controversy focused on the form and function of a state plan. Some argued that the state should establish an ongoing planning process in which plans would be produced and continually revised to meet the need for resolving specific planning problems. Others called for an explicit one-time plan that would determine land use policy for the state in a binding and immutable manner.

These issues were publicly debated when the state administration proposed legislation that would have provided a state planning process leaving the determination of planning policy to the state planning agency.[7] This legislation failed in a storm of opposition. The issue to some extent was a question of responsibility rather than content. State legislators wished to provide explicit guidance for land management decisions and were not willing to entrust the development of that policy to a state agency. They wanted a land use plan that would shape land use decisions in a more firmly directive manner than a state planning process would have assured.

An important step toward the articulation of a state land development policy was provided in 1975 when the legislature enacted a set of interim land use guidance policies for the state Land Use Commission.[8] These policies reflected the consensus throughout the state for a policy of contained growth and included a preference for avoiding adverse impacts on sensitive environmental lands. They marked the first time that a state legislature, anywhere, had set forth an explicit policy for growth management by way of state legislation.

The legislature also adopted a state plan in 1978.[9] The state plan is a remarkable document, most notably because it is the only legislatively adopted state plan in the entire country.[10] It consists entirely of a series of themes, goals, objectives, and priority directions covering social and economic as well as land use policy issues affecting the entire state. Most of the themes, goals, and objectives are hortatory. Only the priority directions contain policy statements that can provide a useful guide to the implementation of the state Land Use Law and other programs affecting land use. These directions include, in

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1961, be based on the 1961 Hawaii State General Plan. The original draft of the bill that became the Land Use Law is contained in HAWAII STATE PLANNING OFFICE & HARLAND BARTHOLOMEW & ASSO., FACTS PERTAINING TO THE PROTECTION AND ZONING OF RURAL, AGRICULTURAL, AND URBAN LANDS WITHIN ALL COUNTIES app. A. (1961).

[7] *See* H.B. 2448-74, 7th Hawaii State Legislature (1974). The debate over this legislation is reported in Catanese, *Plan? or Process?*, PLANNING, June 1974, at 14.

[8] HAW. REV. STAT. §205-16.1 (1976). For discussion of the Hawaii Land Use Law, *see* D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION ch. VII (1976). *See also* LOWRY & MCELROY, STATE LAND USE CONTROL: SOME LESSONS FROM EXPERIENCE, STATE PLANNING ISSUES, vol. 1, no. 1, at 15 (1976).

[9] HAW. REV. STAT. ch. 226 (Supp. 1978).

[10] A comparable attempt to adopt a state land use plan in Vermont failed. *See* Heeter, *Almost Getting It Together in Vermont* in D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 356–71 (1976).

somewhat modified form, the land use policies contained in the legislatively enacted interim land use guidance policy for the Land Use Commission.[11]

Many problems may be inherent in a legislatively adopted state plan. In Hawaii's case, the inflexibility of a legislative plan has been avoided to some extent by the highly generalized content of the statutory planning policies. This trade-off may provide a needed flexibility in planning guidance but may not provide the restraint on land management decisions that the legislature contemplated.

A more fundamental question is whether the legislatively adopted state land use plan has been properly integrated with other land policy measures adopted at the state and local levels. For example, in 1977 the state legislature adopted a detailed set of policies for land use management in the state's coastal zone.[12] These policies were derived from the state coastal plan but they do not represent a coordinated land development policy for the entire state. The 1978 state plan provides that the coastal zone management policies are subject to the policies and objectives of the state plan,[13] but no explicit attempt is made to reconcile any conflicts that might arise between these two coordinate sets of state land management guidance.

The relationship between the county plans and the state plan is also unclear. County plans are to be made consistent with the state general plan,[14] but state functional plans are to be based on the county plans with any conflicts apparently to be resolved by the legislature.[15] Another unresolved issue is the relationship between county plans and the state Land Use Law. Nothing in any of the legislation prevents the counties from planning for growth in a manner inconsistent with land use district determinations made by the state Land Use Commission.[16]

In spite of these difficulties, the state policy plan does commit the state to a comprehensive planning policy as the basis for land management by state and county governments. In theory, the state plan should take all important concerns and needs into account, including the need for environmental protection. However, environmental concerns have been separately addressed in legislation that is not related to the state plan. These statutes will be examined next.

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[11] *See, e.g.*, HAW. REV. STAT. §226-104(c) (2) (Supp. 1978): "Encourage urban growth primarily to existing urban areas where adequate public facilities are already available or can be provided with reasonable public expenditures."

[12] HAW. REV. STAT. §205A-2 (Supp. 1978).

[13] The state plan defines a "state program" to include the coastal zone management program. It then provides that "[s]tate programs shall further define, implement, and be in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter, and the state functional plans adopted pursuant to this chapter." HAW. REV. STAT. §226-52(a) (5) (Supp. 1978).

[14] The state plan statute provides that county plans shall be in conformance with the state plan by January 1982. HAW. REV. STAT. §226-61(c) (Supp. 1978).

[15] HAW. REV. STAT. §226-57(a) (Supp. 1978). This section provides for legislative adoption of functional plans. A functional plan is defined as "a plan setting forth the policies, programs, and projects designed to implement the objectives of a specific field of activity, when such activity or program is proposed, administered, or funded by any agency of the State." HAW. REV. STAT. §226(2) (10) (Supp. 1978). A plan for highways would be a functional plan.

[16] It was clear that the recent massive planning effort carried out by the City and County of Honolulu ignored the state land use district boundaries on the island. *See* Rider, *Transition from Land Use to Policy Planning: Lessons Learned*, 44 J. AM. INST. PLANNERS 25 (1978) (discussing Honolulu planning program).

B. Environmental Protection Legislation

States enacting environmental protection legislation have often moved simultaneously in two directions. One type of legislation, modeled on the National Environmental Policy Act (NEPA),[17] calls for the preparation of an environmental impact statement for any governmental action found to have an environmental impact. The purpose of the statement is to disclose and discuss the environmental effects of the governmental action. Hawaii has enacted a similar law.[18] The law applies to a limited extent to private development, including development in coastal areas. The environmental impact statement provides another procedure by which land development may be reviewed; it supplements the review of land development under substantive standards provided in state or local land use control legislation.

Another type of environmentally protective legislation controls land development directly. It enacts environmental standards for land development that must be satisfied before development permits can issue. Hawaii has also enacted legislation of this type, most notably the Shoreline Management Act of 1975.[19] This Act confers permit authority on the four counties over new development in a narrow coastal zone and is one of the regulatory measures for implementing the state's coastal zone management program. An environmental impact statement is also required on new development located within the coastal zone,[20] but the coastal area in which an environmental statement is required does not extend as far inland as the coastal area covered by the Shoreline Management Act.

Specialized legislation directed solely to environmental protection creates additional problems of coordination in the Hawaii land use control system. One problem arises from conflicting regulatory purposes. An environmental impact statement required by Hawaii's NEPA counterpart must disclose and discuss the environmental impacts of new development. While the issue is not yet definitively settled in this state, the impact statement apparently does not provide a basis on which new development may be approved or disapproved.[21] In other words, an approving agency may not disapprove a new development because of adverse environmental impacts disclosed by the environmental impact statement.

Authority to disapprove a new development within the coastal zone because of adverse environmental impacts is explicitly conferred by the Shoreline Management Act.[22] The state thus provides two independent measures for reviewing the environmental impact of new development in coastal areas: One is a process in which the environmental impact of that development is simply considered, the other involves substantive legislation under which new devel-

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[17] 42 U.S.C. §§4321–4361 (1976).

[18] HAW. REV. STAT. ch. 343 (1976).

[19] HAW. REV. STAT. ch. 205A, pt. II (1976 & Supp. 1978). For discussion of this legislation, *see* V. Murison, The Implementation of Legislative Mandates Through the Adoption of Ordinances by County Governments 48–69 (monograph prepared for Hawaii Coastal Zone Management Program 1976) (on file with authors).

[20] HAW. REV. STAT. §343–4(2) (B) (1976).

[21] *See* HAW. REV. STAT. §343–1(6) (1976) *and* Life of the Land v. Ariyoshi, 59 Haw. 156, 577 P.2d 1116 (1978). For a contrary holding under the Washington state environmental impact statement legislation, *see* Polygon Corp. v. City of Seattle, 90 Wash.2d 59, 578 P.2d 1309 (1978).

[22] HAW. REV. STAT. §205A-28 (1976).

opment is reviewed for compliance with statutory environmental criteria. Neither measure is explicitly related to the planning policies of the state plan in any meaningful way.

A question arises whether this much environmental protection is really necessary. The statutory environmental standards applicable to new development under the Shoreline Management Act are remarkably similar to the standards governing the preparation of environmental impact statements. One environmental review may be considered necessary, but are two?

A California court faced this question under California's interim coastal legislation,[23] on which the Hawaii Shoreline Management Act was modeled. Like Hawaii, California has enacted legislation requiring the preparation of an environmental impact statement on any new development[24] anywhere in the state, including the coastal zone area.

Like the Hawaii Shoreline Management Act, the interim California coastal law required a finding that a development would have no adverse environmental impact before a permit could issue.[25] The California environmental impact statement law also requires an evaluation of the environmental impact of a proposed development. In *Natural Resources Defense Council v. California Coastal Zone Conservation Commission*,[26] a permit had been issued by the Commission for a residential development on the basis of its finding that no adverse environmental impact would be created. The California intermediate Court of Appeals held that no environmental impact statement was required. The coastal commission's finding satisfied the environmental review requirement of the environmental impact statement legislation. As the California court noted,[27] no environmental impact statement should be required from the coastal agency, which is charged with guarding the environment by applying environmentally protective standards.

The *Natural Resources* decision adopted an implied exemption to the statutory environmental impact statement requirement that has now been codified in California.[28] It has also received recognition in judicial interpretations of the environmental impact statement requirement of the National Environmental

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[23] CAL. PUB. RES. CODE §§27400–27426 (1976). The interim California coastal law was repealed as of January 1, 1977. *Id.*, §27650. It has been replaced by permanent coastal legislation enacted in 1976. *See* D. MANDELKER, *supra* note 8, at 70–76 (Supp. 1978).

[24] CAL PUB. RES. CODE §§21000–21174 (1976 & Supp. 1978). In California, the environmental impact statement is called an environmental impact report.

[25] CAL PUB. RES. CODE §27402(a) (1976).

[26] 57 Cal.App.3d 76, 129 Cal.Rptr. 57 (1976).

[27] *Id.* at 91, n. 6, 129 Cal.Rptr. at 67, n. 6.

[28] CAL. PUB. RES. CODE §21080.5 (Supp. 1978): If a regulatory program of a state agency, board, or commission requires "a plan or other written documentation, containing" environmental information sufficiently equivalent to that required by the Environmental Impact Report (EIR), the secretary of the state Resources Agency can certify the regulatory program and the documents required by the certified regulatory program "may be submitted in lieu of" the EIR.

One California intermediate court of appeals has now interpreted this provision to preclude additional implied exemptions from the impact report requirement. It held that the requirements of this provision were not fulfilled by the interim California coastal law and that an impact report was required on an interim coastal permit. City of Coronado v. California Coastal Zone Conserv. Comm'n., 69 Cal.App.3rd 570, 138 Cal.Rptr. 241 (1977), relying on Wildlife Alive v. Chickering, 18 Cal.3rd 190, 553 P.2d 537, 132 Cal.Rptr. 377 (1976) (refusing to extend statutory exemption from environmental impact statement requirement). *See also* Sisley v. San Juan County, 89 Wash.2d 78, 569 P.2d 712 (1977) (impact statement required for permit issued under state Shoreline Management Act).

Policy Act.[29] Given the close kinship between the Hawaii and California shoreline protection and environmental impact statement legislation, the Hawaii courts can also be expected to exempt shoreline management permits from the environmental impact statement requirement.

Even more fundamental questions must be raised concerning the relationship between the Hawaii state plan and the environmentally focused legislation regulating new development to prevent adverse environmental impact. The legislatively adopted state plan contains specific environmentally protective objectives and priority directions.[30] The implication is that since county plans must be consistent with the state plan, they must be sensitive to environmental concerns as well. Counties also administer the permit program authorized by the Shoreline Management Act, which is now based on the legislative policies adopted for the state coastal zone management program.[31] The Shoreline Management Act's permit program may not be necessary now that county plans must conform to environmentally protective policies contained in the state plan. County land use controls implementing county plans based on the statutory state plan could serve just as effectively to provide a means for implementing the state coastal zone management program. Certainly the heavy commitment to comprehensive and environmentally sensitive planning policies at the state and county levels suggests that the role of specialized environmental legislation should be reconsidered.

C. Procedures for Decision-Making in Land Use Control Programs

Decision-making by public agencies in state and local government follows one of two dominant modes: The decision is made through quasilegislative procedures, in which case no formal trial-type adjudication is necessary, or the decision requires an adjudicatory process. The Hawaii State Administrative Procedure Act designates this latter process a "contested case" proceeding.[32] In land use control, at least at the local level, the quasilegislative mode has been the dominant and accepted form. In proceedings before a legislative body for amendments to the zoning map, for example, the procedure is informal and no specific findings of fact are necessary.

Recent mainland developments have altered this dominant decision-making procedure.[33] Many mainland courts have become increasingly aware that all is not well with the decision-making process for land use controls at the local level and are concerned about the informality of the traditional quasilegislative process. An application to amend the zoning of a single parcel of land is viewed by these courts as simply involving the application of policy to the facts supporting the proposed change. They require that adjudicatory procedures be utilized by the local land use agency. These adjudicatory procedures are not imposed on local land use control programs by state administrative procedure

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[29] *See* W. RODGERS, ENVIRONMENTAL LAW 764–66 (1977).

[30] *See, e.g.*, HAW. REV. STAT. §226–11 (Supp. 1978).

[31] HAW. REV. STAT. §205A-2 (Supp. 1978).

[32] HAW. REV. STAT. §91–9 (1976).

[33] *See* REPORT OF THE AMERICAN BAR ASS'N ADVISORY COMM'N ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW 268–80 (R. Fishman ed. 1978).

act provisions; rather, they appear to reflect a judicial view of procedural due process as required by the Constitution.

There is an important link between the procedure chosen for making a land use control decision and the land use policies under which that decision is measured. Amendments to local zoning ordinances allowing changes in use provide one example. Most courts accompany a willingness to allow informal nonadjudicatory procedures for zoning amendments with an ad hoc review of the factors advanced in support of the zoning amendment.[34] When courts require an adjudicatory process for zoning amendments, a more "principled policy" basis for reviewing that amendment must be found. Adjudicatory procedures are required because the zoning amendment process is considered to be an application of previously adopted policy to the circumstances giving rise to the zoning amendment request. An ad hoc policy review of the zoning amendment is not possible under this view.

One approach to providing a "principled policy" basis for reviewing zoning changes made through adjudicatory procedures is to rely on the policies of a local comprehensive plan. This position has been adopted in several Oregon cases.[35] The lesson to be learned is that a shift to adjudicatory procedures for land use decisions may also mean greater reliance on planning policies. These policies are formulated before the decision-making process rather than on an ad hoc basis by reviewing courts.[36]

Comparable developments have occurred in Hawaii land use legislation through an extension of the contested-case procedures of the state Administrative Procedure Act. These changes in the land use control decision-making process have restructured the regulatory functions of the state Land Use Commission. Under the Land Use Law, the Commission is authorized to divide the entire state into four land use districts—urban, agricultural, conservation, and rural.[37] These district assignments control land development throughout the state. Procedures are provided in the Land Use Law for amendments to land use district boundaries.[38] These amendments may occur following an application for boundary change by an individual landowner. The land use district boundary amendment process thus resembles the procedure for amendments to zoning maps under local zoning ordinances. It can likewise be argued that the Land Use Commission is applying and not making policy when it approves amendments to land use district boundaries, and that therefore adjudicatory contested-case procedures should be required.

The Hawaii Supreme Court reached this conclusion in *Town v. Land Use*

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[34] *See* 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW §33.02 (1974). Some public policy reason must be found to support the zoning amendment to avoid the charge that the amendment improperly confers a special benefit on the favored landowner in violation of the equal protection clause of the United States Constitution.

[35] *See* Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973). The Oregon courts appear willing to interpret the policies of a local comprehensive plan but are reluctant to review and make determinations as to whether they are acceptable policy decisions. *See* Green v. Hayward, 275 Or. 693, 552 P.2d 815 (1976) (form of plan to be determined locally; isolated statements may not be severed from plan to justify zoning decision).

[36] *See* Mandelker, *Should State Government Mandate Local Planning?... Yes*, PLANNING, July 1978, at 14.

[37] HAW. REV. STAT. §205-2 (1976).

[38] HAW. REV. STAT. §205-3 (1976).

Commission,[39] decided prior to the enactment of the statutory Interim Land Use Guidance Policy in 1975. In an unsatisfactory opinion that failed to consider mainland developments, the court concluded that the Land Use Commission was applying and not making policy when considering land use boundary changes. It held that the contested-case procedure of the state Administrative Procedure Act applied to these proceedings. The court's decision was codified in the 1975 amendments to the Land Use Law that enacted explicit adjudicatory procedures.[40]

Other related Hawaii legislation providing for the issuance of development permits does not indicate the type of procedure to be followed. The Shoreline Management Act of 1975 is one example. That act provides specific development policies to be applied by the counties when considering whether to issue coastal development permits. The Hawaii Supreme Court may also apply the contested-case procedures of the state Administrative Procedure Act to this statute. The California intermediate appellate courts applied contested-case procedures when considering permits issued under the interim California coastal act.[41] Since the Hawaii Shoreline Management Act is closely modeled on the California legislation, a similar holding is likely if the issue is raised under the Hawaii shoreline management legislation.

Several questions affecting the type of adjudicatory procedure required for the land use control process were left unanswered by the *Town* decision. Since that decision dealt with the procedures of the state Land Use Commission, only that Commission was directly affected by the court's holding. Whether comparable adjudicatory procedures will be required for zoning amendments at the local level affecting single parcels of land remains unclear. The extension of the decision to other state agencies with land use responsibilities is also problematic, given the limited analysis in the *Town* decision. Nor does that decision establish a clear link between the adjudicatory procedures required for Land Use Commission proceedings and the land development policies to be applied in these proceedings. The *Town* decision appeared to accept the criteria for land use boundary amendments contained in the statute at that time. These ad hoc criteria addressed the boundary change issue without reference to an overriding planning policy. Presumably, the Hawaii court would also accept as applicable policy the priority directions for land development contained in the state land use plan, either as supplementary or in addition to the specific statutory criteria provided for boundary amendments. The court left open the question of how

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[39] 55 Haw. 538, 524 P.2d 84 (1974).

[40] HAW. REV. STAT. §205-4 (1976).

[41] *See* City of Coronado v. California Coastal Zone Conserv. Comm'n, 69 Cal.App.3rd 570, 138 Cal.Rptr. 241 (1977); Patterson v. Central Coast Regional Coastal Zone Conserv. Comm'n, 58 Cal.App.3rd 833, 130 Cal.Rptr. 169 (1976); J. Davidson, Administrative Procedures Required for Development Permits in Hawaii 16–17 (paper prepared for Hawaii Coastal Zone Management Program 1979) (on file with authors). Davidson notes that "[a]lthough the California APA, Cal. Gov't Code §§11500 to 11529 (Deering 1973), does not apply to the coastal permit program, the Coastal act itself provided for judicial review by mandate of permit decisions by the coastal commissions. Cal. Pub. Res. Code §27424 (Deering 1976), repealed by §27650 Initiative Measure, operative Jan. 1, 1977. On review, the courts have characterized the permit proceedings as quasi-judicial rather than quasi-legislative, which has led to a stricter standard of review: 'Whether the findings are supported by substantial evidence in light of the whole record.' Cal. Code Civ. Proc. §1094.5, subd. (b)." *Id.* at Footnotes, p. 11 n. 94. *See also* Note, *Coastal Zone Management and Planning California: Strategies for Balancing Conservation and Development*, 15 URBAN L. ANN. 253 (1978).

these policies should be weighed in the land use district boundary amendment process.

This judicial trend toward adjudicatory procedures for land use control decisions raises other critical problems. Those courts requiring adjudicatory procedures appear impressed with the ability of the land use plan to provide the necessary policies to guide the decision-making process. They concentrate on the adequacy of that process, deferring to land use plans to provide the policies for the process. These courts are unwilling to review the content of the planning policies applied by the decision-making agencies. This judicial stance is understandable. Courts are comfortable when reviewing the adequacy of legal procedures that they understand but are less comfortable when asked to review the content and basis of land use plans. They appear willing to leave the formulation of these plans to the planning and political process with little or no judicial supervision.

This judicial attitude presents a dilemma for the public agencies charged with the land use decision-making process in Hawaii. Proposed development in the coastal area, for example, is subject to a variety of inconsistent statutory development policies. A Hawaii court asked to apply these conflicting policies may not have the confidence that led some mainland courts to defer to land use policies adopted in the planning process. One possible reaction of the Hawaii courts is a judicial attempt to work out policy conflicts through statutory interpretation. That approach would be undesirable in a state whose legislature has provided very explicit policy direction through statutory prescription. Judicial intervention to resolve statutory policy conflicts is also risky should judicial interpretation prove unfaithful to the legislative intent.

D. The Regulatory Dilemma in Hawaii: Some Conclusions

Faced with mounting pressures on a fragile environment, Hawaii has looked to more than one technique as a method for preserving its land resources and environmental heritage. The state plan and related land use control legislation reflect a faith in comprehensive planning policy as a method for restraining and shaping land development. The state has also enacted less comprehensive environmentally protective measures that may also be based on legislatively stated policies but that are not carefully integrated with the state plan. Companion land use control measures, such as the Shoreline Management Act, provide protective environmental controls that do not take wider planning and growth management concerns into account. Concurrently, the state supreme court's preference for adjudicatory procedures in land use control decision-making enhances the need for coherent policies for land use decisions at a time when the statutory expression of these policies lacks integration. The network of land use control legislation leaves unresolved the conflicts in land use controls that exist between the state and the counties. It has also provided a more stringent land use control regime for the coastal zone than for the rest of the state.

Coherence in land use policy and control is necessary for Hawaii, whose sensitive land environment cannot support endless and possibly destructive development pressures. Coherence is also necessary if duplication, unnecessary expense, delay, and wasted effort are to be avoided.

II. Some Suggestions for Change in the Hawaii Land Management System

Changes to provide greater coherence in Hawaii's land planning and regulatory process can move in several directions. Emphasis on planning policy and the state plan as well as attention to techniques for coordinating existing regulatory programs are possibilities that will be considered here.

A. Restructuring the State Planning Function

Legislative dominance is the key to the Hawaii state plan and planning process. The state plan was legislatively adopted; state functional plans must also be submitted to the legislature. State planning policies are embodied in a state statute, and their modification will require legislative amendment.[42] Some conflict resolution functions are delegated to a state policy council[43] but the final resolution of any conflicts arising under the state plan also demands legislative attention.

An alternative state planning law could return to the state planning process as it was initially proposed: A state agency could be authorized to supervise and monitor compliance with state planning policies. If properly conceived, a state planning process modeled along these lines could integrate the diverse and uncoordinated elements of the present land planning and control system. It could also provide a comprehensive basis for a land planning policy including environmental and other elements necessary to comprehensive management of land development statewide.

A state planning system of this type is contained in Oregon legislation.[44] The essence of the system is authority in a state planning agency to develop planning policy for the entire state. As authorized by the state planning law, a state Land Conservation and Development Commission has developed a set of planning goals applicable statewide to state programs and to county and municipal planning and land use controls.[45] These planning goals cover policies ranging from agricultural protection to growth management, and must be directly implemented in planning and land use control programs at the local level. Local plans and land use controls are subject to review by the state commission. The local plan governs local land use decisions after the commission approves it.[46] This legislation also provides the foundation for Oregon's coastal zone management program.[47]

How the Oregon state planning goals function as a constraint on local land use control decisions is illustrated by an Oregon Court of Appeals case, *Meeker v. Board of Commissioners of Clatsop County*.[48] An appeal was taken from a

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[42] Haw. Rev. Stat §226-56 (Supp. 1978).

[43] Haw. Rev. Stat. §226-54 (Supp. 1978).

[44] *See* D. Mandelker, *supra* note 8, at 55-60; *id.* at 14-19 (Supp. 1978).

[45] Oregon Land Conserv. & Dev. Comm'n, State-wide Planning Goals and Guidelines (no date).

[46] *See infra* note 48.

[47] Oregon Land Conserv. & Dev. Comm'n, Oregon Coastal Management Program (1976).

[48] Or.App. , 585 P.2d 1138 (1978). Amendments to the Oregon legislation in 1977 now provide for an acknowledgement of local plans by the state commission once the plans are in

decision by the board of commissioners authorizing the subdivision of an eighty-two-acre farm into seven smaller parcels, also to be used as farms, ranging in size from eight to twenty acres. The farm was located in an agricultural area and subject to a statewide planning goal requiring agricultural lands to be "preserved and maintained" for agricultural use. The petitioner-farmer argued that the subdivision of the larger agricultural unit into smaller farms would be inconsistent with that goal.

This argument was rejected by the court, which upheld findings by the board that retention of the farm in its present size would not implement the state planning goals for agriculture. Farms of that size in that area were not economically productive. The board found that subdivision into smaller farm units would permit greater production because it would permit more intensive farming with less capital investment. Neither did the state planning goals or related statutory policies require a minimum size for farms.[49] Maintenance of large-sized agricultural units is not necessary, the court concluded, when it does not reinforce the statutory policy favoring agricultural use.[50]

The *Meeker* case illustrates the force of state planning goals as a control over local land use control decisions. A step in this direction has been taken in Hawaii. Legislative coastal management objectives and policies are judicially enforceable against local land use control decisions,[51] though no judicial enforcement is provided in the legislative state plan.[52] Direct judicial enforcement is helpful, but direct state administrative review appears preferable. In Oregon, state planning goals are adopted and may be continuously revised by the state planning agency. The agency may respond to judicial interpretation in decisions like *Meeker* either by confirming or revising its planning policies. It may also call for revisions in local plans and controls to reflect more precisely

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compliance with state goals. *See* D. MANDELKER, *supra* note 8, at 15 (Supp. 1978). Once a local plan has been acknowledged, the state planning goals are not directly applicable to local land use control decisions, which are governed by the local plan and implementing ordinances. There was no discussion of the local plan in *Meeker*, and presumably it had not yet been acknowledged. *See also* South of Sunnyside Neighborhood League v. Board of Comm'rs of Clackamas County, 280 Or. 3, 569 P.2d 1063 (1977) (change in local plan for specific parcel must not violate state planning goals).

[49] The state planning goal provided that "[s]uch minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area." Meeker v. Board of Comm'rs of Clatsop County, Or. App. , , 585 P.2d 1138, 1140 (1978). The court also referred to the state statute authorizing exclusive agricultural county zoning. *Id.* at __, 585 P.2d at 1141. *See* OR. REV. STAT. §§215.203–215.273. That statute contains a statutory policy providing in part that "[t]he preservation of . . . [agricultural] land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation." OR. REV. STAT. §215.243(2).

[50] In Hawaii, the preservation of agricultural land in agricultural state land use districts is reinforced by a section of the Land Use Law prohibiting lots of less than one acre in these districts. HAW. REV. STAT. §205-5 (Supp. 1978). It has been common practice, at least in some of the counties other than Honolulu, to authorize lots of this size in agricultural districts for homesites on which token agricultural pursuits are accepted as compliance with the agricultural use requirement. In fact, these lots are used for suburban residential development. However, the Attorney General has ruled that the division of a large tract of agricultural land into two-acre lots that cannot practicably be put to agricultural use would be a violation of the statute. OP. HAWAII ATT'Y GEN. No. 75-8 (1975).

[51] The statutory policies of the coastal zone management legislation are enforceable against state and county agencies through a judicial cause of action provided in the statute. HAW. REV. STAT. §205A-6 (Supp. 1978).

[52] The state plan is binding only on county plans, but it is not enforceable through judicial proceedings. HAW. REV. STAT. §226-61 (Supp. 1978).

the state's planning policy as it evolves in response to cases like *Meeker.*

Similar opportunities do not exist in Hawaii because of the lack of a single state planning agency. Legislative revision and supervision of state planning policies to reflect changing priorities and perceptions are unwieldy and cumbersome. Nor is it realistic to expect the legislative process to provide a comprehensive evaluation of planning problems that can yield an integrated set of planning policies. Experience with implementation of the state plan in Hawaii may yet prove the advantages of the Oregon system of delegating planning responsibilities to a state agency with supervisory and review authority.

B. Techniques for Coordinating Existing Regulatory Programs

A directive state land planning program can help provide greater coherence for the administration of controls over land use. However, it may not reach the problems created by the proliferation of regulatory programs, especially the development permits adopted at the state level and complemented by similar local controls. New development projects must often obtain approval in a number of ways, including amendments to state land use boundaries, a variety of state environmental permits, county shoreline management permits in coastal areas, and other local zoning approvals. The regulatory maze must be coordinated to eliminate the present duplication of procedures in the system.

Hawaii is not the only state burdened by a complex regulatory system for land development. Most states adopted new protectionist legislation during the era of reawakened environmental awareness in the 1960's. By the middle of the 1970's, new development was highly regulated by all levels of government in all areas of the nation. Complaints about this complex regulatory system have recently arisen from diverse interest groups.[53] One criticism is that this new regulation does not always achieve its laudable protectionist purposes; it is often counterproductive to other important societal goals such as adequate provision of housing for lower income groups. Yet each regulatory program has also acquired a strong support sector, which may make repeal of often duplicative, frequently unnecessary, regulatory efforts an impracticable solution.

In the face of governmental and private resistance to massive change in the existing regulatory structure, various techniques to coordinate or simplify existing regulation of land development have been proposed and implemented

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[53] Although developers have been the primary group to propose the reform of development regulations, studies offered by developers to buttress their complaints have convinced other groups of the need for change. Existing regulation often wastes agency time and funds and does not always protect the environment nor promote the best quality development or construction of housing for low and moderate income families. The clamor to revise the regulatory system continues to grow as new interest groups climb on the bandwagon. One writer suggests, however, that this growing national consensus for change is based on blind acceptance of business propaganda. *See* Green, *The Faked Case Against Regulation*, The Washington Post, Jan. 21, 1979, at C, 1 ("Inflated cost-benefit studies and the intensity of business propaganda against consumer and environmental regulation might lead a celestial visitor to wonder why we tolerate such stupidity. We seem to have suffered a kind of collective amnesia about exactly why we have these regulatory agencies."). *See also* Kolis, *Regulation: Where Do We Go from Here? Part 2*, URBAN LAND, Vol. 38, No. 2, at 4 (1979).

throughout the nation at all levels of government.[54] Hawaii, too, has initiated efforts to simplify. In addition to local statutory and informal efforts,[55] the Hawaii Coastal Zone Management Act directs all state and county agencies to consider improvements to the development review process.[56] In its efforts to design a state level coordinated permit system for Hawaii, the Hawaii Coastal Zone Management Program studied the provisions and success of state regulatory reform programs currently utilized throughout the nation.[57] This study produced a compilation of available reform techniques in use and a delineation of the variables that contribute to the success or failure of regulatory reform programs.[58] The findings of the study are briefly summarized here. They are followed by an evaluation of the contribution that regulatory reform can offer to Hawaii.

1. Regulatory reform techniques. The review of existing state-level regulatory reform systems revealed the use of variations of six basic regulatory reform techniques: preapplication reviews, a coordinating agency or official, a master application, functional equivalents, development stratification, and—joint hearings.

Preapplication, or conceptual, reviews are utilized in several states in the administration of state development permit programs.[59] The process resembles preapplication procedures often used in local zoning and planned unit development review. The developer proposing a project submits plans to the agency having jurisdiction to approve the project; the agency may then give a preliminary indication of the project's acceptability and suggest modifications. The agency reaction to a project allows the developer to make early project modifications before substantial time and financial commitments are made. However, preapplication reviews may also be meaningless, time-consuming tasks if firm commitments cannot be given by the approving agency following the preapplication review process or if all interested agencies are not required to participate. Nevertheless, local experience with preapplication reviews suggests that similar procedures at the state level should be helpful.

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[54] A complete discussion of the various coordinating techniques can be found in Chapter 3 of an important study, URBAN LAND INSTITUTE, THE PERMIT EXPLOSION: COORDINATION OF THE PROLIFERATION (1976). The study highlights specific coordination procedures and their use in other jurisdictions. The discussion that follows here builds upon the analytical framework developed in THE PERMIT EXPLOSION and the application of that framework to Hawaii. For another important study on governmental reform efforts in the United States and in various foreign nations, *see* CONSERVATION FOUNDATION, GROPING THROUGH THE MAZE: FOREIGN EXPERIENCE APPLIED TO THE U.S. PROBLEM OF COORDINATING DEVELOPMENT CONTROLS (1977).

[55] *See* note 72 *infra.*

[56] As some of its coastal zone management objectives, the Hawaii Coastal Zone Management Act includes the following: "Improve the development review process, communication, and public participation in the management of coastal resources and hazards." HAW. REV. STAT. §205A-2(b)(7)(A) (Supp. 1978). The statutory objectives are binding on all state and county agencies. *Id.*, §§205A-1(1), 205A-4(b), 205A-5.

[57] These studies were carried out under contract with the Pacific Urban Studies Planning Program (PUSPA), University of Hawaii at Manoa, and the senior author. In addition to statutory research, PUSPA conducted site visits to observe implemented regulatory simplification programs in the following states: Maryland, New York, Minnesota, Virginia, California, Washington, and Oregon. Other states with state-level reform techniques include Alaska, New Jersey, Vermont, and Louisiana.

[58] Most of the following discussion is based upon a paper written by the junior author, with the assistance of Robert Alm, for the Hawaii Coastal Zone Management Program.

[59] *See, e.g.*, N.Y. ENVIR. CONSERV. LAW §70-0117(4) (McKinney Supp. 1978-79). The provision is voluntary for both government and applicant and regulations limit conceptual review availability

A state coordinating agency or official, the second regulatory reform technique, may alleviate to some extent the weakness of preapplication review as a coordination or simplification device.[60] If the state coordinating agency or official has authority to require agency participation in a simplified permitting procedure and to render or force an ultimate decision on the acceptability of the project, the length of the permitting process can be shortened and uncertainty for the developer reduced. Two major problems exist with this reform technique. First, conflicting requirements of multigovernmental-level permitting processes are not easily reconciled. For example, different timing, review, hearing, and information requirements are imposed by the myriad statutes affecting new development. Second, regulating agencies are not always willing to relax or relinquish regulatory authority, which may be required when a development project is submitted to the coordinating agency or official. Although this problem could be alleviated if affected agencies contribute to the design of the coordinating process, consensus may be difficult to achieve.

Many states mandate the coordinating agency or official in cooperation with affected state agencies to design a master application form.[61] The master application form is intended to aid the developer in identifying all relevant requirements and affected agencies, and to aid the coordinating official or agency in facilitating a faster and more orderly review. Within a stated period of time, agencies with an interest in the project covered by the application must indicate whether it is complete.[62] The statute may additionally provide for agency waiver of jurisdiction in the event the agency fails to respond to the master application within the specified period of time.[63] Time limits speed agency responses, thus ensuring that the developer receives either approval or denial within a specified period, reducing uncertainty in the approval process. Although the master application is in theory a desirable simplification technique, its design has proved an extremely difficult task in most states because

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to those projects which will "involve a major land use (*e.g.* housing subdivision, planned unit development. . . .)" or to those projects for which "the expense of preparing detailed plans, specifications, without conceptual review, will constitute an undue burden on the project sponsor. . . . " 6A N.Y. CODE RULES & REGS. 621.13(a) (1978). The regulations caution that "[t]he post conceptual review order is not a permit." The applicant must still undergo procedures to obtain required permits before undertaking the project. *Id.*, 621.13(j).

[60] The state legislature's strategy in Maryland was to authorize designation of a coordinating official in the state-level regulatory reform statute. *See* Maryland's Consolidated Permit Procedures Act, MD. CODE ANN. Art. 78A, §§56–67 (Supp. 1978). The Act requires the Board of Public Works, which is composed of the governor, the state treasurer, and the comptroller, to appoint a coordinator. The coordinator is required to keep copies of the state agency regulations and applications and, "if feasible," to adopt a master application with the cooperation of state permitting agencies. The Act additionally requires the coordinator to advise applicants which permits will be required and authorizes him to set up a joint hearing if one is appropriate for the particular development. In practice, Maryland's coordinated procedures have been relatively effective due to the political acceptance the acting coordinator enjoys.

[61] *See, e.g.*, the Minnesota Envir. Coordination Procedures Act, MINN. STAT. ANN. §116C.22–116C.34 (West 1977). Rules and Regulations are found in 6 MINN. CODE ADMIN. REG. §3.101 (1977).

[62] This "completeness determination" is important to the developer because it indicates that the information requirements imposed by the permitting statute have been satisfied.

[63] The Minnesota Act provides three exceptions from agency waiver of jurisdiction in the event an agency fails to make timely response to a master application: a) when "false, misleading, or deceptive information" is submitted by the applicant; b) if "subsequent rules or laws require additional permits"; c) if "unusual circumstances" prevented agency response, and waiver "would result in substantial harm to the public welfare." MINN. STAT. ANN. §116C.26(3) (West 1977). Similar provisions are found in the laws of other states.

of its complexity. Incremental consolidation of two or more applications is a more feasible immediate goal.

Another technique that avoids unnecessary duplicative review and reduces time in the permitting process is the legislative delineation of "functional" regulatory equivalents. As noted earlier,[64] this situation arises when a development project subject to an environmental impact statement is also subject to review under equivalent environmental criteria contained in a development permit statute. Duplicative reviews can be avoided, as in California, by allowing the environmental review under permit legislation to substitute for the equivalent environmental review through the environmental impact statement.[65]

A functional equivalence problem also arises when environmental impact statements on a development project are required both by state and federal legislation. Duplication in the preparation of environmental statements can be avoided if combined statements are authorized or if one statement can substitute for the other.[66]

Permit legislation requiring duplicate review of the same environmental problem in different programs may also create a functional equivalence situation. For example, air quality problems may be reviewed under legislation requiring a coastal permit and, should an air quality permit be required by the state air quality agency, by that agency as well. Duplication can be avoided through the enactment of a rebuttable presumption that a determination by one of these agencies is prima facie binding on the other.[67] This technique can ensure that applicable review criteria have been met while avoiding duplicative review procedures.

Two potential problems are created by the functional equivalence technique. First, one agency may believe that its concerns will not be adequately protected through criteria applied by another agency. This problem will be especially acute if duplicate permitting and review requirements are required at different governmental levels, where interests may not be congruent. The requirement

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[64] *See supra* p. 53.

[65] *See supra* note 28.

[66] In California, if both a federal environmental impact statement (EIS) and state environmental impact report (EIR) are required for a particular project, and a combined EIR-EIS document could be prepared in a shorter period than would be required "to prepare each document separately," the lead agency "may waive time limits" imposed by the state EIR law in order to allow completion of a combined document. CAL. PUB. RES. CODE §21083.6 (Deering Supp. 1978). If both a federal EIS and state EIR are required for a project, the statute mandates the lead agency responsible for the EIR "wherever possible, [to] use the [federal] environmental impact statement as such environmental report." *Id.*, §21083.7.

[67] In 1970, Vermont enacted Act 250, which requires a state permit for most major developments in the state. Act 250 employs the rebuttable presumption technique. VT. STAT. ANN., tit. 10, §§6001-6091 (1973 & Supp. 1978). Some state permits have been administratively coordinated for processing with the Act 250 permit. Act 250 contains ten development review criteria, including the proposed development's potential impact on water and air quality, water availability or supply, soil erosion, traffic, schools, governmental services, aesthetic, historic, and natural scenery considerations, and local and regional plans for development. Applicants with projects that are not deemed "minor" by the state coordinator are advised to obtain state and local permits which are not consolidated into the coordinated procedure prior to submitting an Act 250 application. The applicant's submission of state and local permits creates a rebuttable presumption that the issuance of these permits satisfies related criteria imposed under Act 250. VT. ENVT'L BD. RULE 13(c) (1976). This technique is intended to reduce duplicative information and review requirements. For two excellent studies describing Vermont's Act 250, *see* Heeter, *Almost Getting it Together in Vermont*, in D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 323 (1976); K. Senecal, Vermont's Act 250: An Integrated Approach to Environmental Conservation (paper prepared for Hawaii Coastal Zone Management Program 1978) (on file with authors).

for state and federal environmental impact statements is one example. Second, elimination of one agency's detailed review may remove some of the opportunity for public input; thus, citizen interests may not be considered fully.

Development stratification is a reform technique that may avoid these delegation and public input problems. Several states utilize two forms of development stratification. The first form is the delegation of permitting authority for a particular type of development, for example nuclear power plants, to one permitting agency.[68] This technique allows one agency with sufficient expertise to monitor specialized development, freeing other previously involved agencies to devote more time to regulating the development still within their review powers. A second form of development stratification is the major/minor permit distinction.[69] Major and minor developments are legislatively or administratively defined and each category is processed differently. Minor developments are provided an abbreviated review procedure, while major developments remain subject to the usual detailed review. This technique frees agencies to devote more time to more significant development and considerably reduces the total backlog time for all types of development. One problem with the major/minor development distinction technique is that the cumulative impact of a series of similar small developments may not be adequately considered.

The final regulatory reform technique is the joint hearing.[70] Joint hearings are appropriate when a development is subject to several statutory reviews. They are intended to reduce processing time and the cost of the review process for the developer, the government, and interested citizens. Under this procedure, which is usually optional, two or more state, and sometimes local, permits are consolidated for a joint hearing before a state agency or official. This hearing may or may not be adjudicatory; it may be called simply to gather information on the development. Agency decisions are made in the usual way and judicial

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[68] This legislation is discussed in N. ROSENBAUM, LAND USE AND THE LEGISLATURES ch. III (1976); Williams, *Power Plant Siting Reform—Panacea or Purge?*, PUB. UTIL. FORTNIGHTLY, Vol. 102, No. 10, at 21 (1978).

[69] The New York legislation distinguishes between "major" and "minor" projects. Minor projects are those which "will not have a significant impact on the environment." N.Y. ENVIR. CONSERV. LAW §70-0105(3) (McKinney Supp. 1978-79); 6A N.Y. CODE RULES & REGS. §621.12 (1978). All other projects are major. Minor applications must be processed within forty-five days of receipt of a complete application in order to avoid being deemed approved. *Id.*, §70-0111. Major applications are subject to a lengthier proceeding. The New York statute additionally provides for issuance of "general permits" for minor projects. General permits are available in cases of necessity when "natural disasters or acts of God . . . lead numbers of individuals to seek to undertake similar types of minor projects that are of a remedial nature." General permits remain effective only for specified periods of time. *Id.*, §70-0111(d).

[70] The joint hearing technique is utilized in some form by almost every state-level regulatory reform statute. The first state to enact a joint hearing approach was Washington; its legislation is considered a national model. J. JARRETT & J. HICKS, UNTANGLING THE PERMIT WEB: WASHINGTON'S ENVIRONMENTAL COORDINATION PROCEDURES ACT 3 (1978). The Environmental Coordination Procedures Act (ECPA) was first adopted in 1973 with strong support from governmental, environmental, and developmental sectors and was subsequently amended in 1974 and 1977. WASH. REV. CODE ANN. ch. 90.62 (Supp. 1978). Regulations are found in WASH. ADMIN. CODE ch. 173-08. ECPA was enacted to alleviate the burdens pervasive regulation imposed upon the private developer and to facilitate public input into the regulatory process, *id.*, §90.62.010, but was not necessarily intended to reduce the processing time of the regulatory procedure. JARRETT & HICKS, *supra* at 5. Nor was ECPA intended to alter the permitting powers of agencies included in the joint process: The Act provides that it "shall modify only the *procedures* to be followed in the carrying out of such powers." *Id.*, §90.62.060(7) (emphasis added).

review procedures may or may not be consolidated. Joint hearings have the advantage of reducing the time needed to process permits in the review process and avoiding duplication of information before several agencies whose requirements for the project may overlap.

Joint hearings also present several problems.[71] Participation by local agencies has not usually been required and might be difficult to accomplish because local hearing procedures tend to be informal and may differ from the more formal procedures used by state agencies. Different timing, hearing, and review procedures are often difficult to accommodate. Some agencies may be unwilling to participate and it may be politically impossible to require their participation in the joint hearing process. Finally, citizen groups may be precluded from introducing a maximum amount of evidence when several hearings are mandated for the same development. Hearing consolidation for several development permits may lead unavoidably to a slighting of separate permit requirements that would ordinarily receive concentrated attention.

2. Implementation considerations. The most fundamental considerations in the design and implementation of a regulatory reform technique are the political support given to the innovation and the resources available for its implementation. Absent adequate resource allocation and political support, drafting even the most promising reform tool will be an exercise in futility.[72] Public agencies and private groups must be consulted early in the design of a reform technique in order to ensure that the new program is not only a practical tool but also one that is politically feasible. The governmental entity chosen to enforce or implement the reform technique[73] should be visible to the public, politically accepted, and have sufficient financial resources and personnel in order to be most effective.

The force with which drafters of reform techniques intend to impose new procedures is also a relevant consideration. Many state-level coordination statutes merely authorize rather than mandate consolidation of permitting

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[71] For a brief synopsis of problems encountered with Washington's ECPA, *see* Kolis, *supra* note 53, at 7.

[72] This problem was most severely encountered by two states in our study, Virginia and Alaska. Virginia attempted to design a regulatory reform technique through a 1976 amendment to the state Environmental Quality Act. VA. CODE §10-184.2 (1978). The Act set out brief guideline requirements for the new system and delegated authority to design more explicit rules and regulations to the Council on the Environment, which has no permitting authority of its own. Within the guidelines set forth by the Act, the Council on the Environment promulgated rules and regulations on an interim basis. The Act was to remain operable for one year, commencing January 5, 1978. [VIRGINIA] COUNCIL ON THE ENVIRONMENT, FINAL REPORT ON INTERIM PROCEDURES FOR IMPLEMENTATION OF §10-184.2 OF THE CODE OF VIRGINIA (THE MULTIPLE PERMIT PROCESS) (1977). Five months after interim procedures became effective, no permit information booklet had been completed and no projects had been chosen to undergo the Act's formal coordinated procedure. In addition to statutory problems such as conflicting hearing and time requirements, the Council on the Environment pointed to the lack of political and financial support for the new procedure as the reason for implementation problems.

Similarly, Alaska's 1977 regulatory simplification reform, the Alaska Environmental Procedures Act, ALASKA STAT. §46.35.010-46.35.210 (1977), failed for lack of political and financial support: The law was imposed on agencies that had no part in its genesis. As of November 1978, it had not been utilized.

[73] The point in the governmental structure at which the reform technique is placed is a significant factor in implementation success. Responsibility to implement reform can be delegated to officials in the executive department, to staff or line agencies with or without permitting powers, or to commissions. Each alternative may result in a different degree of agency and political support for the new program.

processes, with the result that agencies unwilling to relinquish or relax regulatory authority refuse to implement or utilize the regulatory reform. Reform techniques that are voluntary on the part of the private sector may be similarly underutilized. Developers familiar with permitting processes are often unwilling to undertake new procedures because old methods are less threatening and may in fact be less time consuming.[74] Developers accustomed to informal agency procedures not requiring a hearing may also resist coordination techniques in which a hearing is mandatory.

Changes leading to the coordination of regulatory procedures also demand an accommodation of competing interests. A reform technique viewed by one group as expediting review procedures, for example, may be seen by another group as sacrificing important environmental controls. State and local agencies with important programs to guard may be hostile to change. The accommodation of competing interests in planning and land use control programs will require careful compromise if improved regulatory procedures are to succeed.

3. Regulatory reform in Hawaii. The starting point for developing regulatory reform techniques in Hawaii should be a thorough documentation and analysis of requirements in existing legislation.[75] Conflicting hearing, information, and time deadline requirements must be recognized before any sort of consolidating overlay is attempted. In addition, because agency practice may not precisely coincide with statutory requirements, research must be directed toward delineating the manner in which the permitting process actually operates. Reformers must be aware of the procedures in fact utilized by regulatory agencies. This initial study should isolate the denominators common to each regulatory program and these should be the basis upon which a regulatory reform technique is designed.

The importance of early research and delineation of statutory requirements and actual agency practice can be illustrated by the following examples. Hearings of the Land Use Commission in Hawaii are required to be held in the manner of a contested-case proceeding,[76] while most other agency hearings are legislative in nature. Legislative imposition of a joint hearing requirement

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[74] In Virginia, members of the Council on the Environment described the Act as "virtually meaningless" because coordinated procedures are voluntary for both applicants and governmental agencies. *See* VA. CODE §10-184.2 (1978).

In Washington, the coordinated procedures fail to mandate local agency participation. Many feel that this tends to weaken or disrupt ECPA's comprehensive coordination aim. *See supra* note 71. Participation by local governments is voluntary.

[75] Hawaii's Department of Planning and Economic Development has already begun this task. *See* [HAWAII] DEPARTMENT OF PLANNING AND ECONOMIC DEV., A REGISTER OF GOVERNMENT PERMITS REQUIRED FOR DEVELOPMENT (1977). Efforts are currently directed toward ascertaining agency hearing requirements and toward delineating agency practices in the approval process. Efforts toward regulatory simplification are also under way at the county level. For a description of regulatory simplification programs in Hawaii, *see* Hawaii's Efforts Toward a Coordinated Regulatory Process for Land Development (paper prepared for Hawaii Coastal Zone Management Program 1978) (on file with authors).

[76] The Hawaii Land Use Law, HAW. REV. STAT. ch. 205 (1976 Supp. 1978), empowers the state Land Use Commission to delineate the boundaries of four land use districts—agricultural, conservation, urban, and rural—and to rule upon petitions for boundary amendments. Following the Hawaii Supreme Court decision in Town v. Land Use Comm'n, 55 Haw. 538, 524 P.2d 84 (1974), which invalidated informal hearing procedures adopted by the Commission, the Land Use Law was amended to require adjudicatory procedures modeled on the contested-case procedures of the state Administrative Procedure Act. *Id.*, §205-4(b). The Land Use Commission is the only major state permitting agency in Hawaii required to follow formal contested-case hearing procedures. *See* text accompanying notes 37–40 *supra*.

without accommodation of these diverse hearing requirements would therefore serve a dubious, if not useless, purpose in consolidating or simplifying regulatory procedures. Knowledge of actual agency practice might also alter the type and scope of the regulatory reform chosen for implementation. For example, although Hawaii has a state environmental impact statement (EIS) requirement,[77] ninety percent of all developments receive a negative declaration by the responsible agency.[78] It would therefore seem to be an inaccurate legislative assumption that EIS proceedings are lengthy and that an entire regulatory reform process must be lengthened to accommodate EIS proceedings. Accommodation of the EIS requirement must obviously be made but the extent of the accommodation should depend, in part, upon actual agency practice.

The first step in developing any state-level regulatory reform technique has already taken place in Hawaii: A permit register, or list of permits and regulatory agencies, has been compiled. Provision must now be made continuously to update the register and to make this information easily available to the public.

Research into statutory requirements and actual agency practice is still in its beginning phase in Hawaii; the feasibility of any broad overlay consolidation or simplification reforms cannot at this point be predicted. Research so far has indicated, however, that regulatory reform in Hawaii will likely be most successful if approached on an incremental basis. Several incremental regulatory reform techniques can be recommended to aid in simplifying Hawaii's complex development regulation system.

An incremental regulatory reform approach in Hawaii should begin with the design of a master application form. The master application need not consolidate all development permit applications. In fact, if the lack of success in other states in developing a master application can be deemed a warning for reformers in Hawaii, a total consolidation should not initially be attempted. The master application form should be limited to a consolidation of those permits with the most obvious common requirements. Time deadlines for responses from those agencies included in the consolidated application, with a provision for agency waiver of jurisdiction in the event the agency fails to respond within the specified period, are also necessary.

The reform techniques of an updated and current permit register, master application, and time limits on agency response will not alone raise Hawaii's regulatory system to its most effective level. Yet successfully implemented and administered incremental changes in the system will promote public and private confidence in and support for the concept of regulatory reform.

III. Conclusion

Hawaii's land use control system, once organized around the state Land Use Commission and supplemented by local planning and related programs, has been severely dislocated by changes in the planning and regulatory structure. A state plan has been legislatively adopted but its links with county plans are

[77] Haw. Rev. Stat. ch. 343 (1976).

[78] D. Cox, P. Rappa & J. Miller, The Hawaii State Environmental Impact Statement System: Final Report to the Office of Environmental Quality Control 61, 139 (1978). A negative declaration is a finding by the agency that no environmental impact statement is required.

not fully clarified. Coastal management policies have also been legislatively adopted but are not well integrated with the state plan. These policies are in turn implemented largely through a coastal permit program delegated to the counties. County coastal permit decisions at variance with state coastal policies can be corrected only through judicial action. An environmental impact statement is required for some private development, including development in coastal areas. It is not linked to state and county plans and provides an independent reference point for the review of new development projects. This catalogue is only partial; no other state has so vast and conflicting an array of regulatory programs applying to land development.

Fragmentation of land use planning and control authority is compounded by wide variations in the procedures used to consider land development projects. Adjudicatory contested-case procedures required of the state Land Use Commission contrast strongly with the less formal procedures used by other state and county agencies.

The accelerating development pressures on Hawaii's fragile island environment demand more coherence in planning procedures than presently exists. Incremental changes that consolidate development approval hearings, provide for master applications, and achieve related pragmatic reforms are one possibility, and may be all that is politically possible for the present. More fundamental change may have to emphasize one set of planning and control techniques at the expense of others. Environmental reviews provided by environmental impact statements, for example, may ultimately appear redundant in a state in which more comprehensive planning and environmentally focused regulatory programs have been enacted. The state plan may have to play a more active role as the basis for land use regulation and environmental control legislation.

The time has arrived for less innovation and for a more coherent alignment of existing programs if Hawaii is to have the planning and land use control system it so richly deserves.

OWNERSHIP OF GEOTHERMAL RESOURCES IN HAWAII

I. INTRODUCTION

Mounting energy problems in the United States have sharpened concerns in Hawaii over the state's heavy reliance on imported petroleum.[1] A major objective of the 1978 Hawaii State Plan is the lessening of this dependence through utilization of natural energy sources. Among the sources under study are solar and wind energy, conversion of growing plants and organic garbage into fuel, the warmth of the ocean's top layers, and the heat of the earth accumulated underground in reservoirs of superheated water or steam—geothermal energy.[2]

A geothermal reservoir has been found on the Island of Hawaii capable of producing electricity with the application of technology already in commercial use at other geothermal areas.[3] However, among the impediments to developing geothermal power in Hawaii is the uncertainty of the ownership of the subsurface reservoirs. There is doubt as to whether they belong to the owners of the overlying land or have been reserved to the state government as "minerals."[4]

The purposes of this comment are exploratory: to identify the causes of the uncertainty, to trace the history of mineral reservations in Hawaii from which the uncertainty arose, to ascertain if case law has disposed of the uncertainty, and to present arguments which may be advanced on either side to resolve the issue. Finally, the divergent approaches to analogous questions of natural resource ownership taken by the Hawaii Supreme Court and the Federal District Court in Hawaii in recent years are contrasted to indicate that the choice of forum may be important in resolving the problem.

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[1] Approximately 92 per cent of the energy used in Hawaii is derived from imported oil. The remainder comes from burning bagasse, the crushed cane residue of sugar mills (7 per cent), and from small, run-of-the-river hydroelectric plants (1 per cent). HAWAII DEPARTMENT OF PLANNING & ECONOMIC DEVELOPMENT, SOLAR ENERGY: HAWAII & THE U.S. ISLANDS OF THE PACIFIC 3-4, 3-6 (1978).

[2] *Id.* at 3-12—3-15.

[3] Geothermal power has been used to generate electricity since 1904. It is a regular energy source in California, New Zealand, Japan, Italy, Iceland, Mexico and the U.S.S.R. and is being developed in the Philippines, Nicaragua, El Salvador and other countries. E. KRUGER & C. OTTE, GEOTHERMAL ENERGY 15-58 (1973).

[4] How geothermal resources are classified for purposes of regulation and possible determination of property rights has been analyzed by Sato & Crocker, *Property Rights to Geothermal Resources*, 6 ECOLOGY L. Q. 250, 486 (1977) [hereinafter cited as Sato & Crocker]. A bibliography of relevant statutes, cases and other materials bearing on the legal classification of the resource is appended to 13 LAND AND WATER L. REV. 349 (1977). Neither article includes Hawaii within its purview.

II. BACKGROUND

In 1976, a geothermal reservoir of exceptionally great heat, quite promising as a power source for generating electricity, was discovered in Puna, Hawaii.[5] This indigenous energy, harnessed to steam turbines, could reduce the state's dependence on expensive imported petroleum and would be environmentally safe.[6] Commercial exploitation has lagged, however, in part because ownership of the resource remains in doubt.[7]

The Hawaii legislature had sought to resolve the uncertainty in 1974 by amending the statutory definition of "minerals" reserved to the State explicitly to include geothermal resources.[8] The intent was to establish state ownership of all aggregations of subsurface heat, whether occurring under private or public lands. Two assumptions underlay the 1974 act: (i) that the Hawaii government had reserved to itself mineral rights on virtually all lands placed in private ownership since the Great Mahele[9]; (ii) that the redefinition of "mineral" to include "geothermal" would apply to reservations made a century or more ago. In fact, the first assumption may be incorrect. Although the number of land patents or grants[10] issued by successive governments of Hawaii which omit mineral reservations is unknown,[11] it is apparent that many private estates are held without explicit reservations. Whether mineral reservations can be inferred from the grant or patent is not clear.[12] Reasons for the ambiguity are to be found in the origins of private land ownership in Hawaii.

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[5] At about 6,000 feet below sea level, the experimental well drilled by the University of Hawaii Geothermal Project produces slightly saline water heated to more than 350° Celsius by convection from magma extruded at great depths by the nearby Kilauea Volcano. The hot water, kept under enormous pressure by the impermeable rock which seals off the reservoir, rises in the well and, as it approaches normal atmospheric pressure, flashes into steam which can be used to power the turbines of an electric generator. For a description of the well *see* KINGSTON, REYNOLDS, THOM & ALLARDICE, LTD., HAWAII GEOTHERMAL PROJECT WELL COMPLETION REPORT, HGP-A (Sept. 1976) and YUEN, CHEN, KIHARA, SEKI, TAKAHASHI, HGP-A RESERVOIR ENGINEERING, UNIVERSITY OF HAWAII (Sept. 1978).

[6] R. KAMINS, REVISED ENVIRONMENTAL IMPACT STATEMENT FOR THE HAWAII GEOTHERMAL RESEARCH STATION (Hawaii Department of Planning & Economic Development, 1978).

[7] Uncertainty as to property rights in geothermal resources in Hawaii was identified as a major barrier to development by counsel for Atlantic-Richfield Company when testifying before the Senate Committee on Energy and Natural Resources of the Hawaii Legislature on January 23, 1978.

[8] Act 241, 1974 Haw. Sess. Laws, amending HAW. REV. STAT. §182-1 (1978). Other states by statute have either defined geothermal resources as water resources or have classified them as *sui generis*. Any one of these definitions is defensible since a geothermal resource is the heat of the earth, usually transmitted by steam or hot water (the case in Hawaii) in which are dissolved silicates and other minerals. *See infra* at p. 79, and, for a comprehensive analysis (except for Hawaii) of geothermal definitional statutes, Sato & Crocker, *supra* note 4, at 486–95.

[9] The Mahele ("division" or "portioning") was the action taken by the government of Kamehameha III to replace the ancient, basically tenurial system of landholding with one grounded upon fee simple property rights based on Anglo-American law. *See infra* notes 13 and 59.

[10] Patents were deeds issued by the Kingdom of Hawaii to lands awarded under and following the Great Mahele, as briefly described *infra*, notes 13 and 23, while documents of title to other lands, conveying private ownership after the Mahele, were designated as "grants." Grants far outnumber patents.

[11] Most of the grants from which the mineral reservation was omitted were issued between 1900 and 1955, as will be shown below. During that 55-year period, the territorial government granted "over 8,000" patents. K. LAU, MINERAL RIGHTS & MINING LAWS 20 (Legislative Reference Bureau, University of Hawaii, 1957) [hereinafter cited as LAU].

[12] An examination of the patents and grants underlying title to parcels adjacent to the initial geothermal exploration sites in Puna, (corresponding to Sections 3 and 4, Zone 1, of the real

From the beginning of the Mahele in 1848[13] until 1900, the patents which evidenced fee simple ownership usually included a standard provision reserving to the Hawaiian government "all mineral or metallic mines of every description."[14] The phrase derived from an 1845 statute which created a Land Commission to administer the Mahele.[15] This act prescribed the language of fee simple patents issued by the government, including the foregoing phrase. The statutory prescription was omitted from the Civil Code of 1859[16]; nevertheless, the same form of patent, with identical mineral reservation, continued to be used with seemingly few exceptions until after Hawaii was annexed by the United States.[17]

When Hawaii became a territory in 1900, the mineral reservation was dropped from the patent form. Even when new patents were issued on subdi-

property tax map for the Island of Hawaii) made in 1977 for the State Department of Planning and Economic Development showed that 57% of the area (17,469 acres) was either owned by the State or held under an explicit mineral reservation to the State; 12% (3,764 acres) was clearly not under a reservation; approximately 30% (9,283 acres) was held by private owners under documents lacking an explicit reservation, but deriving from land grants originally patented subject to an explicit reservation. (Examples of the latter category are given *infra* note 19.) There is no reason to believe that the Puna district is unrepresentative of the entire state with respect to the prevalence of mineral reservations. In any event, the results of the search show that explicit reservations to the State of mineral rights, although extensive, are far from being universal.

[13] Technically, the Mahele—or division of lands between chiefs and konohiki ("landlords") on the one hand and the sovereign on the other, recorded in the "Mahele Book"—was completed between January 27 and March 7, 1848. However, as used here as a short-hand term for the installation of an essentially allodial system in Hawaii, the "Mahele" also comprehends the Kuleana Act of 1850 and other legislation under which land went into private ownership during the entire second half of the nineteenth century, as catalogued by L. CANNELORA, in THE ORIGIN OF HAWAII LAND TITLES AND OF THE RIGHTS OF NATIVE TENANTS, (1974), and narrated by S. DOLE in EVOLUTION OF HAWAIIAN LAND TENURES, reprinted in HAWAIIAN HISTORICAL SOCIETY PAPERS, No. 3 (Dec. 5, 1892). J. CHINEN, THE GREAT MAHELE (1958) [hereinafter cited as CHINEN], is an authoritative source for the events of 1848.

[14] Patents written in Hawaiian phrased the reservation "*ua koe nae i ke aupuni na mine minerala a me na metala a pau.*"

[15] *Laws of Kamehameha III*, Vol. 1, 107, subsequently reenacted as Art. 4, Ch. 7, Pt. I of *An Act to Organize the Executive Departments of the Hawaiian Islands*, 1845–46 Haw. Sess. Laws 107, *reprinted in* REV. LAWS. HAW. 2120 (1925). "This [statute] we must consider as the foundation of all titles to land in this Kingdom, except such as come from the King, to any part of his reserved lands, and excepting also the lists of Government and Fort lands reserved." Thurston v. Bishop, 7 Haw. 421, 429 (1888). "It was this Commission that, with the exception of a few awards made to chiefs by the Minister of the Interior . . . settled and established the inception of private land titles in this Territory." Territory of Hawaii v. Liliuokalani, 14 Haw. 88, 104 (1902).

[16] As noted in §1491 of the CIVIL CODE of 1859. The Hawaii Supreme Court held that the omission constituted a repeal. In re Application of Robinson, 49 Haw. 429, 421 P.2d 570 (1966).

[17] From the examples of patents issued by the successive regimes of Hawaii presented by J. CHINEN, ORIGINAL LAND TITLES IN HAWAII (1961), from the discussion of R. KUYKENDALL, THE HAWAIIAN KINGDOM, 1778–1854, 282–98 (1957) [hereinafter cited as KUYKENDALL], and from an examination of some 300 patents in the course of the Puna land research (*supra* note 12), the following chronology of practice prior to annexation with respect to the mineral reservation may be constructed:

a. Pre-1848: Before the Mahele, a few royal grants were made without any mineral reservation, notably in Manoa Valley, Oahu, and Makawao, Maui, where in 1846 about a thousand acres were sold off as an experiment in fee simple ownership.

b. 1848–1892: Royal patents, even after the repeal of the statutory reservation clause in 1859, included a mineral reservation, *except*—

(1) Warranty ("Kamehameha") deeds, issued up to 1865, conveying title to portions of the monarch's own lands which he sold; and

(2) Quitclaim deeds, issued by the Minister of the Interior around 1882.

c. 1892–1893: Land patents issued by the Provisional Government continued to use the same mineral reservation clause as included in the royal grants of the Kingdom.

d. 1893–1900: The clause was included in patents issued by the Republic of Hawaii.

visions of large tracts originally patented subject to the mineral reservation,[18] the territorial land office omitted the phrase.[19] In 1955 the Territory again began to insert reservations in patents, but not consistently.[20] In 1963, after a flurry of excitement over the possibility of mining bauxite locally, the state legislature enacted a statute declaring that "all land patents, leases, grants or other conveyance of state land shall be subject to and contain a reservation to the State of all the minerals. . . . "[21] Since then the reservation has remained standard in land grants, but between 1900 and 1963 an undetermined number of grants were issued without it. Only if the reservations are implicit in these conveyances and others lacking it can it be assumed, as did the 1974 Legislature, that all private lands in Hawaii are subject to a mineral reservation.

III. Question of Implicit Mineral Reservations

In the absence of a sustained commercial interest in mineral exploitation, there has been little occasion to litigate mineral rights in Hawaii; to date, there is only one recorded case. The Hawaii Supreme Court, in *In re Robinson*[22] held that the 1845–59 statutory reservation was "self-effectuating" and was validly included in royal patents of that period even though lacking in the Land Commission award which preceded the patents.[23] However, the holding in *Robinson* is probably limited to lands distributed pursuant to Land Commission awards; it explicitly leaves open the question of whether a reservation can be implied in patents issued after the 1859 repeal of legislation prescribing the form of the patent.[24]

Arguably, the government of Hawaii, by including a mineral reservation in the statute which implemented the Great Mahele[25] and by retaining it throughout the time of the Kingdom, Provisional Government and Republic as a standard phrase in land patents, firmly established the intent of the sovereign

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[18] The principle that a second patent might be issued on land already patented "by name only" (lacking a metes and bounds description) was established in Greenwell v. Paris, 6 Haw. 315 (1882).

[19] *E.g.*, Royal Patent 4497 (on Land Commission Award 8559) was issued to C. Kanaina on June 11, 1861, subject to the mineral reservation; on November 13, 1905, Land Patent 8177 was issued on the same land to Rufus A. Lyman. The Kanaina patent was "by name only," meaning that the tract was identified only by its Hawaiian place name. A detailed boundary description was supplied, as required by the laws implementing the Mahele, by the attorneys for the new patentee. An adjacent area in Puna, Hawaii, was covered by Land Commission Award 8559B, *apana* (portion) 15. Grant 8088, issued in 1899, contains the mineral reservation, but Grant 8094, issued on the same *apana* in 1909, does not.

[20] In 1955, a comprehensive reservation was incorporated in many of the land patents issued by the Territory of Hawaii, and is found in patents presently issued. The reservation usually follows a reservation of water rights and as currently incorporated [1957] is phrased in the following language: "RESERVING, ALSO to the Territory of Hawaii in perpetuity all rights to clay, minerals, mineral substances, oil and natural gases of every sort and description, that may be upon the surface or in or under the land . . . " Lau, *supra* note 11, at 2.

[21] Act 11, 1963 Haw. Sess. Laws 9, 10; Haw. Rev. Stat. §182-2(b) (1976).

[22] 49 Haw. 429, 421 P.2d 570 (1966).

[23] The essential steps whereby land titles were created under the Mahele were: (i) The Board of Commissioners issued Land Commission awards to persons deemed qualified to receive title to parcels; (ii) Upon payment of commutation and furnishing of a boundary description, a royal patent—including the mineral reservation—was granted to the awardees. See J. Chinen, *supra* note 13, for a detailed description of the process.

[24] 49 Haw. 429 at 443 n. 14, 421 P.2d 570 at 578 n. 14 (1966).

[25] *See supra* note 15.

to reserve mineral rights in all lands placed in private ownership. Omission of the phrase from some grants, if through inadvertence or neglect on the part of government employees, should not be taken as a waiver of that reservation. As the *Robinson* court noted, if no one contemplated mining when the grants were issued, there may have been no reason "to focus attention on the question" of mineral rights.[26] There is no record of any legislative or gubernatorial directive authorizing territorial officials to omit the reservation from patents covering portions of larger tracts originally granted subject to the reservation.[27] Their acts, which served to convey without consideration possessory rights already reserved by the sovereign, may have been *ultra vires*. The single opinion of the Attorney General of that period concerning mineral rights[28] did not address the question of these twice-patented lands.

The argument for finding an implied reservation is weaker for those lands initially patented after establishment of the territorial government. The general exclusion of the mineral phrase from the thousands of patents issued between 1900 and 1955[29] cannot plausibly be ascribed to mere oversight[30] by functionaries who failed to execute a policy of reserving mineral rights. Early in the territorial period, the question of mineral reservations was raised by the Commissioner of Public Lands, who asked whether the reservation formerly contained in patents had been made in compliance with any law. The Attorney General replied that because of the 1859 repeal of the 1845 statute prescribing the form of royal patents, there was no prohibition on the outright sale of mineral lands.

> While I do not find any law which either expressly or by necessary implication permits you to dispose of mineral land in the Territory of Hawaii, yet there being no prohibition of such disposition I think it will be safe to advise you under the circumstances that a sale by you of a tract of land of a mineral character as distinguished from agricultural would probably be held to be valid.[31]

There is no intimation here that the territorial government intended to reserve mineral rights.

In sum, there is only one basis within traditional legal doctrine[32] for concluding that land originally conveyed to private owners without express reservation of subsurface rights is nevertheless subject to a mineral reservation. Since the beginning of an allodial system in Hawaii, a general practice of reserving mineral rights had existed, and the legislature had not sanctioned a different practice. Such an argument applies most forcefully to those lands, extensive in the known geothermal zone of Puna,[33] where fee simple estates first created

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[26] 49 Haw. 429 at 441, 421 P.2d 570 at 577 (1966), *citing* U.S. v. Cal., 332 U.S. 19, 39–40 (1947).

[27] *See supra* note 19.

[28] 379 OP. ATT'Y GEN. (Haw. 1906).

[29] LAU, *supra* note 11, at 12.

[30] The Organic Act which established the territorial government itself provided a reminder of the potential value of mineral rights in its provisions concerning mining leases on public lands at §73(1).

[31] 379 OP. ATT'Y GEN. (Haw. 1906). The court in *Robinson* (note 22 *supra*) did not comment on the contents or merits of this opinion.

[32] A different perspective for judgment is provided by the doctrine or social philosophy labeled "public trust," discussed *infra* note 94.

[33] Approximately 30 percent of the acreage adjacent to the experimental well in Puna is held under patents with such a history. *See supra* note 12.

under royal patents which did contain the standard reservation were subsequently granted again by the Territory with no reservation.[34] At least with respect to such lands initially patented before 1862,[35] it can be argued that the reservation, once made by the Kingdom, remained in force for the benefit of its successor in interest, the Territory of Hawaii, absent legislative authorization to waive the reservation.[36]

IV. Question of Mineral Reservations Made Prior to 1974

Irrespective of whether implied mineral reservations exist, there remains the question of how far back in time geothermal resources have been covered by any reservations, whether implied or explicit. Have the rights reserved to the government of Hawaii always extended to geothermal resources, or was the reservation applied to hot water reservoirs only after the statutory definition of "mineral" was amended in 1974 to include "geothermal resources?"[37] The Ninth Circuit Court of Appeals recently ruled in *United States v. Union Oil Co.*

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[34] Before 1862, many grants were described only by their Hawaiian place name.

> [E]very portion of land constituting these Islands was included in some division, larger or smaller, which had a name, and of which the boundaries were known to the people living thereon or in the neighborhood . . . [During the Great Mahele] no body of surveyors could have been found . . . who might have surveyed these large estates within the lifetime of half of the grantees . . . . The "Mahele" or division was, therefore, made without survey. Tracts of land known to the Hawaiians as an ahupuaa or ili were awarded to those entitled by name of the ahupuaa or ili. By such grant was intended to be assigned whatever was included in such tract according to its boundaries as known and used from ancient times.

In re Boundaries of Pulehunui, 4 Haw. 239, 240–41 (1879).

By an act of June 19, 1852, the Board of Commissioners to Quiet Land Titles which administered the Mahele was authorized to award lands to chiefs and *konohikis* ("landlords," approximately) "by name [of the land] only." *An Act Relating to Land Titles of Konohikis,* 1852 Haw. Laws 28, reprinted in Rev. Laws Haw. 2144 (1925). This authority remained in effect for ten years, until, by an Act of August 23, 1862, a Boundary Commission was created and surveys were required for all land awards. 1862 Haw. Sess. Laws 27. *Cf.* State v. Midkiff, 49 Haw. 456, 421 P.2d 550 (1966), adjudicating claims to land awarded "in name only."

[35] Since, as just noted, legislative authority to issue patents "in name only" was removed in 1862, such patents issued after that year may have been completely invalid, meaning that the lands affected were not lawfully placed into private ownership until a subsequent grant by the Territory, at which time the executive may or may not have had authority to alienate them without reserving mining rights.

[36] The argument questions the authority of the territorial Superintendent of Public Works, who succeeded to the powers and duties of the Republic's Minister of the Interior (Pratt v. Holloway, 17 Haw. 539 (1906)), to grant an interest in land which was previously reserved by the Hawaii government. No judicial decision clearly dispositive of the question has been found, but it has been held that where the sale of the land covered by a patent had been previously withheld from sale by the Hawaii government, the patent is void for want of authority in the Superintendent. Territory v. Gay & Robinson, 25 Haw. 651 (1920). It can be otherwise argued that the discretion vested in the Superintendent to be inferred from the Opinion of the Attorney General (cited *supra* note 31) was lawfully exercised in granting mineral rights along with the surface estate, absent any statutory prohibition. Territory v. Gay & Robinson could be distinguished as referring only to the extent of the surface estate which the government could convey, with no applicability to the reservation of subsurface rights from a patent lawfully issued.

[37] Act 241, 1974 Haw. Sess. Laws 700, amending Haw. Rev. Stat. §182-1 (1976). The amended statute defines "geothermal resources" broadly, to include the "natural heat of the earth, the energy, in whatever form, below the surface of the earth present in, resulting from, or created by, or which may be extracted from, such natural heat . . . " Technology does not yet exist for extracting heat directly from magma, the ultimate geothermal heat source in Hawaii. Since hot water or steam is now the medium necessary for exploitation of the heat, discussion is limited to reservoirs of geothermal liquids. For a description of alternative modes of utilizing geothermal resources, *see* Austin, *Technical Overview of Geothermal Resources,* 13 Land & Water L. Rev. 9 (1977).

of California[38] that the "mineral" rights in land in California reserved to the federal government did cover geothermal resources. Is the decision dispositive of the issue in Hawaii?

Union Oil was a quiet title action, filed by the United States Attorney General[39] to ascertain whether the reservation to the United States of "all coal and other minerals" in land granted under the Stock-Raising Homestead Act of 1916[40] applied to geothermal reservoirs. The Court of Appeals held that geothermal resources were included in the mineral reservation,[41] predicating its opinion on Congressional intent, as evidenced by legislative history. It found that before 1916 the executive branch had called the attention of Congress to abuses and inefficiencies that had resulted from granting for agricultural use public land which overlay fuel deposits and had recommended separate disposition of surface and subsurface rights. Beginning in 1909, Congress enacted statutes which reserved minerals in various classes of land to be sold.[42] Examination of the legislative record showed that (i) the basic purpose of the 1916 Act was to expand agriculture, and (ii) Congress, in enacting the mineral reservation provision, was particularly concerned about preserving fuel deposits. Objection to the large area (640 acres) to be given each patentee was countered by assurances to Congress that the grants were limited to the surface estate and that even oil, arguably not a mineral, was covered by the reservation.[43]

The very language of the statute suggested to the court that Congress intended the reservation to be liberally construed. It states: "All . . . patents issued under [this Act] . . . shall be subject to and contain a reservation to the United States of all the coal and other minerals. . . . "[44] Although geothermal steam was not used as a power source in the United States in 1916,[45] the court reasoned that the express reservation of coal plus the intent of Congress "to implement the principle urged by the Department of Interior and retain governmental control of subsurface fuel sources"[46] made it clear that the legislative purpose would be served by declaring geothermal resources to be "mineral" and thus reserved to the federal government.

> [T]he mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest. Geothermal resources contribute nothing to the capacity of the surface estate to sustain livestock. They are depletable subsurface reservoirs of energy, akin to deposits of coal and oil, which it was the particular objective of the reservation

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[38] 549 F.2d 1271 (9th Cir. 1977).

[39] The Geothermal Steam Act of 1970 directed such suits whenever the Secretary of the Interior found that geothermal development of lands subject to the reservation was "imminent" (30 U.S.C. §1020(b) (Supp. 1978)) in order to resolve uncertainty as to ownership of the resource and thus encourage its development. The lands subject to this suit are in the vicinity of The Geysers, approximately 80 miles north of San Francisco, site of the only major commercial development of geothermal energy in the United States. With an installed capacity well above 500 MW, it is the largest geothermal power facility in the world.

[40] 43 U.S.C. §299 (1964).

[41] *Reversing* 369 F. Supp. 1289 (N.D. Cal. 1973).

[42] 549 F.2d at 1275.

[43] *Id.* at 1277–78.

[44] 43 U.S.C. §299 (1964).

[45] 549 F.2d at 1273. Italy was then the only nation utilizing geothermal power to generate electricity, a technology it adopted in 1904.

[46] *Id.* at 1276.

clause to retain in public ownership. The purposes of the Act will be served by including geothermal resources in the statute's reservation of "all the coal and other minerals." Since the words employed are broad enough to encompass this result, the Act should be so interpreted.[47]

Against the extensive legislative record relied on in *Union Oil* to construe the scope of the federal reservation, the page in Hawaii is virtually blank. Little is known of the origin of Hawaii's mineral reservation beyond the bare facts already stated.[48] In 1845 the legislature enacted a mineral reservation provision[49] as part of a complex statute drafted by John Ricord,[50] the first Attorney General of Hawaii. The statute was subsequently incorporated into an organic act to organize the government of Kamehameha III.[51] In 1859 the statutory mineral reservation provision was repealed,[52] not to be reenacted until 1963.[53]

Why did the Kingdom of Hawaii adopt a reservation of minerals just as the Great Mahele was about to begin? And why did the government delete the reservation from its statutes when the Mahele was largely completed, but nevertheless continue to use the clause as boiler-plate in its land patents throughout the rest of the century?[54] Neither the sparse legislative history of the period, nor Kuykendall, the premier investigator of Hawaii's early political history,[55] sheds any light on the matter. A Hawaii jurist expressed understandable puzzlement by the presence of this exotic element in the first land laws of a jurisdiction which lacked metals and had no inkling that it possessed any mines.[56]

The intended scope of the Hawaii reservation cannot be readily inferred from the basic purpose of the land distribution program to which it was incidental. Indeed, the very attempt to analogize from *Union Oil* reveals the disparity between the circumstances of the federal homesteading act and those of the Mahele.[57] Whereas the federal program had the limited purpose of encouraging ranching and affected only a relatively small portion of the public

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[47] *Id.* at 1279.

[48] *See* p. 70 *supra.*

[49] *See supra* note 15.

[50] KUYKENDALL, *supra* note 17, at 262–63.

[51] *See supra* note 15.

[52] By explicit omission from the CIVIL CODE of 1859, §1491.

[53] Act 11, 1963 HAW. SESS. LAWS 9; HAW. REV. STAT. §182-2 (1976).

[54] *See* p. 70 *supra.*

[55] Successive parts of two [organic] acts were submitted by Ricord first to his ministerial colleagues for examination and revision, and afterwards to the legislative council for discussion, amendment, and final action. The two houses put the drafts through three readings, "debated them section by section with patience and critical care, altering and amending them in numerous essential respects;" and finally passed them. ... [However] [w]e have no data from which to reconstruct the debates in the legislative council ...
KUYKENDALL, *supra* note 17, at 262.

[56] That the mineral reservation must have been "some foreigner's idea as it is certain that minerals, metals, or mines played no part in the economy or life of Hawaii at that time" is the conclusion of Justice Cassidy (dissenting) In re Application of Robinson, 49 Haw. 429, 444 n.1, 421 P.2d 570, 579 n.1 (1966). Had the Justice been inclined to point his finger at some particular foreigner, the logical target would have been the primary drafter of the statute, Attorney General Ricord, a lawyer educated in New York who sojourned in Florida, Louisiana, Texas, Arizona and Oregon before coming to Hawaii in 1844. Muir, *John Ricord*, 52 SW. HIST. Q. 49 (1948). That was four years before the California gold strike, but 16 years after a sizeable gold rush began at Duke's Creek, Georgia, an event which may have impressed this traveller through the South.

[57] *See* p. 75 *supra.*

domain, the Great Mahele was an act of primary importance—the creation of a legal regime for real property in the Anglo-American mode—which applied to all lands in the Kingdom. The purposes of an act as fundamental as the Mahele were appropriately broad and diffuse. In the Statement of Principles adopted by the Board of Commissioners that administered the Mahele, and in judicial opinions interpreting them, diverse motives were ascribed for the creation of an allodial system, all stemming from the kingly concerns and enlightened self-interest attributed to Kamehameha III. These include promoting social justice by giving commoners a more secure position through land ownership; encouraging greater efficiency in land use through the incentives of private ownership; gaining the respect of western nations accustomed to the allodial system[58] and safeguarding the private estate of the King from possible invaders.[59] Since none of these purposes provides a rationale for interpreting the intended scope of the mineral reservation made incident to the Mahele, *Union Oil* seems clearly distinguishable from, and hence not dispositive of, the "scope" question posed in Hawaii.

Lacking both clear judicial precedent and any indication of legislative intent, one might construe the mineral reservation in Hawaii by analogizing the law applying to petroleum, an energy source which also occurs in natural reservoirs of fluid and gas, and which has been the subject of extensive litigation. The rule in "perhaps a majority of states"[60] is that a reservation of "minerals" includes both oil and gas.[61] However, the applicability by analogy of this

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[58] "Ancient practice, according to testimony, seems to have awarded to the tenant less than justice and equity would demand, and to have given to the King more than the permanent good of his subjects would allow." Statement of the Board of Commissioners to Quiet Land Titles, February 9, 1846, *reprinted in* S. BALLOU, THE LAWS OF HAWAII 142 (1898).

> The Hawaiian rulers have learned by experience . . . that the well-being of their country must essentially depend upon the proper development of their internal resources, of which land is the principal; and that in order to [sic] its proper cultivation and improvement, the holder must have some stake in it . . . They perceive by contact with foreign nations, that such is their uniform practice . . . They are desirous to conform themselves in the main to such a civilized state of things, now that they have come to be a nation in the understanding of older and more enlightened Governments.

Id. at 146.

[59] Estate of His Majesty Kamehameha IV, 2 Haw. 715, 722, 725 (1864). The language of the court, like that of the Board of Commissioners quoted in the preceding note, implies that Kamehameha III deliberately chose to institute the Great Mahele. However, accounts of the period indicate that, a decade or more before the Mahele began, the youthful monarch had lost a power struggle with the chiefs who had accepted Christianity, and he no longer determined government policy. Real power lay with his advisers and with a faction of the chiefs, notably Kinau, the *kuhina nui* ["prime minister," in free translation].

> Early in 1835 Kauikeaouli [Kamehameha III] conceded that the chiefs had won. . . . He approved a new code of laws . . . and he placed law enforcement in the hands of Kinau. From that time on he virtually abandoned the direction of the affairs of state. He spent most of his time with foreigners, riding, sailing, bowling, or playing billiards. . . .

G. DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 92 (1968). *See also* R. KUYKENDALL, THE HAWAIIAN KINGDOM, *1778–1854*, 136 (1957).

[60] R. HEMINGWAY, THE LAW OF OIL & GAS 1 (1971).

[61] The difficulty inherent in determining whether or not oil or gas or any other substance is included within the terms of a grant or reservation of "minerals" lies in the traditional approach of attempting to find and to give effect to an intention to include or to exclude specific substances, when, as a matter of fact, the parties had nothing specific in mind on the matter at all. . . . The severance of "minerals" generally should be construed to sever from the surface ownership all substances presently valuable in themselves, . . . whether their presence is known or not known, *and all substances which become valuable through the development of the arts and sciences*, and that nothing presently or prospectively valuable as extracted substances would be intended to be excluded from the mineral estate.

purported rule in Hawaii may be questioned, given the phrasing of the reservation included in grants made under the Mahele and up to 1955, which read "all mineral and metallic mines of every description."[62] Here, "mineral" is an adjective limiting "mines," from which it can be argued, by narrow construction, that the reservation was not of all minerals but only of those which occur in mines, i.e., hard minerals.[63] Since 1957, Hawaii statutes have defined "mining" and "mining operations" broadly, to include the removal of oil and gas, as well as solid minerals,[64] but these latter-day definitions do not resolve the ambiguity of the reservation contained in earlier grants.

Nor does general property law provide a clear answer to the question of what mineral rights the Hawaii government had reserved. The old common law maxim of *cujus est solum, ejus est usque ad coelum et ad inferos*[65] suggests that the fee simple estates created by the Mahele include rights to all subsurface materials not explicitly excluded by the terms of the grant or by the operation of law.[66] However, even in American jurisdictions which adopted the common law in its fullest scope, there are ample precedents limiting the *cujus est solem* doctrine, notably with respect to rights to percolating subsurface water claimed by an owner of the surface estate. After reviewing these precedents as they may apply to mineral reservations, Sato and Crocker conclude that the doctrine has been so limited by judicial construction and truncated by legislation that "a state may proceed to allocate geothermal resource rights with a clean slate"[67] and without concern for the old maxim. A fortiori, that would be true in Hawaii, where the common law was specifically adopted subject to "Hawaiian usage" in practice before 1893.[68] Such usage, coupled with certain native rights guaranteed by statute, have placed numerous limitations on the possessory rights of landowners.[69] For example, residents of an area may cross private lands to reach the beaches, to take firewood and certain building materials, to

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F. TRELEASE, H. BLOOMENTHAL & J. GERAUD, NATURAL RESOURCES 733 (1965), *quoting* 1 E. KUNTZ, LAW OF OIL AND GAS 305 (1962) (emphasis supplied).

[62] *See supra* note 15 for legislation setting the language of the reservation.

[63] The diversity of interpretation given to "mine" is illustrated by the following opinions: "A 'mine' is an excavation in the earth made for the purpose of getting metals, ores or coal." Pruett v. O'Gara Coal Co., 165 Ill. App. 470, 489 (1911); "[Mine] does not comprehend every possible excavation by which mineral matters are brought to the surface. It appears to be definitely settled in most jurisdictions that a gas well or oil well cannot be regarded as a mine." Lambert v. Pritchett, 284 S.W.2d 90, 91 (Ky. 1955); "Oil is a mineral, and . . . an oil well is a mine." Mid-Northern Oil Co. v. Walker, 65 Mont. 414, 427, 211 P. 353, 356 (1922).

[64] The 1957 statute on strip mining and the 1963 statute on state mineral reservations both define mining to include the extraction of all minerals, "whether solid, gaseous, or liquid." HAW. REV. STAT. §§181-1, 182-1 (1976).

[65] "To whomever the soil belongs, he owns also to the sky and to the depths." 2 BLACKSTONE COMMENTARIES 18 (1902).

[66] Opposed is the doctrine that every land grant by the sovereign is to be construed "most strongly" against the grantee, that nothing passes "except what is conveyed in clear and explicit language, inferences being resolved for the government." Pace v. State, 191 Miss. 780, 4 So. 2d 270, 274 (1941).

[67] Sato & Crocker, *supra* note 4, at 319.

[68] "The common law of England, as ascertained by English and American decisions, is declared to be the common law of Hawaii in all cases, except as . . . established by Hawaiian usage. . . . " HAW. REV. STAT. §1-1 (1976) (originally enacted as 1892 HAW. SESS. LAWS, Ch. 57, §5).

[69] HAW. REV. STAT. §7-1 (1976), reserves these rights to "the people," a term variously construed to mean "tenants" Oni v. Meek, 2 Haw. 87 (1858), those becoming tenants before 1900, Damon v. Tsutsui, 31 Haw. 678 (1930), and any "lawful occupier" of *kuleanas* as against the *ahupua'a*, Dowsett v. Maukeala, 10 Haw. 166 (1895) and Carter v. Territory, 24 HAW. 47 (1917).

use the water supply, and to fish in ocean areas adjacent to private lands.[70] It is by no means evident that a fee simple estate in land, so hedged about with exceptions to its free use and enjoyment by the grantee and his successors, would be construed to include the ownership of geothermal resources.[71]

With no clear guidance from Hawaii law, a court may be influenced by the definition of "geothermal" in other states with known geothermal resources. However, there is no consensus. While Hawaii is the only state to define geothermal reservoirs as "mineral" by statute,[72] California has arrived at the same definition through case law.[73] The statutes of Montana and Wyoming, however, classify the resource as "water,"[74] while in Idaho and Washington it is neither mineral nor water, but a resource *sui generis*.[75] No guidance is to be found in this even division of categories, any of which can be justified, since geothermal resources do occur as water, do carry other minerals, and are indeed *sui generis*.[76]

IV. Policy Considerations

The determination of ownership rights in geothermal resources in Hawaii presents two difficult questions for the courts: (i) is a mineral reservation to be inferred in grants which lack one? (ii) are geothermal resources included in "mineral" reservations made in grants issued before 1974? When confronted with the foregoing questions, the courts may be influenced by the economic consequences of their decision—how it will affect the development of the new resource and the distribution of its benefits—within the constraints of due process.[77]

An economic consideration is the efficiency in utilizing the resource. Because geothermal fluids, like oil and gas, occur in large reservoirs which may underlie several adjacent parcels, under private resource ownership a pattern of beggar-thy-neighbor drilling may occur, as competing exploiters each seek to maximize their take from the common pool. The experience of the oil and gas industry has documented the wastefulness of that mode of extraction, which results in a smaller recovery of the available resource than does a "unitized" exploitation of each reservoir.[78] Unitization can be required by the state even if the resource

[70] Fishing rights of the public, stemming from those recognized by Art. 5, Ch. 6, Pt. I, §§1–8 of An Act to Organize the Executive Departments, 1845–46 Haw. Laws 90–92, are now incorporated in Haw. Rev. Stat. §§188–1 to 188–14 (1976).

[71] Ho'ala Kanawai Inc., a non-profit native Hawaiian association, has asserted that Hawaiians have a special claim to geothermal resources, based on §5(f) of the Admission Act, Pub. L. No. 86–3, 73 Stat. 4 (1959), which requires the State of Hawaii to hold public lands in trust for purposes including "the betterment of the conditions of native Hawaiians." It is not clear if the claim also extends to resources not explicitly reserved to the state. Honolulu Star-Bulletin, July 28, 1978, at A-1, Col. 2.

[72] Haw. Rev. Stat. §182–1 (1976).

[73] Geothermal Kinetics, Inc. v. Union Oil Co. of Cal., 75 Cal. App. 3d 56, 141 Cal. Rptr. 879 (1977); Pariani v. State, No. 657-291 (San Francisco County Super. Ct. June 30, 1977).

[74] Mont. Rev. Codes Ann. §89-867(1) (Supp. 1977); Wyo. Stat. §41-3-901(a) (ii) (1977).

[75] Idaho Code §42-4002(c) (1977); Wash. Rev. Code §79-76.040 (Supp. 1977).

[76] *See* Sato & Crocker, *supra* note 4, at 486-95, for a comprehensive discussion of these statutes.

[77] Violation of due process was found by the U. S. District Court for the District of Hawaii in *McBryde* and *Sotomura*, recent cases dealing with the ownership of other natural resources, discussed *infra* note 95.

[78] Tarlock, *An Environmental Overview of Geothermal Resources Development*, 13 Land & Water

is judged to be privately owned, but experience in the oil and gas field shows that it may be difficult to impose and administer if competition among producing firms is strong.[79] Presently, unitization is provided for but not required under the geothermal drilling rules adopted by the Hawaii Board of Land and Natural Resources.[80]

As maximization of physical recovery from geothermal reservoirs would be more likely under state ownership, so would maximization of the share of product value going to Hawaii interests. Costs of drilling wells and constructing a geothermal power plant of commercial size are so great[81] that it will probably require the finances of a national corporation to exploit geothermal resources. Furthermore, the economies of scale which are characteristic of geothermal production[82] would encourage development by a single producer in any region,[83] such as Puna, or on an entire island. As monopsonist in the market for mineral leases, the developer would enjoy obvious advantages in bargaining with individual landholders for production from their respective tracts. Not the least of these advantages is the company's option of by-passing any particular site for a well and choosing instead an adjacent estate. The government, however, would have the contravening power of a monopolist, if it were held to own all geothermal resources. By statute, the state must put to public auction mineral leases on all public lands,[84] and it may auction leases on private lands where minerals are reserved.[85] With auctions, the state government could more readily maximize royalties and leasehold rents from any reservoir area than would private owners dealing separately with presumably foreign corporations developing the field.[86]

Alternatively, if the state were to maximize the total economic utilization of geothermal resources instead of royalties and rents, as resource owner it would be well positioned to encourage further uses of the hot water in processing and

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L. REV. 289 (1977). "Unitization" is the requirement of the state that a reservoir be exploited under a common plan for drilling designed to maximize total yield, irrespective of the fact that several parties have rights to drill in that field.

[79] Sato & Crocker, *supra* note 4, at 529–32, drawing upon the history of unitization in California.

[80] DEPT. OF LAND AND NATURAL RESOURCES, REGULATIONS ON LEASING OF GEOTHERMAL RESOURCES AND DRILLING FOR GEOTHERMAL RESOURCES IN HAWAII, Rule 3.15 (June 1978) [hereinafter cited as HAWAII GEOTHERMAL REGULATIONS].

[81] Calculated in 1975 to exceed $100 million for a facility producing 200 MW of electricity. Greider, *Status of Economics and Financing of Geothermal Energy Power Productions*, PROCEEDINGS, SECOND U. N. SYMPOSIUM ON THE DEVELOPMENT AND USE OF GEOTHERMAL RESOURCES 2305, 2311 (May 1975) [hereinafter cited as U. N. SYMPOSIUM]. The total capitalization of the Hawaiian Electric Company, Inc. is less than $500 million. Honolulu Advertiser, Nov. 29, 1978, A-10, col. 1.

[82] C. BLOOMSTER & C. KNUTSEN, THE ECONOMICS OF GEOTHERMAL ELECTRICITY GENERATION FROM HYDROTHERMAL RESOURCES 30–31 (1978) (prepared for the U. S. Energy Research and Development Administration).

[83] Until now, all production at The Geysers, California, has been by the Union Oil-Magma-Thermal Power combine, selling exclusively to the Pacific Gas & Electric Co. Now that the capacity of the field has far exceeded 500 MW, other companies are seeking to develop production. Finn, *Price of Steam at The Geysers*, U. N. SYMPOSIUM *supra* note 81, at 2295. In Hawaii, the principal entrepreneurial interest has been demonstrated by a large oil company, Atlantic-Richfield Co. Honolulu Advertiser, April 29, 1978, C-7, col. 2.

[84] HAW. REV. STAT. §182–4 (1976); HAWAII GEOTHERMAL REGULATIONS, Rule 3.4.

[85] There must be a public auction unless, by two-thirds vote, the Board of Land and Natural Resources grants a mining lease to the occupier of the land. HAW. REV. STAT. §182–5 (1976); HAWAII GEOTHERMAL REGULATIONS, Rule 3.5.

[86] Monopoly profits, including the hypothesized retention by the developer of some of the economic rent at the expense of private landowners, could be captured by Hawaii through taxation, but this means of increasing the state's share of product value is indirect and uncertain.

manufacturing, after the hot water was used to power the turbines of a generating station.[87] Such encouragement could be provided, for example, by setting lower royalty payments[88] for geothermal fluids put to multiple uses.

Regarding geothermal fluids only as a power source for generating electricity, the example of the sole producing field in the United States suggests that government intervention in pricing may be necessary to distribute the economic benefits of geothermal energy more broadly than could owners, developers and appliers of the heat. At The Geysers,[89] the price of steam delivered to the Pacific Gas & Electric Company is calculated under a formula essentially based on the price of alternative fuel—coal, crude oil, atomic and hydroelectric power.[90] Steep rises in the cost of fossil fuels have increased geothermal steam prices far above the cost of production, with much benefit to the geothermal producers but little to the consumers of electric power. Arguably, the Public Utilities Commission could use its regulatory authority to control such "sweetheart" contracts in Hawaii,[91] but as owner of the resource the state could more adequately ensure that long-term benefits are passed on to consumers, should geothermal power be less costly than power derived from oil.

The weight given by the courts to these and other policy considerations may differ greatly according to the forum. The issue of geothermal resource ownership might be brought before the federal district court as a due process issue under the 14th Amendment,[92] or might appear before the Hawaii Supreme Court in an action to quiet title in geothermal resources, as in *Union Oil*.[93] Extrapolating from the recent line of decisions from these tribunals, the approaches of the two forums may differ greatly. The Hawaii Supreme Court has been more receptive to arguments, in close cases, that the state owns natural resources in controversy.[94] In two recent actions, the U.S. District Court for the

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[87] Multiple uses of geothermal water are briefly discussed in R. KAMINS, REVISED ENVIRONMENTAL IMPACT STATEMENT FOR THE HAWAII GEOTHERMAL RESEARCH STATION 69 (March 1978) (Prepared for the Hawaii Dept. of Planning & Economic Development.)

[88] By present regulation, royalties on geothermal steam must be set between 10 and 20% of gross value and between 5 and 10% for by-products of the geothermal fluid. Additionally, the Board of Land and Natural Resources may impose a royalty based on "net profit, cash bonus or otherwise." HAWAII GEOTHERMAL REGULATIONS, Rule 3.13.

[89] *See supra* note 39.

[90] Finn, *Price of Steam at The Geysers*, U. N. SYMPOSIUM *supra* note 81, at 2295.

[91] Under its general powers and duties, HAW. REV. STAT. §269–6 (1976), the Commission has authority to approve clauses for automatic "fuel adjustments," linking the cost of kilowatt hours to the price of fuel oil paid by electric companies. *See* 76 Op. Att'y Gen 1 (Haw. 1976). By extension, the authority could be exercised to approve, and require, adjustments geared to the production costs plus reasonable profits of an alternative fuel, such as geothermal steam.

[92] As in Robinson v. Ariyoshi and Sotomura v. County of Hawaii, discussed *infra* note 95.

[93] 549 F.2d at 1276. *See* p. 75 *supra*.

[94] In the past few years the Court has explicitly relied on the public trust doctrine in deciding cases relating to property rights in shorelines and lava extensions. The doctrine holds that the sovereign, as trustee for the people over their rights in certain natural resources, such as rivers, coastal shores and tidelands, is closely constrained by its fiduciary duty in granting private rights to these resources Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. R. 471 (1970). The doctrine was established in Hawaii in 1899, when the Supreme Court used it to deny a corporation the right to develop portions of Honolulu Harbor. King v. Oahu Ry. & Land Co., 11 Haw. 717 (1899). Tidewater lands were also held to be vested in the sovereign "as the representative of the nation and for the public benefit" in Bishop v. Mahiko, 35 Haw. 608, 646 (1940).

In three recent cases, the court has referred to the doctrine in deciding competing claims of the state and private landowners to rights in natural resources. The first reference came in decisions which had the effect of maximizing the state's ownership of beachlands. Whereas in In re Ashford,

District of Hawaii, arrived at contrary findings of law, holding that such resources belong to private owners.[95]

Either court may be influenced by indications of legislative intent. The 1974 amendment to include geothermal resources under the mineral reservation was such an indication, but its effectiveness was limited by erroneous assumptions as to the prevalence of the reservation.[96] A bill was introduced before the 1979 session of the Hawaii Legislature which declared that the state owns all geothermal rights, regardless of the presence or absence of a mineral reservation in the grant or patent which conveyed a parcel into private ownership.[97] However, the bill failed to pass leaving to the judiciary responsibility for deciding the question of geothermal ownership when it arises.

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50 Haw. 314, 440 P.2d 76 (1968), the court had relied on custom and usage to set the line of vegetation as the boundary of public ownership, in County of Hawaii v. Sotomura, 55 Haw. 176, 184, 517 P.2d 57, 63 (1973) *cert. denied* 419 U. S. 872 (1974) and in In re Sanborn, 57 Haw. 585, 593, 562 P.2d 771, 777 (1977), the court invoked the public trust doctrine to support its decision allowing state ownership up to the vegetation and debris mark. In *Sanborn* the court noted that its decision did not depend on the doctrine, but in State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) the doctrine was central to its holding that the state owned those areas along the ocean which had been formed by recent lava flows.

In light of *Sotomura*, *Sanborn* and *Zimring*, which decided rights in the surface estate, the Hawaii court may also give heed to arguments applying the public trust doctrine to questions of ownership of subsurface rights. In *Zimring*, the court stated that if private landowners were adjudged to be the owners of new lava extensions, they would be granted a windfall and, it concluded that "equity and sound public policy" demanded that the windfall should instead "inure to the benefit of all the people of Hawaii." 58 Haw. 106 at 121, 566 P.2d 725 at 735 (1977). By analogy, it can be argued that the recent discovery of geothermal resources, the existence of which was unexpected when public lands were placed into private ownership, should also be treated as a windfall to inure to the population at large through state ownership.

Application of the public trust doctrine in Hawaii prior to *Sotomura*, *Sanborn* and *Zimring* is traced in Town & Yuen, *Public Access to Beaches in Hawaii: A Social Necessity*, 10 HAW. B. J. 5, 26 (1973).

[95] In Robinson v. Ariyoshi, 441 F. Supp. 559 (1977), the District Court ruled that private landowners had water rights earlier awarded to the state by the Hawaii Supreme Court, in McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973) and 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed*, 417 U. S. 962 (1974), *cert. denied*, 417 U. S. 976 (1974). Acknowledging that it is "axiomatic that the law of real property is left to the states to develop and administer", the District Court justified its intervention by what it held to be a violation of due process, resulting in a judicial "taking," in *McBryde*.

Sotomura v. County of Hawaii, 460 F. Supp. 473 (1978), held contrary to the Hawaii Supreme Court in the action cited in note 94 *supra*, that state ownership of beachland reaches only to the line of seaweed, and not to the higher line of vegetation. The court declared: "The [state] decision in Sotomura was ... intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation." *Id.* at 13-14.

The *Robinson* decision has been appealed to the Ninth Circuit Court and the attorney representing Hawaii County was quoted as saying that *Sotomura* would also be appealed. Honolulu Advertiser, Oct. 17, 1978 at A-4, col. 1. Appellate decisions in the Ninth Circuit will certainly influence and may determine the legal regime for geothermal resources in Hawaii. On June 25, 1979, the U.S. District Court for the District of Hawaii dismissed an action by the landowners in *Zimring* (*supra* note 94), claiming title to lava accretions to beachland on the Island of Hawaii. Visiting U.S. District Judge Conti held that the federal court lacked jurisdiction to review the decision of the Hawaii Supreme Court on this property question. However, he distinguished *Sotomura* and *Robinson* (*supra* note 95) on the ground that in those cases the Hawaii Court, by raising questions of ownership *sua sponte* and deciding them without a hearing on the merits, had denied the landowners due process. *Zimring v. State*, No. 79-0054, Fed. Supp. (D.Haw. 1979).

[96] *See* p. 70 *supra*.

[97] H. B. 79-396. If the bill were enacted into law it could be attacked as an unconstitutional taking of private property without compensation and could be defended as being a proper exercise

V. CONCLUSION

Ownership of geothermal resources, recently discovered in Hawaii, is uncertain. A 1974 state statute[98] declares the resource to be "mineral" and therefore included within the mineral rights expressly reserved by the Hawaii government in land grants made before 1900 and again after 1955. The 1974 statute may establish the state as owner of hot water under lands granted since enactment of the statute but it leaves in doubt whether pre-1974 mineral reservations cover geothermal resources and whether the reservations are to be implied in grants which contain no express retention of mineral rights. A special problem is presented by lands originally patented subject to a mineral reservation, portions of which were subsequently granted to private owners without one.

The leading decision on the issue of geothermal rights, *United States v. Union Oil Co. of California*, 549 F.2d 1291 (9th Cir. 1977) holds that geothermal resources are included among the "minerals" retained by the federal government in a distribution of homestead lands. However, the case may be distinguished by the fact that the *Union Oil* court relied on a well-documented record of Congressional intent to construe "minerals," while in Hawaii there is no indication of legislative intent.

Property law offers but limited guidance in predicting how a court would decide the ownership of geothermal resources. The common law maxim of *cujus est solum* has been severely truncated with respect to the ownership of subsurface resources which can be analogized to geothermal reservoirs. The states with known geothermal resources, and those with oil and gas (the energy sources most similar to geothermal) are split in classifying the subsurface reservoirs as mineral or non-mineral.

Presented with close questions of definition and intent bearing on the ownership of geothermal resources and lacking clear doctrinal guidance or dispositive precedent, a Hawaii court may give weight to policy arguments, such as the likely effects on the production of geothermal energy and on the distribution of its benefits under private or public ownership. Recent decisions on the ownership of other natural resources contested by private parties and the State of Hawaii indicate that the Hawaii Supreme Court has been responsive to social benefit arguments while the U. S. District Court has found the assertion of state ownership on such grounds to be a taking in violation of the 14th Amendment.

Robert M. Kamins

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of the state's authority to define property rights, under the decisions handed down by the Hawaii Supreme Court in *McBryde* and *Sotomura*, discussed in notes 94 and 95, *supra*.

[98] Act 241, 1974 Haw. Sess. Laws.

DEFAMATION: A STUDY IN HAWAII LAW

It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense.[1]

From its beginnings in the English common law[2] to the Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*,[3] the American law of defamation, without the constraints of federal intervention, developed in what could at best be called a haphazard fashion. Since *New York Times*, however, the common law has been even further confused by the Court's unsteady efforts to arrive at the proper balance between a state's interest in adequately redressing injury to reputation and the constitutional protections of the First Amendment.

The purpose of this comment is to clarify the common law of defamation and to assess the impact of recent constitutional developments on the common law in general and on Hawaii law in particular. It is intended that this comment will provide the reader with a working knowledge of when the State of Hawaii is constitutionally able to provide a remedy for an injury to reputation and what criteria the state will use in determining whether such injury has in fact occurred.

I. THE COMMON LAW

A. The Prima Facie Case

At common law, the plaintiff's prima facie case is established when he has proved that the defendant has published a defamatory statement of and concerning the plaintiff, and that the recipient has understood the defamatory meaning of the statement and its application to the plaintiff.[4]

A statement is considered defamatory if it tends to hold the plaintiff up to hatred, contempt or ridicule, or causes him to be shunned or avoided.[5] In more

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[1] W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 737 (4th ed. 1971) [hereinafter cited as PROSSER].

[2] A general discussion of the history of the law of defamation is beyond the scope of this article. *See*, instead, Carr, *The English Law of Defamation* (pts. 1-2), 18 L.Q. REV. 255, 388 (1902); Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99; Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries* (pts. 1-3), 40 L.Q. REV. 302, 397 (1924), 41 L.Q. REV. 13 (1925); Rosenberg, *The New Law of Political Libel: A Historical Perspective*, 28 RUTGERS L. REV. 1141 (1975); and Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903), 4 COLUM. L. REV. 33 (1904).

[3] 376 U. S. 254 (1964).

[4] RESTATEMENT OF TORTS §613 (1938); PROSSER, *supra* note 1, at 776.

[5] PROSSER, *supra* note 1, at 739. The catalogue of defamatory words in Kimmerle v. New York Evening Journal, 262 N.Y. 99, 186 N.E. 217 (1933), appears exhaustive: "Words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace . . . ." This often-cited formulation—*see, e.g.*, PROSSER, *supra* note 1, at 739 n. 17; *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 877 (1956) [hereinafter cited as *Developments*]; Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VIRGINIA L. REV. 1349, 1352 (1975) [hereinafter cited as Eaton]—includes the idea of disgrace that Prosser considers necessary to constitute a defamation. *See* PROSSER, *supra* note 1, at 739.

general terms, a statement is defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[6]

It is for the court to determine whether the words in issue are reasonably susceptible of a defamatory interpretation, and then for the jury to determine whether they were in fact so understood.[7] If the defamatory meaning is not apparent on the face of the publication, the plaintiff has the burden of pleading and proving that extrinsic facts exist (the "inducement") such that the implicit relationship of the statement to those facts (the "innuendo") in effect establishes a defamatory meaning.[8] In the absence of such innuendo, the expression is conclusively presumed to have been used in a harmless sense.[9]

The making of a defamatory statement, however, is not sufficient in itself to give rise to a cause of action for defamation. Designed as a protection for a person's interest in reputation,[10] an action in defamation will not lie if the opprobrious statement is born and then dies solely within the confines of the relationship between plaintiff and defendant. Under common law, then, the focus in establishing an invasion of the plaintiff's interest in reputation is not the offense he might personally take to the statement nor the mental distress it may engender in him, but instead the adverse effect the statement's publication may have on his reputation in the eyes of others. Although the plaintiff's humiliation and wounded feelings may give rise to "parasitic" damages, a cause of action for defamation is not initially made out unless there is a communication (publication) to a third person.[11]

Prior to modification by *New York Times* and its progeny, the common law provided that once the defamatory meaning of the statement and its reference to plaintiff were established and shown to have been conveyed to and understood by a third person, the defendant was held strictly accountable.[12] This strict liability obtained whether or not defendant had published the statement under an honest belief that it was true,[13] whether or not he had expected the words would be taken in a defamatory sense,[14] and even if the ridicule of an entirely fictitious figure led quite by chance to the offended reputation of a person by the same name.[15] The common law, in other words, held unswervingly to the principle, stated by Lord Mansfield over two centuries ago, that "[w]henever a man publishes he publishes at his peril."[16]

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and Beyond: An Analytical Primer, 61 VIRGINIA L. REV. 1349, 1352 (1975) [hereinafter cited as Eaton]—includes the idea of disgrace that Prosser considers necessary to constitute a defamation. *See* PROSSER, *supra* note 1, at 739.

[6] RESTATEMENT OF TORTS §559 (1938).

[7] PROSSER, *supra* note 1, at 747. *See, e.g.*, Baldwin v. Hilo Tribune-Herald, Ltd., 32 Haw. 87, 100 (1931); Provisional Gov't of the Hawaiian Islands v. Smith, 9 Haw. 257 (1893).

[8] PROSSER, *supra* note 1, at 748.

[9] *See* Baldwin v. Hilo Tribune-Herald, Ltd., 32 Haw. at 94, in which the Hawaii Supreme Court held it reversible error for plaintiff's counsel to ask the jury to ascribe a defamatory meaning to ambiguous words not pleaded by innuendo as injurious to the plaintiff.

[10] *See* PROSSER, *supra* note 1, at 737; *Developments*, *supra* note 5, at 877.

[11] *See* PROSSER, *supra* note 1, at 761; Runnels v. Okamoto, 56 Haw. 1, 525 P.2d 1125 (1974).

[12] PROSSER, *supra* note 1, at 771.

[13] *Id.* at 772.

[14] *Id.* at 773.

[15] Jones v. E. Hulton & Co. [1909] 2 K.B. 444, *aff'd* [1910] A.C. 20, cited in PROSSER, *supra* note 1, at 772, and in *Developments*, *supra* note 5, at 903.

[16] Quoted in *Developments*, *supra* note 5, at 902.

B. Defenses: Truth and Privilege

At common law, if the plaintiff could prove his prima facie case, the defendant might still avoid liability through the defenses of truth and privilege.

1. *Truth.* Truth is a complete defense to a civil action for defamation,[17] even though the statement is uttered maliciously and in fact injures the plaintiff's reputation.[18] The common law, however, created a presumption of falsity which imposed upon the defendant the burden of pleading and proving the truth of the statement in issue.[19] Placing the burden of proof on the defendant has been justified as encouragement to investigate and ascertain the truth of potentially harmful allegations before disseminating them—in other words, to deter the "easy lie."[20]

Courts did not favor the defense of truth and attempted early on to apply scrupulously the rule that defendant's justification must counter every aspect of the defamatory imputation.[21] In order to constitute a complete defense, therefore, it is essential that the evidence establish the truth of the defamatory matter in its entirety and not just a part of it .[22] It is generally agreed, however, that proof of the literal truth of every minute detail in the accusation need not be supplied but that the defendant must simply establish the "substantial truth" of the imputation.[23]

2. *Privilege.* A defendant may also avoid liability by proving that the statement was absolutely or conditionally privileged. Privileges arise when

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[17] Waterhouse v. Spreckels, 5 Haw. 246, 248 (1884). *Accord,* Wright v. Hilo Tribune-Herald, Ltd., 31 Haw. 128 (1929); Gomez v. Hawaiian Gazette Co., 10 Haw. 108, 113 (1895). The early decisions in criminal defamation cases did not permit truth as a defense, but this harsh English precedent was altered by statute in nearly every state to allow the defense of truth if the statement was made with good motives and justifiable ends. PROSSER, *supra* note 1, at 796–97; *Developments, supra* note 5, at 932.

[18] *Developments, supra* note 5, at 932.

[19] PROSSER, *supra* note 1, at 798; Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons,* 49 S. CAL. L. REV. 1131, 1145 (1976). In Kahanamoku v. Advertiser Publishing Co., 25 Haw. 701, 708 (1920), the Hawaii Supreme Court, noting that the plaintiff is not required to prove falsity of the alleged defamatory statements at trial but rather that the defendant must plead truth as a defense in his behalf, concluded that under Waterhouse v. Spreckels, 5 Haw. 246 (1884), it is not necessary for the plaintiff to even allege falsity of the statements in his complaint.

[20] *See* Eaton, *supra* note 5, at 1358–59.

[21] *See* PROSSER, *supra* note 1, at 798; *Developments, supra* note 5, at 932.

[22] Wright v. Hilo Tribune-Herald, Ltd., 31 Haw. 132. In this case, the court held that a motion for nonsuit was improperly denied on two grounds. First, the court found that the article complained of was not proven to be substantially true. The court noted that both the reasonable inference (culpable breach of professional duty) drawn from the defamatory charge (the plaintiff, a superintendent nurse, went on an unannounced vacation leaving three patients in serious condition with only one nurse and an inexperienced maid to run the entire hospital on 24-hour shifts) and the charge itself, were not justified in light of the plaintiff's testimony. The article in issue had further charged that plaintiff "is the nurse who's [*sic*] administration and social affairs were to be probed by the Hawaii Board of Supervisors had she not handed in her resignation to become effective not later than December 31." The court found that the truth of the charge was not completely established insofar as there was no evidence that the social affairs of the plaintiff were to be probed by the Board. The court found that the only reason the investigation had been abandoned was that the plaintiff had handed in her resignation, even though the plaintiff's "administration" of the hospital had apparently resulted in a suspension (ending in her resignation on the grounds of poor health) after the numerous complaints filed against her had led to an investigation by the Board. The second ground for sustaining exception to the nonsuit was that the publication was not privileged under a "fair comment" theory, discussed *infra* at p. 95.

[23] PROSSER, *supra* note 1, at 798. *See, e.g.,* Wright v. Hilo Tribune-Herald, Ltd., 31 Haw. at 130.

important social purposes are deemed to be furthered by allowing certain kinds of discussion or communication. In some instances the social interest sought to be furthered is of such paramount importance that defendant's immunity for false statements is considered absolute.[24] More often, however, the interest served by permitting publication, although important, is not so vital that plaintiff's interest in reputation may be completely disregarded. Publication in these instances is conditioned upon good motives and reasonableness of conduct.[25]

a. *Absolute Privilege.* The grant of absolute privilege is generally limited to communications related to certain governmental activities.[26] A primary justification for absolute privilege is the recognition that the effective operation of government requires that persons of special position and status be free from an inhibiting fear that the actions they take in the course of their official duties may have an adverse effect on their personal interests.[27] Not only would the possibility of costly expenditures of time and money in litigation deter persons from assuming such positions of responsibility but, for those who have become public officials, the time spent in defending a suit could greatly disrupt their service to the public.[28]

i. *Judicial Actors.* All official participants in a judicial proceeding[29] enjoy an absolute privilege to publish, during every step of the proceeding until disposition, defamatory matter which bears relation thereto.[30] Fearful that as a result of such broad immunity court proceedings might become a spawning ground of extraneous defamation, most courts have come to require that the offending statement be somehow relevant to an issue in the case.[31] Most courts do not hold the requirement of relevance to mean that the statement need qualify as admissible under the rules of evidence, but instead simply demand a showing that there be "some reasonable relation or reference to the subject of inquiry," with all doubts resolved in favor of the defendant.[32]

It should be noted, however, that the Hawaii Supreme Court appears

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[24] PROSSER, *supra* note 1, at 776.

[25] *Id.* at 777.

[26] *See Developments, supra* note 5, at 917. *But see,* PROSSER, *supra* note 1, at 784–85, discussing absolute immunity in cases in which plaintiff has given his consent to be defamed and cases dealing with the confidential communications between husband and wife.

[27] RESTATEMENT (SECOND) OF TORTS [hereinafter RESTATEMENT], at Introductory Note, ch. 25, topic 2, tit. B (1977).

[28] *Developments, supra* note 5, at 918.

[29] Proceedings of quasi-judicial administrative agencies may also enjoy absolute immunity. Communications made to the Hawaii Supreme Court's "Rule 16 Committee on Ethical Practices" were held to be absolutely privileged in Wong v. Schorr, 51 Haw. 608, 466 P.2d 441 (1970). The court, stressing the secrecy of the Commission proceedings, reasoned that absolute immunity should be accorded such statements to encourage citizens to air their grievances against attorneys and initiate proceedings without the threat of a defamation suit, so that the public could best be protected from unethical practices. In order that the court not create a rule of law which would protect some members of the public while placing those who are unaware of the existence of a Rule 16 Commission in jeopardy for complaining about an attorney's unethical behavior to the Bar Association Ethics Committee, the court also reluctantly extended absolute privilege to the Bar Ethics Committee, pointing to cases which reasoned that such a committee may serve as an arm of the court. The court, however, firmly advised the Bar to take immediate steps to cloak the Committee with appropriate rules of operation, requirements of secrecy and other proper safeguards. *See* discussion of administrative proceedings in *Developments, supra* note 5, at 920–21.

[30] RESTATEMENT, *supra* note 27, at §§585–589; PROSSER, *supra* note 1, at 777–81.

[31] PROSSER, *supra* note 1, at 778.

[32] *Id.* at 779.

reluctant to find operative the protection of an absolute privilege to defame during judicial proceedings. In *Ferry v. Carlsmith*,[33] Ferry brought an action in defamation for words spoken by defendant Carlsmith during a previous trial for malicious prosecution, in which trial Ferry was the defendant and Carlsmith was the attorney for plaintiff Mitsuhashi. In the defamation action, Ferry claimed that the words which accused him of feloniously attempting to extort "hush money" from Mitsuhashi "were false and defamatory and were not pertinent or material to the issue in said action or to the matters then under discussion or inquiry."[34] The Hawaii Supreme Court, reversing a non-suit and remanding the cause for a new trial, found Ferry's testimony to have established that the dealings between Ferry and Mitsuhashi "were innocent of wrong and entirely free from any taint or just suspicion that Ferry was acting dishonestly in relation thereto."[35] The court noted that even if the burden of proving non-materiality had initially been on the plaintiff as part of his prima facie case,[36] the testimony elicited from plaintiff on cross-examination had provided sufficient evidence of non-materiality to shift the burden to the defendant. The court held that Carlsmith had failed to sustain his burden of producing rebuttal evidence to justify the use of such language.

In arriving at its holding, the court, rather than only requiring that a defamatory statement bear "some reasonable relation ... to the subject of inquiry," stated that a communication is accorded absolute privilege "if the same is a fair comment upon the evidence *and* relevant to the matters at issue."[37] By putting the two requirements in the conjunctive, the court appears to require a significantly higher degree of pertinence than is required in most other jurisdictions.[38]

ii. *Legislators.* The United States Constitution provides that "for any Speech or Debate in either House, they [senators and representatives] shall not be questioned in any other Place."[39] Accordingly, a legislator's absolute privilege to publish defamatory matter obtains whenever his statements are in furtherance of his legislative functions as a member of Congress, whether on the floor of the legislative body or in committee or subcommittee work.[40]

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[33] 23 Haw. 589 (1917).

[34] *Id.* at 590.

[35] *Id.* at 593. Defendant claimed that plaintiff should have been required to introduce into evidence the entire transcript of the previous trial properly to show nonmateriality of the words to all issues in the case. The court considered such a measure cautious but unnecessary.

[36] The controversy centered around whether plaintiff's negative allegation of non-materiality had shifted the defendant's burden of an affirmative defense to the plaintiff. The court did not decide this issue since it found that the plaintiff's allegations were, in any event, sufficiently supported.

[37] 23 Haw. at 591 (emphasis added). The RESTATEMENT, *supra* note 27, at §586, comment c, states a position directly contra to the "fair comment" approach: "[T]he fact that the defamatory publication is an unwarranted inference from the evidence is not enough to deprive the attorney of his privilege."

[38] The absolute privilege to defame during judicial proceedings was constructed to further the "public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients." RESTATEMENT, *supra* note 27, at §586, comment a. If this policy is to be respected, it seems that Hawaii courts would be wise to allow, consistent with most jurisdictions, greater protection to statements made during judicial proceedings than the protection extended in *Ferry*, leaving matters of abuse to the disciplinary power of the court. *Id. See* discussion of a corresponding privilege for those claiming abuse in Wong v. Schorr, *supra* note 29.

[39] Art. I, Section 6.

[40] RESTATEMENT, *supra* note 27, at §590, comment a; PROSSER, *supra* note 1, at 781. *See* Eastland

The Hawaii Constitution provides that "[n]o member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of his legislative functions."[41] Studying a record of the Hawaii Constitutional Convention proceedings of 1950 and the difference in wording between Art. I, Sec. 6 of the federal constitution and Art. III, Sec. 8 of the state constitution, the Hawaii Supreme Court in *Abercrombie v. McClung*[42] recognized that the broad protection granted to a state legislator was clearly intended to be unrestricted as to time or place as long as the legislator was acting within his legislative functions. With this broad immunity delineated, the court went on to hold narrowly that the defamatory statements published by defendant McClung in response to a request for clarification of a speech previously made in a forum of the legislature on a subject of legitimate legislative concern were absolutely privileged. The court stated that the clarification was in exercise of defendant's legislative functions to keep the public informed and to serve the public interest.

iii. *Executive Officers.* Complete freedom in performing the duties of important executive offices of the nation and state requires that the persons who occupy those positions be able to publish information incidental to such duties without the threat of civil liability.[43] Under this policy, certain executive officers are protected by absolute immunity from civil suit for defamation when the statements are made in the discharge of their duties.[44]

In *Barr v. Matteo*,[45] the United States Supreme Court held that an alleged libel published at the direction of the petitioner and made within the "outer perimeter" of petitioner's duties as Acting Director of a federal agency was absolutely privileged. The court, in dictum, refused to restrict the privilege to executive officers of cabinet rank:

> The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.[46]

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v. United States Servicemen's Fund, 421 U. S. 491, 501 (1975); Gravel v. United States, 408 U. S. 606, 616 (1972); Tenney v. Brandhove, 341 U. S. 367, 377 (1951); Kilbourn v. Thompson, 103 U. S. 168 (1881).

[41] Art. III, Section 8.

[42] 55 Haw. 595, 525 P.2d 594 (1974).

[43] RESTATEMENT, *supra* note 27, at §591, comment a. *But see* Medeiros v. Kondo, 55 Haw. 499, 522 P.2d 1269 (1974), discussed *infra* at p. 90.

[44] PROSSER, *supra* note 1, at 782.

[45] 360 U. S. 564 (1959).

[46] *Id.* at 572–73. The Court recognized that although upper-echelon executive officers would in effect enjoy broader coverage than lower-ranking governmental officers, this broader coverage was afforded by virtue of the responsibilities of their respective offices rather than by virtue of the title of the position occupied:

> To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by law to his control or supervision," [citation omitted]—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. *Id.* at 573–74.

Most state courts, however, have restricted the use of absolute privilege to the protection of top state officials.[47] In these states, inferior officers are covered by the less extensive protection of a qualified privilege.[48]

Hawaii has gone even further in restricting the protection enjoyed by its superior officials. In *Medeiros v. Kondo*,[49] the Hawaii Supreme Court announced that the doctrine of absolute immunity would no longer be permitted to shield any nonjudicial government officer from liability for a tortious act. The court felt that a plaintiff should be allowed to recover if his "inquiry into malice"[50] revealed that the defendant had abused his conditional privilege to defame. The court held, however, that "the best way to balance the interests of the maliciously injured party against the innocent official is to allow the action to proceed but to limit liability to only the most guilty of officials by holding plaintiff to a higher standard or proof than in a normal tort case."[51] The court therefore allocated to the plaintiff the "burden of adducing clear and convincing proof that the defendant was motivated by malice and not by an otherwise proper purpose."[52] The court justified denial of an absolute privilege on the grounds that the burden of a trial would not in itself discourage good men and women from public service, but that the crux of the matter was the possibility of an actual holding of liability against an innocent official[53]—a danger that plaintiff's higher burden of proof would alleviate.

It should be remembered, however, that federal officials, "even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution." Butz v. Economou, 98 S.Ct. 2894, 2905 (1978). Thus the Supreme Court, noting that "*Scheuer* [v. Rhodes, 416 U. S. 232 (1974)] and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment," recently held that, "in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." Butz v. Economou, 98 S.Ct. at 2911. Absolute immunity from damages liability was extended to persons performing adjudicatory functions within a federal agency, consistent with the absolute immunity accorded participants in a judicial proceeding. *Id.* at 2911–15; *see* note 29 and corresponding text.

[47] RESTATEMENT, *supra* note 27, at §591, comment c; PROSSER, *supra* note 1, at 783.

[48] *Id.*

[49] 55 Haw. 499, 522 P.2d 1269 (1974).

[50] *Id.* at 503–04, 522 P.2d at 1272.

[51] *Id.* at 504–05, 522 P.2d at 1272.

[52] *Id.* at 505, 522 P.2d at 1272. In Runnels v. Okamoto, 56 Haw. 1, 525 P.2d 1125 (1974), the Hawaii Supreme Court upheld summary judgment for defendant Heen, an elected councilman for the City and County of Honolulu, and defendant Okamoto, the city council auditor and fiscal adviser, on the issue of malice. Finding *Kondo* controlling and dispositive, the court stated that the bare allegations in the complaint which asserted that defendants were motivated by malice did not in and of themselves suffice as "clear and convincing" evidence of malice and improper purpose. The court found that the plaintiff had had his "inquiry into malice" and that "the pleadings, interrogatories, and uncontroverted affidavits, depositions and exhibits, taken together, show the absence of a genuine issue" as to the material fact of malice. *Id.* at 6, 522 P.2d at 1129.

[53] Since under the State Tort Liability Act, HAW. REV. STAT. §662-15(4) (1976), the State of Hawaii does not make itself liable for a claim arising out of a cause of action in defamation, an employee of the State is clearly vulnerable to personal suit for a defamatory statement published in the performance of his duties. It should also be noted that although the State Tort Liability Act permits the Attorney General to defend a State employee in a civil action resulting from the employee's performance of his duties, such a defense is discretionary.

> The attorney general *may* defend any civil action or proceeding brought in any court against any employee of the State for damage to property or for personal injury, including death, resulting from the act or omisssion of any State employee while acting within the scope of his employment.

HAW. REV. STAT. §662-16 (1976) (emphasis added). A State employee may therefore be susceptible to debilitating attorney's fees in addition to a judgment for damages.

b. *Conditional Privilege.* "There remain[s],"[54] as characterized by Prosser, "a group of situations in which the interest which the defendant is seeking to vindicate is regarded as having an intermediate degree of importance, so that the immunity conferred is not absolute, but is conditioned upon publication in a reasonable manner and for a proper purpose."[55]

i. The Interests Protected. A person's right to protect his own interests from actual or reasonably feared invasion by publishing defamatory matter is qualifiedly privileged if the publisher reasonably believes that "a sufficiently important interest" of his is jeopardized and that "the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."[56] The publication of defamatory matter to protect the interests of persons other than the publisher may be conditionally privileged if the publisher reasonably believes that a "sufficiently important interest of the recipient or third person" is jeopardized and that "the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct."[57] In determining whether a publication is within generally accepted standards of decent conduct, courts often look to the nature of the relationship between the parties, and whether the publication is made in response to a request or is simply volunteered by the publisher.[58]

A conditional privilege is also recognized where the publisher and recipient have a common interest in a particular subject matter and the publisher reasonably believes that facts exist which the recipient sharing the common interest is entitled to know.[59] This common interest may be found among those who have entered into or are considering business dealings with one another, or among members of a group with either a common pecuniary interest (*e.g.*, creditors concerned about the affairs of a common debtor, fellow shareholders, partners in business) or a common interest of a non-pecuniary character (*e.g.*, professional societies, fraternal or religious organizations).[60]

A communication to one who can act in the public interest may also be found conditionally privileged. This situation arises when the publisher reasonably believes that a "sufficiently important public interest" is at stake, and that "the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true."[61]

Aku v. Lewis[62] and *Russell v. American Guild of Variety Artists*[63] appear to be the only two decisions of the Hawaii Supreme Court which deal with condi-

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[54] Whether or not conditional privileges do indeed "remain" is an interesting question after the Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U. S. 323 (1974), discussed *infra* at pp. 104–08. Since the question has not yet been resolved by the high court, however, this article will discuss the privilege assuming, as does the RESTATEMENT, *supra* note 27, at ch. 25, topic 3, tit. A, *Special Note on Conditional Privileges and the Constitutional Requirement of Fault*, that there are situations in which the privilege is yet vital. *See* note 84, *infra* and corresponding text.

[55] PROSSER, *supra* note 1, at 785–86.

[56] RESTATEMENT, *supra* note 27, at §594; *Developments, supra* note 4, at 924.

[57] RESTATEMENT, *supra* note 27, at §595.

[58] *Id.*; PROSSER, supra note 1, at 788–89; *Developments, supra* note 5, at 924–25.

[59] RESTATEMENT, *supra* note 27, at §596; PROSSER, *supra* note 1, at 789.

[60] PROSSER, *supra* note 1, at 789–91.

[61] RESTATEMENT, *supra* note 27, at §598.

[62] 52 Haw. 366, 477 P.2d 162 (1970).

[63] 53 Haw. 456, 497 P.2d 40 (1972).

tionally privileged occasions arising out of a legitimate interest of the publisher, third party, or an interest common to both.

In *Aku*, plaintiff Earle E. Aku brought an action against Hal Lewis, also known as J. Akuhead Pupule, Jim Lathrop and Pacific Broadcasting Co., Inc., alleging that the defendants had published to their radio and television audience defamatory statements about the plaintiff, indicating that he was representing himself as defendant Lewis in an attempt to defraud the public. Defendant answered that the statements were qualifiedly privileged and moved for summary judgment. The trial judge held that defendants' publication, even if libelous, was qualifiedly privileged as a business communication. Finding no abuse of the privilege, the court granted defendants' motion for summary judgment. On appeal, the Hawaii Supreme Court, citing a United States Supreme Court decision, *White v. Nicholls*,[64] and two leading English cases, *Harrison v. Bush*[65] and *Toogood v. Spyring*,[66] set out a test for determining under what circumstances a qualified privilege is to be considered applicable:

> A qualifiedly privileged occasion arises when the author of the defamatory statement reasonably acts in the discharge of some public or private duty, legal, moral or social, and where the publication concerns subject matter in which the author has an interest and the recipients of the publication a corresponding interest or duty.[67]

The court indicated that the presence of an interest or duty on the part of the recipient was essential to the existence of such a privilege: "If the person or persons to whom the communication is addressed have no recognized interest in the statement, there is no privilege."[68] Finding defendants to have a protectable interest in the substantial commercial value of radio star Hal Lewis' trade name "Aku," and finding members of the listening audience to have a corresponding interest as to "Aku's" affiliation with a solicitation program (evidenced by the fact that two telephone inquiries were made to Pacific Broadcasting Co.), the court acknowledged that defendants possessed a conditional privilege to defame.[69]

The court thus appeared to find in the facts of Aku *two* bases from which a conditional privilege would traditionally arise: protection by the publisher of his own interests and protection by the publisher of another's interests. In view of the existence of two bases from which a conditional privilege might properly arise, the ramifications of the court's "corresponding interest" test were not completely clear. The test may have been no more than an acknowledgment of the common law rule that the recipient of a communication made to protect the publisher's own interests be one whose knowledge of the defamation will be of service in providing such protection and, similarly, that in order for the publisher to act in the interest of another, his action must be consonant with a legal duty or otherwise within generally accepted standards of decent conduct, rather than being merely officious. The court, however, may have been in effect

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[64] 44 U. S. 266, 290 (1845).
[65] 119 Eng. Rep. 509, 519 (1855).
[66] 149 Eng. Rep. 1044, 1049 (1834).
[67] 52 Haw. at 371, 477 P.2d at 166.
[68] *Id.*
[69] The court reversed the lower ruling of summary judgment, however, on the issue of abuse. *See* notes 79–81 and corresponding text.

melding[70] the privilege that arose in the publisher's protection of his own interest and the privilege that arose when the publisher attempted to protect the interest of others, with the new requirement that the two interests exist independently and correspondingly, before a conditional privilege would arise.

Referring to the test set out in *Aku*, the court in *Russell* noted that the defense of qualified privilege would only be available to defendant if the author of the publication had acted reasonably and if the author and the recipient had a corresponding interest. The court indicated that the term "corresponding interest" signified a "common interest" such as that possessed by credit agencies and their subscribers.[71] Apparently finding that defendant (plaintiff's union representative) was similarly serving the recipient's (plaintiff's booking agent) "common, corresponding interest" in plaintiff's working status, the court determined that defendant's response to recipient's request for information was qualifiedly privileged.[72]

In light of both Hawaii cases, it appears fair to conclude from the comprehensive test introduced in *Aku* and reiterated and delimited in *Russell* that the court has set a difficult standard for a defendant to meet in order to enjoy a qualified privilege: both recipient and publisher need have a recognizable interest in the same subject matter, which entitles the recipient to the information at defendant's disposal. This standard appears most clearly consonant with the "common interest" conditional privilege at common law. On the other hand, it appears that where only one party has a protectable interest in the matter, the conditional privileges traditionally accorded at common law may not be available to a defendant in this jurisdiction.

ii. *Abuse.* A conditional privilege may be defeated by improper motive or unreasonable conduct.[73] It has been frequently said that a statement published with "malice" will defeat an otherwise applicable conditional privilege.[74] Most courts and commentators, however, find the term "malice" to be more confusing than useful since it variously refers to the "legal malice" which is implied as a matter of law from the publication of a statement which is defamatory *per se*,[75]

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[70] Note that the court made a footnote reference to three different RESTATEMENT conditional privilege sections in its general description of the occasion when a qualified privilege would arise. 52 Haw. at 371 n. 8, 477 P.2d at 166 n. 8.

[71] 53 Haw. at 461 n. 3, 497 P.2d at 44 n. 3.

[72] The recipient booking agent had obtained an engagement for plaintiff in a Honolulu nightclub. The plaintiff subsequently informed her agent by telephone that the engagement had been terminated and asked him to find her another booking. In response to an inquiry by the agent seeking information as to plaintiff's circumstances, defendant, branch manager of the union to which plaintiff belonged, wrote a letter informing the agent that the booking had been terminated (with the support of the Hawaii Branch Executive Committee of the union, after full hearing) after the plaintiff had failed to appear for a scheduled performance. The defendant mistakenly added that the plaintiff was in and had been committed to the State Mental Hospital. The court sustained the lower court's finding that the plaintiff's union representative had an interest in plaintiff's circumstance as a member of the union, and that the plaintiff's booking agent had a common interest in plaintiff's work status by her appeal to him for new work, even if not for the fact that he had obtained the terminated engagement.

[73] *See generally* PROSSER, *supra* note 1, at 792–96; *Developments*, *supra* note 5, at 929–31.

[74] *See* Aku v. Lewis, 52 Haw. at 375–76 n. 16, 477 P.2d at 168 n. 16, referring to cases cited in Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865–67 (1931) and PROSSER, TORTS §110, 821–23 (3d ed. 1964); PROSSER, *supra* note 1, at 794; *Developments*, *supra* note 5, at 930.

[75] *See* PROSSER, *supra* note 1, at 794; *Developments*, *supra* note 5, at 930. Eaton concludes that such malice was but is no longer part of the plaintiff's prima facie case. Eaton, *supra* note 5, at 1353

to the "spite or ill will" which justifies a recovery of punitive damages,[76] to the "knowing-or-reckless-disregard" standard which limits the constitutional privilege to defame public figures,[77] or to an intermediate state of mind. It is considered more useful simply to inquire whether the publication is "made primarily for the purpose of furthering the interest which is entitled to protection."[78] If the publication is not so motivated, the purpose behind such publication is considered abusive, and the privilege disappears.

Notwithstanding proper motive, however, a conditional privilege will be vitiated if defendant unreasonably publishes defamatory matter unnecessary or irrelevant to the interest deserving protection,[79] unreasonably makes excessive publication of the defamatory matter[80] or, since there is no social benefit in a lie, neither believes the matter to be true nor has reasonable grounds for believing it to be true.[81]

A substantial minority of cases at common law took the position that instead of vitiating the conditional privilege on a defendant's negligent belief that the defamatory matter was true, courts should demand knowledge of falsity or "reckless disregard" of the statement's truth or falsity.[82] This position will probably gain wider acceptance since, after the United States Supreme Court's decision in *Gertz v. Robert Welch, Inc.*,[83] communication which had been considered to deserve the protection of a qualified privilege appears no longer to enjoy any greater protection than that afforded less socially significant discussion.[84] If this higher standard of proof of fault is placed on the plaintiff, however, it should be expected that a court will likely be more hesitant to find at the outset that such a conditionally privileged occasion exists.[85]

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n. 15. *See, e.g.*, Murphy v. Maui Publishing Co., 23 Haw. 804, 810 (1917). *But cf.* Baldwin v. Hilo Tribune-Herald, Ltd., *infra* note 119, at 617.

[76] PROSSER, *supra* note 1, at 794.

[77] *See* discussion of New York Times Co. v. Sullivan, *infra* at p. 100.

[78] PROSSER, *supra* note 1, at 795; RESTATEMENT OF TORTS §603 (1938). *See* Aku v. Lewis, 52 Haw. at 375–76, 477 P.2d at 168, and Russell v. Guild of Variety Artists, 53 Haw. at 463 n. 4, 497 P.2d at 45 n. 4.

[79] In *Aku*, 52 Haw. at 372–74, 477 P.2d at 166–67, the court found that the accusatory language imputing to Aku criminal conduct went far beyond the defendant's legitimate interest in disassociation from the telephone solicitation campaign. The court thus found that the privilege had been abused.

[80] In *Aku*, *id.* at 374–75, 477 P.2d at 167–78, the court found that the publication to Pacific Broadcasting Co.'s statewide television audience unreasonably exposed a large number of disinterested people to the defamation. Since the crime threatened was of limited urgency, the court held the privilege to be abused by excessive publication.

[81] *See* RESTATEMENT, *supra* note 27, at §§600, 604, 605A; PROSSER, *supra* note 1, at 792–96. In *Aku*, 52 Haw. at 376, 477 P.2d at 168, the court found that defendant had no reasonable grounds for believing that plaintiff was involved in fraudulent activity on the basis of two unidentified phone calls which had merely inquired into Lewis' association with plaintiff.

[82] *See* RESTATEMENT, *supra* note 27, at ch. 25, topic 3, tit. A, *Special Note on Conditional Privileges and the Constitutional Requirement of Fault.*

[83] 418 U. S. 323 (1974), discussed *infra* at pp. 104–08.

[84] Since *Gertz* requires that a plaintiff prove that the defendant was at least negligent in discovering the falsity of the statement, if the plaintiff establishes his prima facie case, he has in one step also defeated the protection of a conditonal privilege in a jurisdiction which permits such abuse to be established by mere proof of unreasonableness. Note, however, that the precise holding of *Gertz* does not extend beyond actions involving media defendants. *See* RESTATEMENT, *supra* note 27, ch. 24 §580B, comment e; note 225 *infra.*

[85] Note that Hawaii, as discussed above, already appears hesitant to acknowledge conditionally privileged occasions. It does not therefore appear difficult to justify placing the burden of showing "reckless disregard" of the truth on the plaintiff to vitiate privilege. At the present time, however, Hawaii requires only a showing of negligence. *See, e.g.*, Aku v. Lewis, 52 Haw. at 371–72, 477 P.2d at 166; Russell v. Guild of Variety Artists, 53 Haw. at 462–63 n. 4, 497 P.2d at 45 n. 4.

iii. *Special Types of Conditional Privilege.* When the media communicates information, it usually does so for its own commercial purposes rather than to serve individual or group interests; even if such interests can be discerned, the media generally publishes information too broadly to be protected on the bases discussed above.[86] The defense of "fair comment" on matters of public concern and the qualified privilege to publish fair and accurate reports of official proceedings were therefore developed at common law in order that the media would not be deterred from providing the public with information on public affairs.[87]

A report of an official proceeding is conditionally privileged if the report is accurate and complete or a fair abridgement of what has occurred.[88] The privilege exists even when the report contains what the publisher knows to be a false and defamatory statement so long as the proceeding is accurately reported.[89]

The conditional privilege granted to "fair comment" was created at common law to protect public comment and criticism of persons and things in the public domain.[90] A majority of American courts extended the privilege only to statements of pure "opinion"; a communication of untrue facts or a comment based on such facts was, therefore, not protected even though due care was exercised in checking the accuracy of the facts.[91] A minority of courts, however, took the position that the public welfare depended upon frank and open debate on public issues, even if at the expense of an occasional injury to reputation.[92] It was, of course, this latter view which ultimately prevailed.[93]

C. *Libel and Slander*

Owing to the two sources from which the modern law of defamation developed,[94] a suit for defamation may take one of two forms: as libel, which generally involves written or printed materials, or as slander, which generally involves the spoken word.[95]

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[86] *See, e.g.,* Aku v. Lewis, 52 Haw. at 366, 477 P.2d at 162.

[87] *Developments, supra* note 5, at 927.

[88] *Developments, id.* at 929; RESTATEMENT, *supra* note 27, at §611. Murphy v. Maui Publishing Co., 23 Haw. at 810, recognized that a newspaper was privileged to publish a report in a judicial proceeding after a hearing therein, but cautioned that this privilege arose only with respect to a public hearing or action in open court. *But see* Campbell v. New York Evening Post, Inc., 245 N.Y. 320, 157 N.E. 153 (1927) cited in *Developments, supra* note 5, at 929.

[89] RESTATEMENT, *supra* note 27, §611, comment b.

[90] Eaton, *supra* note 5, at 1362–63.

[91] *Developments, supra* note 5, at 927. The Hawaii Supreme Court, in dealing with the issue of whether untrue statements of fact fell under the fair comment privilege, has repeatedly denied such protection. *See, e.g.,* Cabrinha v. Hilo Tribune Herald, Ltd., 36 Haw. 355 (1943); Territory v. Ota, 36 Haw. 80 (1942); Territory v. Crowley, 34 Haw. 774 (1939); Wright v. Hilo Tribune-Herald, Ltd., 31 Haw. 128 (1929); Lyman v. Hilo Tribune Publishing Co., 13 Haw. 453 (1901). *Wright,* in particular, deals exhaustively with the arguments pro and con, and comes to the conclusion that such an extension "would with great injustice expose public servants to a hazard against which other persons are protected, this hazard being the dissemination of defamatory falsehoods. The doctrine of privilege, we think, should not be extended so far." 31 Haw. at 138–39.

[92] *See* Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908), the leading case in the battle to extend protection for non-negligent misstatements of fact.

[93] *See* discussion of New York Times Co. v. Sullivan and its progeny, *infra* at pp. 100–04.

[94] *See supra* note 2; *Developments, supra* note 5, at 887.

[95] PROSSER, *supra* note 1, at 751. In PROSSER, *id.* at 752–54, the characterization of the defamatory statement as either libel or slander appears to rest on whether the statement was embodied in some permanent physical form. Since such distinctions inherited from the sixteenth century are quite senseless in light of modern methods of communication, it can be argued that the libel/slander

1. *Slander.* Recovery for slander at common law is permitted only by a showing that pecuniary loss has been occasioned by the injury to reputation unless the defamatory imputation is considered so serious as to create a presumption that such special damages have been incurred.[96] That presumption would arise if the statement, whether on its face or by proof or extrinsic facts: (1) accused the plaintiff of a crime of "moral turpitude" or a crime subject to "infamous punishment,"[97] (2) said that plaintiff was afflicted with a loathsome disease,[98] (3) imputed unchastity to a female plaintiff,[99] or (4) affected plaintiff in his calling.[100]

If the statement does not fall within the slander *per se* categories listed above, however, the plaintiff must prove "special" damage—damage which can not be assumed to flow necessarily from the publication of the defamation and which therefore must be supported with specific proof.[101] Special damage in the law of defamation is distinguishable from its application in other areas of the law, however, by the further requirement that the special damage to reputation be pecuniary.[102] Exclusion from the society of one's friends, for example, is not enough to make a slanderous statement actionable if under the circumstances proof of special damage is required.

Once the requisite special damages are shown, however, the common law permits recovery for any "general" damage which would normally be assumed to flow from the particular publication, including those damages for emotional distress, bodily harm and general injury to reputation.[103]

2. *Libel.* The well-established English rule that all libel is actionable without proof of special damage was early assimilated into the American common law.[104] There developed, however, a most curious split in the American law of defamation: the libel *per se/per quod* bifurcation. The distinction permitted libel that was defamatory on its face to be actionable, as under the English rule, without proof of special damage. A libel that required reference to extrinsic facts to disclose a defamatory meaning, however, unless falling within one of the four exceptional slander *per se* categories, was actionable only where special damage was pleaded and proved.[105] This development, which Prosser considers

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distinction should be scrapped altogether. Perhaps a system which focuses more directly on the size of the audience and/or the opprobriousness of the statement, without regard to form, would correlate better with the statement's potentiality for real harm. Thus we would rid the law of the anomalous situation that harm is more readily presumed from a line on a postcard, than from a statement made over a microphone to a crowded auditorium.

[96] *Id.* at 754; *Developments*, *supra* note 5, at 887.

[97] PROSSER, *supra* note 1, at 755; Gomez v. Hawaiian Gazette Co., 10 Haw. 108, 110 (1895).

[98] The exception is generally limited to venereal disease and other diseases "held in some special repugnance, and that are lingering or chronic" such as leprosy. RESTATEMENT, *supra* note 27, at §572, comment c. *See also* PROSSER, *supra* note 1, at 756–57.

[99] The rule has not been applied to a man, presumably since damge to his reputation will not be as great. *See* PROSSER, *supra* note 1, at 760. Prosser opines that the imputation of homosexuality may, however, be actionable without proof of special damage. *Id.*

[100] This exception to the necessity of proving special damages has been "limited to defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself. The statement must be made with reference to a matter of significance and importance for that purpose, rather than a more general reflection upon the plaintiff's character or qualities...." PROSSER, *supra* note 1, at 758. *See also* RESTATEMENT, *supra* note 27, at §573.

[101] PROSSER, *supra* note 1, at 760.

[102] *Id.*

[103] *Id.* at 761.

[104] Prosser, *Libel Per Quod*, 46 VIRGINIA L. REV. 839, 843 (1960).

[105] *Id.* at 844.

a majority view[106] but which the *Restatement of Torts* calls a minority position,[107] is generally agreed—agreement being a rarity in this area—to be the product of judicial confusion.[108] The terms libel *per se* and libel *per quod* had originally been used to distinguish libel which was defamatory on its face from libel which was not, as an indication of the different allegations necessary in pleading.[109] The confusion apparently developed when courts began using the libel *per se/per quod* terminology to parallel the use of the *per se* terminology in the law of slander; since only slander which had been designated as slander *per se* was actionable without proof of special damages, courts reasoned that only libel which had been designated as libel *per se* should similarly be actionable without proof of special damages.[110]

An interesting note in the *Vanderbilt Law Review*,[111] cited in a footnote to the Hawaii Supreme Court opinion in *Russell v. American Guild of Variety Artists*,[112] traces the genesis of the judicial confusion back to a misinterpretation of a theory propounded by John Townshend in his treatise, *Slander and Libel*.[113] Although the underlying basis of Townshend's thesis, that the purpose of all defamation actions is simply to redress pecuniary injury,[114] was apparently rejected by the Hawaii Supreme Court in *Kahanamoku v. Advertiser Publishing Co.*,[115] other aspects of his reasoning appear to be consistent with language in the Hawaii cases. While other courts mistakenly understood Townshend to suggest that plaintiffs suing for libel requiring reference to extrinsic fact must plead and prove special damage, Townshend in fact had defined libel *per se* broadly enough[116] that all written defamation, including a statement requiring reference to extrinsic fact, was exempted from proof of special damage.

In *Kahanamoku*, although cautioning that if a statement is not libelous *per se* the plaintiff must allege and prove special damage, the Hawaii Supreme Court, like Townshend, provided a definition of libel *per se* which appears to encompass all libel. The court quoted Cooley for the proposition that

> [a]ny false and malicious writing published of another is libelous *per se*, when the tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him. Any words that tend to lower the plaintiff in the estimation of his friends or in the common estimation of citizens, or that tend to injure his social character or status, or to destroy the confidence of his neighbors in his integrity, are libelous *per se*.[117]

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[106] *Id.*

[107] RESTATEMENT, *supra* note 27, at §569, comment b.

[108] *See, e.g.*, PROSSER, *supra* note 104, at 848; Note, *Libel Per Se and Special Damages*, 13 VAND. L. REV. 730, 732 (1960).

[109] *Developments, supra* note 5, at 889–90.

[110] Although initially born out of this confusion, the distinction has been subsequently justified by the reasoning that a defendant who did not know the extrinsic facts should not be liable without fault. *See* note 125 *infra*.

[111] *Supra* note 108.

[112] 53 Haw. at 459 n. 2, 497 P.2d at 43 n. 2.

[113] TOWNSHEND, SLANDER AND LIBEL (3d ed. 1877), discussed in 13 VAND. L. REV., *supra* note 108, at 732.

[114] More current scholarship interprets the gist of a defamation action to vindicate a "relational" rather than a pecuniary interest. *See* PROSSER, *supra* note 1, at 737, citing Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936).

[115] 25 Haw. at 713.

[116] Townshend considered written language actionable *per se* when it tended '"to bring a party into public hatred or disgrace,' or 'to degrade him in society' or expose him to hatred, contempt or ridicule . . . ." *Supra* note 113.

[117] COOLEY ON TORTS, 3d ed. at 400–02, quoted at 25 Haw. at 711.

> ... In determining whether the words charged are libelous *per se*, they are to be taken in their plain and natural import according to the ideas they are calculated to convey to those to whom they are addressed, *reference being had not only to the words themselves, but also to the circumstances under which they were used.*[118]

It appears, then, that the Hawaii Supreme Court's characterization of libel *per se*, like Townshend's, in effect simply rephrased the English rule that all libel is actionable without proof of special damage. If after *Kahanamoku* there yet remained any question as to whether the court had purposefully intended to include within the definition of "libel *per se*" libel established by reference to extrinsic fact, however, it should have been dispelled once and for all by *Baldwin v. Hilo Tribune-Herald, Ltd.*[119]

In *Baldwin*, the lower court had sustained a demurrer on the grounds that since the newspaper article was not defamatory on its face and since the plaintiff had not alleged special damages, the complaint had failed to state a cause of action. The Hawaii Supreme Court remanded with instructions to overrule the demurrer. The court, acknowledging that a libel defamatory on its face is actionable without proof of special damages, pointed out that other libel could also be so actionable:

> If, for instance, words are published of and concerning another which on their face are reasonably susceptible of two meanings, one innocuous and the other defamatory, and the person claiming to be aggrieved by their publication by *innuendo* ascribes to them the defamatory meaning and alleges that they were so intended and were so understood and claims general damages only, his complaint states a cause of action.... In a case of this kind no allegation of special damages is necessary. The very words themselves, if they are susceptible of the meaning ascribed to them by plaintiff in his innuendo and if they were so intended and capable of being so understood by readers of ordinary intelligence, carry their own poison just as effectually as though they had no other meaning than a defamatory one and for their false and malicious publication general damages are recoverable. They are libelous *per se.*[120]

It should be noted that the Hawaii Supreme Court has avoided using the term libel *per quod* in its treatment of libel cases except in one instance. In *Russell v. American Guild of Variety Artists*,[121] the court referred to Prosser's statement of the "majority" libel *per se/per quod* distinction in a footnote but did not appear

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[118] *Id.* at 408–10, quoted at 25 Haw. at 712 (emphasis added). Although Cooley recognizes that defamatory publications are classified either as publications actionable *per se*, or publications actionable on averment and proof of special damage, he apparently does not base this distinction on whether or not the defamatory imputation is clear on its face. Like the Hawaii Supreme Court, Cooley nowhere uses the term libel *per quod*. In discussing statements that "are not libelous *per se*" (and hence would require a showing of special damages), Cooley makes no mention of statements which require reference to extrinsic facts but instead lists the following:

> To charge one with doing what he has a lawful right to do, as trying to get a law passed that would relieve his property from a sewer assessment by making the cost a general charge. To charge a hotel man with being a hog, because he sent away for his supplies instead of buying them at home; that plaintiff caused her husband to commit suicide, as she might be the innocent cause; that plaintiff is a labor agitator; or a man "of more or less indifferent repute;" or that he had owed a debt for years and that when sued he slunk behind that statute of limitations. COOLEY ON TORTS, Student Edition, at 216 (1907) (citations omitted).

[119] 30 Haw. 610 (1928).

[120] *Id.* at 617. *See also* Cabrinha . Hilo Tribune Herald, Ltd., 36 Haw. at 367; Tagawa v. Maui Publishing Co., 49 Haw. 675, 679, 427 P.2d 79, 82 (1967).

[121] 53 Haw. 456, 497 P.2d 40 (1972), discussed *supra* at pp. 91–93.

by that reference to adopt such a position.[122] In view of the confusing references to libel *per se* in Hawaii case law, it is not surprising that Federal District Judge Samuel King, in an attempt to apply Hawaii law in *Butler v. United States*,[123] should come to the conclusion that "Hawaii recognizes a distinction between libel *per se* and libel *per quod* and the necessity for an innuendo and special damages for the latter to be actionable."[124] Under the foregoing discussion of Hawaii precedent, however, it would appear that this statement of the law is incorrect.

Although the *per se/per quod* distinction has been adopted by many states, it appears that the trend now is to realign with the English view and to permit recovery for any libel without proof of special damage even if the statement is not defamatory on its face.[125] Hawaii, therefore, seems to have chosen early on a respectable position, albeit one that could now profit by a clear restatement.

D. Damages

If the defendant is found liable for a defamation actionable *per se*, the plaintiff has a possible claim to three types of damages—general, specific and punitive.

General damages are those damages which naturally and necessarily flow from the publication of the opprobrious statement, including those damages for emotional distress, bodily harm and general injury to reputation.[126] Prior to modification by *New York Times* and subsequent cases, general damages were presumed to result from the mere publication of the defamatory words and recovery was therefore permitted without specific evidence of injury.[127] The jury could, in its discretion, return a verdict for nominal damages only[128] but

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[122] *Id.* at 459 n. 2, 497 P.2d at 43 n. 2. Note that the court appers to misstate Prosser by implying that the slander *per se* determination is independent of the libel *per quod* determination. A more accurate rendition of the "majority" rule would be to link the libel *per quod* and slander *per se* categories in the conjunctive (as joint requirements) rather than in the disjunctive, so that it is clear that once a statement is found to be libel *per quod*, it is then to be treated as slander and may therefore escape the requirement of special damage only if it then falls into one of the slander *per se* categories. The court's misreading is understandable in light of its greater familiarity with the Cooley formulation, discussed in *Kahanamoku*, *supra* note 18, at 710, in which written statements falling within the slander *per se* categories are treated as libel *per se* at the outset, rather than going through the process of being first found libel *per quod* and then being exempted under a slander *per se* escape hatch.

[123] 365 F.Supp. 1035 (D. Haw. 1973).

[124] *Id.* at 1044.

[125] The RESTATEMENT, *supra* note 27, at §569, comment b, points out that the principal justification for the special damage requirement—that if the defendant did not know of the extrinsic facts he would be liable without fault—has been eliminated by the *Gertz* requirement that the plaintiff show fault on the part of the defendant regarding the defamatory character of the communication. *See* discussion of *Gertz*, *infra* at pp. 104–08.

[126] PROSSER, *supra* note 1, at 761. *Developments*, *supra* note 5 at 935–36, opines that the universal lack of clarity in analyzing what constitutes general damages in a defamation recovery has led to the result that juries are not properly instructed by trial courts so as to avoid granting double recovery, and appellate courts are not adequately prepared to determine whether the proper limits of jury discretion have been exceeded. *Developments* therefore suggests that "general damages be defined in terms of the specific harms which an individual may suffer because of the harm done to his reputation—for example, pecuniary injury, loss of association, physical injury, and mental suffering [,]" rather than by the more common formulation that "general damages compensate the plaintiff for injury to his reputation as well as for pecuniary loss and mental suffering." *Id.* at 936.

[127] Van Poole v. Nippu Jiji Co., 34 Haw. 354, 358 (1937).

[128] *Id.* at 361.

where the defamatory charge was actionable *per se*, plaintiff was prima facie entitled to substantial damages.[129]

Although the plaintiff need not have proved special damages[130] in order to recover general damages, if he did not plead special damages, he was presumed to rest content with those damages which were the natural result of the libel upon his reputation and feelings; evidence of special damage would not, therefore, be received by the jury.[131]

Punitive damages are allowed, as in other areas of tort law, on the theory that the defendant was "actuated by actual as distinguished from legal malice; that he ought to be punished therefor; and that the community should be protected by discouraging a repetition by him or by others of such publications so actuated."[132]

Where defamatory words were not actionable *per se*, the plaintiff had to plead and prove special damages as part of his prima facie case. Once he had proved such special damages, however, the bar to recovery was lowered, and general and punitive damages could be obtained.[133]

II. Constitutional Developments Since 1964

A. New York Times Co. v. Sullivan[134]

Prior to 1964, the publisher of a defamatory statement could be held strictly liable to the plaintiff unless he could show that the statement was privileged. In *New York Times*, however, the Supreme Court, recognizing that the "profound national commitment" to debate on public issues "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,"[135] held that the constitutional guarantees of the First Amendment, applicable to the states by the Fourteenth Amendment, require

> a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[136]

The plaintiff in *New York Times*, the commissioner responsible for overseeing the operations of the Montgomery, Alabama, police force, had been awarded $500,000 in a state court verdict against the New York Times for printing a paid editorial advertisement which inaccurately described the Montgomery

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[129] *Id.* at 359.

[130] *See* discussion of special damages, *supra* at p. 96.

[131] Baldwin v. Hilo Tribune Herald, Ltd., 32 Haw. at 96.

[132] Kahanamoku v. Advertiser Publishing Co., 26 Haw. 500, 503 (1922). The court in *Kahanamoku* held that since punitive damages are intended to punish an offender for his malice, and since the plaintiff has otherwise been compensated for all the injury he has actually suffered (through general damages), the principal publishing company was not susceptible to punitive damages for the malicious act of its agent writer, absent the principal's participation in or ratification of the malicious act.

[133] *See* note 103 *supra* and corresponding text.

[134] 376 U. S. 254 (1964).

[135] *Id.* at 270.

[136] *Id.* at 279–80.

police force's actions against civil rights leader Dr. Martin Luther King and against student participants in a civil rights demonstration. The Supreme Court overturned the state court verdict, likening it to the imposition of sanctions under the Sedition Act of 1798.[137] Although the Sedition Act had expired by its own terms without being tested in the Supreme Court, the Court found "broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment['s]"[138] commitment to unencumbered public discussion. The Court reasoned that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[139] Referring to the absolute privilege granted to a public official under *Barr v. Matteo*,[140] the Court concluded that critics of official conduct should have a fair equivalent of the immunity granted to the officials themselves—hence, the actual malice standard.

1. *Actual Malice.* The constitutional privilege to defame is defeasible upon a showing of actual malice with "convincing clarity."[141] Actual malice, unlike legal malice at common law, however, is never presumed from the mere publication of a libel *per se*.[142] Instead, the plaintiff has the burden of pleading and proving that the defendant's conduct was motivated by such malice; only by falling outside of the constitutional protection of *New York Times* is the plaintiff's cause of action thus maintainable.[143]

The application of the Supreme Court's actual malice standard engendered much confusion in the lower courts since at common law the term "malice" had traditonally been used to signify spite or ill-will or improper motive rather than a finding of the knowing or reckless disregard of truth.[144] In an attempt to clarify the standard, the Supreme Court, in *Garrison v. Louisiana*,[145] explained that only those false statements made with a "high degree of awareness of their probable falsity" could be the subject of either civil or criminal sanctions under the "reckless disregard" component of the *New York Times* test.[146] In *St. Amant v. Thompson*,[147] the Court referred to its previous decisions and found them to be clear on the point that "reckless conduct is not measured by whether a

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[137] *Id.* at 277.

[138] *Id.* at 276.

[139] *Id.* at 277.

[140] 360 U. S. 564 (1959), discussed at 376 U. S. at 282.

[141] 376 U. S. at 285–86.

[142] *Id.* at 283–84.

[143] The RESTATEMENT, *supra* note 27, at §580A, comment e, maintains that the term "constitutional privilege" is misleading. In tort law, the term "privilege" ordinarily refers to a defense *raised by the defendant* which excuses him from the liability charged by the plaintiff. Under *New York Times*, however, *the plaintiff has the burden* of asserting and proving that the constitutional "privilege" is not applicable to his cause of action; in other words, that the defendant was motivated by actual malice.

Although at common law the burden of pleading and proving truth as a defense was on the defendant, it may be that the *New York Times* requirement that plaintiff show defendant acted with knowledge or reckless disregard shifts the burden of establishing falsity onto the plaintiff as part of his prima facie case. *But see* Eaton, *supra* note 5, at 1381–86, who argues vigorously that the burden remains on defendant.

[144] *See* discussion in Eaton, *supra* note 5, at 1370–75. *See also* discussion of "malice" *supra* at pp. 93–94.

[145] 379 U. S. 64, 79 (1964).

[146] *Id.* at 74.

[147] 390 U. S. 727 (1968).

reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[148] Recognizing that "the reckless disregard standard may permit recovery in fewer situations than the standard of the reasonable man or the prudent publisher [,]"[149] the Court nevertheless adhered to the view that "to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones."[150] The *St. Amant* decision does not allow an automatic finding for a defendant based on his avowal of good faith, but relies on the finder of fact to determine whether the circumstances of the publication indeed indicate such lack of "actual malice":

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.[151]

A plaintiff need not, however, merely rely on objective, circumstantial evidence to raise an inference of actual malice. In *Herbert v. Lando*,[152] the United States Supreme Court has recently provided that "the thoughts and editorial processes of the alleged defamer would be open to examination" in order that a plaintiff not be completely foreclosed from adducing direct proof of the defendant's state of mind.[153] The Court rejected the argument that

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[148] *Id.* at 731.

[149] *Id.*

[150] *Id.* at 732.

[151] *Id.* In Tagawa v. Maui Publishing Co., 50 Haw. 648, 448 P.2d 337 (1968), the Hawaii Supreme Court, quoting extensively from *St. Amant*, noted that although a simple telephone call would have uncovered the erroneous nature of the statement which defendant publishing company printed about plaintiff, a member of the Maui County Board of Supervisors, mere investigatory failure without a high degree of awareness of probable falsity, though perhaps raising the issue of negligence, was not sufficient to meet the standard of actual malice. Since there was no evidence in the record that defendant deliberately falsified the column or that it published the column while harboring a high degree of awareness as to the probable falsity of the statements contained in the column, the court held that the motion for summary judgment was properly granted below. *Id.* at 656, 448 P.2d at 342.

In response to depositions and affidavits submitted by defendant which denied malice, plaintiff had filed an affidavit which noted that an editorial published on the same day as the column in issue had called him "tender skinned." Plaintiff also related a previous occasion on which the editor of the defendant publishing company had said: "[y]ou are trying to be too big for your size.... You know I can blast you." The Hawaii Supreme Court affirmed summary judgment, stating that

> where plaintiff is a public official and defendant is a newspaper publisher which published an allegedly defamatory column about plaintiff's official conduct, summary judgment for defendant may be granted where defendant shows through uncontroverted depositions and affidavits that the publication was made without deliberate falsification and without a high degree of awareness of the probable falsity of the statements in the publication; in such instance, there is no genuine issue of "actual malice" for trial.

Id. at 652, 448 P.2d at 340. The court understood the contentions in plaintiff's affidavit to go to the issue of malice only in the sense of "ill will" and therefore not to evidence the constitutionally necessary knowledge-or-reckless-disregard standard.

[152] 47 U.S.L.W. 4401 (U. S. April 18, 1979) (No. 77-1105).

[153] *Id.* at 4402.

constitutionally protected speech would be chilled by permitting discovery of the thoughts, opinions and conclusions of the publisher relevant to proving malice, and accordingly refused to create such an evidentiary privilege "where there is a specific claim of injury arising from a publication that is alleged to have been knowing or recklessly false."[154]

2. *Public Official, Public Figure, Public Interest.* The delineation of who falls within the public official classification for purposes of the *New York Times* rule was attempted by the Supreme Court in *Rosenblatt v. Baer*:[155] "[T]he public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[156]

Although a great variety of low-ranking govermental employees have been found to be public officials by the lower courts,[157] not all aspects of such a public official's life are thus laid open to public discussion. Apparently heeding the *New York Times* limitation that the constitutional privilege should apply only to such falsehoods that deal with a public official's "official conduct,"[158] the Hawaii Supreme Court in *Aku v. Lewis*,[159] found the rule inapplicable to a policeman, although otherwise a "public official," on the ground that "plaintiff's conduct as coach for the youth football team was unofficial and that of a private citizen."[160]

In 1967, the United States Supreme Court in *Curtis Publishing Co. v. Butts*,[161] broadened the application of the malice standard to include libel actions brought by public figures against media defendants. In *Butts*, the Court noted that the plaintiff, an athletic director accused by a *Saturday Evening Post* article of conspiring to fix a football game, not only commanded a substantial amount of interest at the time of the publication in issue but that he also "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements."[162] Although the case could not be analogized to prosecutions for seditious libel and *New York Times v. Sullivan* was therefore not strictly controlling, the Court noted that the public interest in the circulation of the material involved and the publisher's interest in circulating it, were not any less than that involved in the *New York Times* situation.[163] The Court, therefore, felt justified in extending the constitutional limitation applicable to actions brought by public officials to actions brought by public figures.[164]

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[154] *Id.* at 4406.
[155] 383 U. S. 75 (1966) (supervisor of a county-owned ski resort found to be a public official).
[156] *Id.* at 85.
[157] *See* discussion in Eaton, *supra* note 5, at 1376–77.
[158] 376 U. S. at 279.
[159] 52 Haw. 366, 477 P.2d 162 (1970).
[160] *Id.* at 375, 477 P.2d at 168.
[161] 388 U. S. 130 (1967).
[162] *Id.* at 155 (citation omitted).
[163] *Id.* at 154.
[164] Although the Court in *Butts* used the standard that a public figure could only "recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," *id.* at 155, instead of the "actual malice" standard, Justice Powell, writing for the *Gertz* majority, discussed *infra* at pp. 104–08, later interpreted *Butts* as having extended the *New York Times* rule to public figures.

Implicit in the *Butts* decision was the finding that public interest was a legitimate criterion in evaluating the protection-worthiness of speech under the First Amendment. It was therefore not a surprise when a plurality of the Court in *Rosenbloom v. Metromedia, Inc.*[165] explicitly held that the *New York Times* rule applied to libel actions brought by private figures involved in issues of "public or general interest." The plurality reasoned that the protection of the First Amendment must embrace not only discussion of public officials and public figures, but must logically extend to discussion of "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period,"[166] in order that freedom of discussion could fulfill its historic function of enabling effective self-government. To insure that such discussion would not be deterred, the Court, therefore, held that a libel action brought by a private person for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern would be sustained only upon clear and convincing proof of actual malice. In thus balancing the state's interest in protecting individual reputation against the "great freedoms" of the First Amendment and finding free discussion to be clearly the weightier in all "matters of public or general concern, without regard to whether the persons involved are famous or anonymous,"[167] the *Rosenbloom* decision in effect granted the media carte blanche to report with impunity anything it determined to be of enough public interest to warrant coverage.

In a dissenting opinion therein, Justice Harlan argued that maintaining the constitutional distinction between public and private plaintiffs "is at least as likely to protect true First Amendment concerns as one that eradicates such a line and substitutes for it a distinction between matters we think are of true social significance and those we think are not."[168] Harlan felt, moreover, that the fact that "the public person has a greater likelihood of securing access to channels of communication sufficent to rebut falsehoods concerning him than do private individuals,"[169] provided a persuasive reason why the *New York Times* rule should not be applicable. Harlan instead advocted leaving it to the states "to define for themselves the applicable standard of care so long as they do not impose liability without fault[.]"[170]

Although the *Rosenbloom* plurality rejected Harlan's arguments for fear that self-censorship would result from use of a standard less stringent than actual malice, Harlan's reasoning nevertheless prevailed when the Court decided *Gertz v. Robert Welch, Inc.*[171]

B. Gertz v. Robert Welch, Inc.

The litigation in *Gertz* arose subsequent to the conviction of Nuccio, a Chicago policeman, for second degree murder. The victim's family had retained Elmer Gertz to represent them in a civil action against Nuccio for damages. After the State obtained Nuccio's conviction, an article appeared in a magazine

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[165] 403 U. S. 29 (1971).
[166] *Id.* at 41, quoting from Thornhill v. Alabama, 310 U. S. 88 (1940).
[167] 403 U. S. at 44.
[168] *Id.* at 69 (Harlan, J., dissenting).
[169] *Id.* at 70.
[170] *Id.* at 64.
[171] 418 U. S. 323 (1974).

published by Robert Welch, Inc., which falsely stated that Gertz had arranged Nuccio's "frame-up" as part of a Communist conspiracy to discredit the local police. The article called Gertz a "Communist-fronter" and falsely implied that he had a criminal record. Gertz filed a libel action in federal court and subsequently received a jury verdict of $50,000. The trial judge, however, determined that the *New York Times* privilege was applicable and entered judgment for defendant notwithstanding the verdict.[172] The court of appeals affirmed[173] on the basis of *Rosenbloom v. Metromedia, Inc.*,[174] decided after the district court's *Gertz* decision.

On appeal, however, a reconstituted Supreme Court[175] rejected the "public issue" criteria of the *Rosenbloom* plurality, doubting the wisdom of committing the task of determining "what information is relevant to self-government"[176] to the conscience of judges.[177] The Court felt that the *Rosenbloom* test inadequately served the competing values at stake.

> On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*.... On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions.[178]

The Court, in attempting more equitably to accommodate the competing interests embodied in the law of defamation and the freedoms of speech and press, resurrected Harlan's suggestion in *Rosenbloom*, to hold that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[179]

1. *The Distinction.* The Court justified the exemption of private individuals from the *New York Times* rule on two grounds. First, the Court reasoned that since private individuals do not often enjoy the opportunities shared by public officials and public figures to counteract false statement through "channels of effective communication," and are therefore more susceptible to injury, the state's interest in protecting such private persons is correspondingly greater.[180] Second, the Court found that individuals who seek governmental office or assume roles of special prominence in affairs of society invite attention and comment,[181] whereas a private individual "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood."[182] Although the Court recognized the possibility that one could

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[172] 322 F.Supp. 997 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U. S. 323 (1974).

[173] 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U. S. 323 (1974).

[174] 403 U. S. 29 (1971).

[175] Justices Powell and Rehnquist occupied the seats vacated by Justices Harlan and Black.

[176] 418 U. S. at 346, quoting Marshall, J. in *Rosenbloom*, 403 U. S. at 79.

[177] 418 U. S. at 346.

[178] *Id.*

[179] *Id.* at 347.

[180] *Id.* at 344.

[181] *Id.* at 344–45.

[182] *Id.* at 345.

"become a public figure through no purposeful action of his own," the Court noted that such instances of "truly involuntary public figures must be exceedingly rare."[183] It was more common, the Court stated, that those classed as public figures had "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[184] In either event "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual."[185]

The designation of a public figure may thus rest on either of two alternative bases:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues . . . . Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.[186]

2. *Fault.* In permitting a state to protect a private person whose reputation is injured by a defamatory falsehood on a showing less demanding than that required by *New York Times* even where an issue of public interest may be implicated, the Court apparently tried to restore to the state courts the responsibility for developing the law in this area which they had previously enjoyed. But only to a certain extent. In an attempt to shield the press and broadcast media from the rigors of strict liability,[187] the Court completed the dramatic revision of the common law it had begun in *New York Times*, with the requirement that where "the substance of the defamatory statement 'makes substantial danger to reputation apparent [,]'"[188] states must require that even a private plaintiff prove at least some degree of fault.

3. *Damages.* The *Gertz* Court made yet another dramatic change in the common law. The Court held that states may not permit recovery of either presumed or punitive damages unless knowledge of falsity or reckless disregard of the truth is proven.[189] Finding that "the largely uncontrolled discretion of

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[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* at 351–52. Using this analysis, the Court found that plaintiff, although long active in community and professional affairs and consequently well-known in some circles, had not achieved such general fame that he should be classified a public figure for all purposes and in all contexts. The Court found further that plaintiff's participation in the issue was related solely to his representation of a private client. He had not even discussed the litigation with the press and had otherwise kept a low profile. Since he had neither thrust himself into the public limelight nor engaged the public's attention in an attempt to influence its outcome, the Court found that plaintiff could not even be characterized as a public figure for the particular controversy.

[187] *See* discussion of common law damages, *supra* notes 127-29, and corresponding text.

[188] 418 U. S. at 348. Justice White read the Court as implying that those statements that did not make the "substantial danger to reputation" test would be subject to the *New York Times* actual malice standard. *Id.* at 389 n. 27 (White, J., dissenting).

[189] *Id.* at 349.

juries to award damages where there is no loss" may "inhibit the vigorous exercise of First Amendment freedoms [,]" the Court considered it "appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved."[190] The Court, therefore, restricted recovery in cases devoid of actual malice to compensation for actual injury. Actual injury, however, is not confined to out-of-pocket loss or to "special damages" in the traditional defamation sense:[191]

> Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.[192]

Hence, where the *Gertz* holding applies, private plaintiffs are only allowed to recover such actual damages as can be justified under the evidence to compensate for actual injury. Absent proof of *New York Times* malice, the common law presumption of general damages for injury to reputation in cases of defamation *per se* is constitutionally unacceptable.

The ramifications of the *Gertz* "actual injury" requirement are not wholly clear. Although the term implies tangible harm, the Court, by not requiring the plaintiff to present evidence "which assigns an actual dollar value," may be considered to have left the common law concept of what constitutes general damages virtually intact.[193] Under this view, the only significant alteration to recovery in defamation is that the plaintiff must, as in other actions for negligent harm, plead and submit proof that general damages were incurred rather than rest on a common law presumption.

A notable aspect of the *Gertz* decision is that the Court appears willing to permit recovery by a suit in defamation for "actual injury" to plaintiff's mental calm without requiring a showing of the adverse effects that the statement's publication would have on the plaintiff's reputation in the eyes of others. If recovery for mental distress can thus be redressed independently, the tort of defamation appears to have undergone a rather startling metamorphosis. Presumed damages were originally designed to redress injury to reputation that were considered to flow necessarily from the publication of the defamatory matter to third persons. Mental distress was only a "parasitic" damage to the injury to reputation otherwise presumed from the publication; the key was always the possible adverse effect of the statement's publication on the plaintiff's reputation in the eyes of others. Under *Gertz*, however, the presumption of injury to reputation disappears and a plaintiff may recover independently for emotional distress without ever establishing that an injury to reputation in fact occurred. While this two-headed animal may be a way of recovering in jurisdictions which do not exhibit a strong interest in independently redressing injury caused by the negligent infliction of emotion distress, in Hawaii such a

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[190] *Id.*

[191] *See* discussion of special damages, *supra* notes 101 and 102, and corresponding text.

[192] 418 U. S. at 350.

[193] Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 1 MINN. L. REV. 645, 670 (1977).

redefinition of defamation would appear to be merely duplicative.[194] It is apparent from *Time, Inc. v. Firestone*,[195] however, that if a state is so inclined, the Supreme Court will not hesitate to uphold the decision.

In *Firestone*, plaintiff withdrew her claim for damage to reputation on the eve of trial. On appeal from an award of damages for mental anguish to plaintiff, the Supreme Court had no difficulty in finding and upholding a proper cause of action for defamation:

> Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in *Gertz*. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.[196]

C. Time, Inc. v. Firestone

In *Firestone*, the plaintiff Mary Alice Firestone, a prominent member of Palm Beach society, brought a suit in defamation against *Time* for erroneously reporting the grounds on which her divorce was granted. Although the Florida Supreme Court had characterized the plaintiff's divorce as a "cause célèbre," the United States Supreme Court refused to classify Firestone as a public figure, reasoning that the plaintiff had not voluntarily thrust herself into a public controversy nor in any event was this the sort of "public controversy" envisioned by *Gertz* to create public figure status.

1. *Voluntariness.* In *Gertz*, the Court had acknowledged that in rare instances a person could achieve the status of a public figure "through no purposeful action of his own,"[197] by somehow being "drawn into a particular public controversy."[198] The Court's analysis in *Firestone*, however, appeared to find significant the fact that in order to obtain a divorce the plaintiff had necessarily rather than voluntarily instituted the court proceedings. In stressing a part of the *Gertz* decision which recognized as public figures those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,"[199] and in expressing a concern that individuals "drawn into a public forum largely against their will" should not lose the protection they would otherwise have,[200] the *Firestone* Court appears to have made voluntariness a prerequisite to attaining the status of a public figure.

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[194] Hawaii has been in the forefront of states amenable to redressing injury caused by the negligent infliction of emotional distress. *See* Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970). *But cf.* Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 532 P.2d 673 (1975).

[195] 424 U. S. 448 (1976).

[196] *Id.* at 460.

[197] 418 at 345.

[198] *Id.* at 351.

[199] 424 U. S. at 453.

[200] *Id.* at 457.

2. *Public Controversy.* The Court refused to find that the dissolution of marriage through judicial proceedings qualified as a "public controversy" such that Firestone had become a public figure under the *Gertz* standard. Although the Court acknowledged that "the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public,"[201] Justice Rehnquist, writing for the Court, refused to equate "public controversy" with "all controversies of interest to the public."[202] In reasoning that "[t]he details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*,"[203] the Court has indicated that reputational interests will only be subjugated if a "sufficient" public interest can be identified.[204] Even though the *Firestone* Court ostensibly holds to a public figure analysis, the Court appears willing to use a public interest analysis *sub rosa* in arriving at that determination.[205]

III. WHERE HAWAII STANDS

A. Private Individual, Public Interest

In Cahill v. Hawaii Paradise Park Corp.,[206] decided by the Hawaii Supreme Court after *Gertz* and before *Firestone*, the Court dealt extensively with the possible applicability of a public interest test to defamation actions involving private persons. Recognizing that the United States Supreme Court in *Gertz* had given it the opportunity to enlarge the protections granted to publishers and broadcasters by requiring more than mere negligence, the court, after studied analysis, declined the offer.

Referring to its decision in *Aku v. Lewis*,[207] the court noted that although the allegedly fraudulent ticket solicitation was apparently a matter of public concern, the court had not considered it then appropriate to announce a rule which would protect the broadcaster from liability for negligence.[208] The court found significant that it had developed in *Aku* the following rationale adopting the standard of reasonable care: "[We] conclude that it is in society's interest in these circumstances to make defaming publishers less willing to speak due to the risk of being found negligent."[209] The court reasoned that "the orderly

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[201] *Id.* at 454.

[202] *Id.*

[203] *Id.* at 457. The Court thus refused defendant's suggestion that the *New York Times* privilege should be extended to all reports of judicial proceedings, finding that Cox Broadcasting Corp. v. Cohn, 420 U. S. 469 (1975) (which had held that the Constitution precludes states from imposing civil liability based upon the publication of truthful information contained in official court records open to public inspection), provided adequate protection to the legitimate public interest in accurate reports of judicial proceedings. *See* notes 88 and 89, *supra*, and corresponding text.

[204] Apparently an interest more directly concerned with the "central meaning" of the first amendment as defined in *New York Times*, discussed *supra*. *See* Note, *Public Figures, Private Figures and Public Interest*, 30 STANFORD L. REV. 157, 181–88 nn. 145–59 and corresponding text (1977).

[205] *See* the excellent discussion of this thesis, *id.* at 175–79.

[206] 56 Haw. 522, 543 P.2d 1356 (1975).

[207] 52 Haw. 366, 477 P.2d 162, discussed *supra* at pp. 91–93.

[208] 56 Haw. at 533, 543 P.2d at 1364.

[209] *Id.*, quoting Aku v. Lewis, 52 Haw. at 378, 477 P.2d at 169.

development of the law of defamation [,] with the consistent basic rationale"[210] would thus militate against departure from the negligence standard it had announced in *Aku*.[211] The Court further found it difficult to read in the Hawaii Constitution, "using substantially identical words to define the constitutional protection of speech and press," a purpose to effect "a more substantial limitation upon the liability of the news media than does the First Amendment."[212]

The court criticized the *Rosenbloom* concern with self-censorship of the media as "founded on the intuitive finding of the Justices, unaided by any empirical evidence."[213] Considering itself an inappropriate body to develop empirical evidence to confirm or refute the *Rosenbloom* plurality, and not being referred to any instance where such self-censorship had occurred, the court therefore refrained from announcing any change in the standard of liability to private individuals declared in *Aku*, "reserving the question for further consideration when and if it is presented to us in a manner which satisfies the concerns just expressed."[214]

Although the court thus rejected the public interest test as not required by the Hawaii Constitution, by Hawaii case law, or by general principle, and moreover as difficult to apply,[215] the court indicated that public interest criteria may still be considered indirectly in applying the negligence standard. Quoting a tentative draft of the Restatement of Torts[216] as "suggestive and useful,"[217] the court apparently would consider "the nature of the interests which the defendant was seeking to promote by publishing the communication" in determining whether the publisher was guilty of negligence.

B. Outlook

In defamation actions, Hawaii appears to be a decidedly pro-plaintiff state. All libel is apparently treated as actionable *per se*.[218] Executive officials and attorneys in judicial proceedings are not shielded by the absolute privileges available in other jurisdictions.[219] Conditional privileges appear to be available only if there exists a common, corresponding interest between the defendant publisher and the recipient.[220] And in *Cahill*, the court refused to extend the *New York Times* rule to issues of public interest or concern.[221] Nonetheless

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[210] 56 Haw. at 534, 543 P.2d at 1364.

[211] The issue of negligence in *Aku* only arose in connection with the inquiry into abuse of a qualified privilege. Until *Cahill*, the court had never approved a fault standard with respect to the prima facie case.

[212] 56 Haw. at 534–35, 543 P.2d at 1365.

[213] *Id.* at 536, 543 P.2d at 1366.

[214] *Id.* The court may be receptive to arguments and data on self-censorship such as presented in Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 22 (1975).

[215] 56 Haw. at 536, 543 P.2d at 1366.

[216] RESTATEMENT (SECOND) OF TORTS (Tentative Draft No. 21, 1975), at §580B, comment g. Section 580B, comment g, of the Tentative Draft has subsequently been adopted and promulgated by the American Law Institute as §580B, comment h, of the RESTATEMENT (SECOND) OF TORTS, *supra* note 26.

[217] 56 Haw. at 537 n. 7, 543 P.2d at 1366 n. 7.

[218] *See* discussion of libel, *supra* at pp. 96–99.

[219] *See* discussion of absolute privileges, *supra* at pp. 87–90.

[220] *See* discussion of conditional privileges, *supra* at pp. 91–93.

[221] *See* discussion of *Cahill*, *supra* at pp. 109–10.

Hawaii must, under the *Gertz* decision, require some showing of fault in granting a recovery for injury to reputation. And herein lies the difficulty.

As previously discussed, once a private plaintiff passes the negligence barrier, damages on a large variety of grounds are recoverable. If the plaintiff cannot establish negligence, however, his reputation will likely not be vindicated despite the fact that much damage may have been done to his good name by the publication of a false statement.

It probably will be of little consolation to the injured person to point out that he could attempt to counter the defamatory publication with a publication of his own.[222] Such untried possibilities as declaratory relief[223] or a suit strictly for nominal damages[224] are not likely to be any more reassuring.

Whatever may be the unfortunate effect on a person whose injured reputation cannot be vindicated, however, the Supreme Court will apparently continue to require that such occasional sacrifices be made in the name of free speech and press. Considering the major adjustments that have been made to the law of defamation in the years since *New York Times*, however, it is highly unlikely that the balance presently struck between reputation and the weightly protections of the First Amendment will remain undisturbed for long.

For now, one may attempt to convince the Hawaii courts that strict liability should still obtain where injury has been caused by a non-media defendant.[225] Although the Hawaii Supreme Court might reject any further addition to the variety of standards now operational in the law of defamation, the court has traditionally been tender to the reputation of its citizens, and such an argument may therefore not be entirely lost.

Susan Kee-Young Park

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[222] Self help may be expensive. Although "right to reply" statutes are apparently unconstitutional under Miami Herald Publishing Co. v. Tornillo, 418 U. S. 241 (1974), it may be still permissible to enact a statute which requires publication of a retraction. *See* Comment, *Reply and Retraction in Actions Against the Press for Defamation: The Effect of Tornillo and Gertz*, 43 FORDHAM L. REV. 23 (1974).

[223] *See* RESTATEMENT, *supra* note 27, at ch. 27, *Special Note on Remedies for Defamation other than Damages.*

[224] *Id.* at §621, comment b, and §620, comment c.

[225] There has been considerable discussion on the issue of whether *New York Times* and its progeny are or should be limited in effect to media defendants. *See* discussion in Robertson, *Defamation and The First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 4 TEXAS L. REV., 199 (1976).

ELECTIVE SHARE UNDER HAWAII'S UNIFORM PROBATE CODE

INTRODUCTION

Until July 1, 1977, the effective date of Hawaii's Uniform Probate Code,[1] statutory provisions of dower and curtesy governed a surviving spouse's interest in the decedent's realty.[2] Organizationally and substantively patterned after the Uniform Probate Code,[3] Hawaii's Uniform Probate Code is the outgrowth of a proposed draft prepared by the Hawaii Probate Code Revision Committee pursuant to legislative mandate.[4] Cognizant that dower both encumbers title[5] and provides inadequate protection for surviving spouses in a society where realty no longer constitutes the primary source of wealth, the U.P.C. draftsmen replaced dower and curtesy with the right of a surviving spouse, either male or female, to elect a one-third share of the decedent's estate.[6] This right to an elective share is embodied in section 2-201 of the U.P.C.[7], which provides as follows:

> (a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the *augmented estate* under the limitations and conditions hereinafter stated.
>
> (b) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.[8]

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[1] HAW. REV. STAT. ch. 560 (1976).

[2] HAW. REV. STAT. §§533-1, 533-16 (1976).

[3] UNIFORM PROBATE CODE (1974 ed.). The Uniform Probate Code's official text, prepared by the Joint Editorial Board for the Uniform Probate Code, was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in August, 1969. UNIFORM PROBATE CODE at III [hereinafter cited as U.P.C.].

Hawaii's version of the U.P.C. reflects such a substantial modification of the U.P.C. that Hawaii is not considered by some to be a U.P.C. state. *See* Wellman, *Hawaii's Not a UPC State*, UPC NOTES, No. 17 (1976). To date, there are approximately fourteen states which have substantially adopted the Uniform Probate Code: Alaska, Arizona, Colorado, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. Indiana, New Jersey, Pennsylvania and Wisconsin are considered quasi-U.P.C. states and are included in this number. *See generally* UPC NOTES, Nos. 1-22 (1972-1978).

[4] The Uniform Probate Code (Hawaii), Proposed Draft, 1972, Judicial Council of Hawaii Probate Code Revision Project; *see* Act 128, 1970 Haw. Sess. Laws 245.

[5] Although a husband could convey, devise or otherwise alienate his property during his lifetime, unless his wife joined in the conveyance or released her dower interest in the property, the grantee or devisee of the property took subject to the wife's dower interest. This constituted an encumbrance upon title to such property. *See* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS §29 (2d ed. 1953) [hereinafter cited as ATKINSON].

[6] U.P.C. §2-201 [Right to Elective Share], Comment; U.P.C. §2-113 [Dower and Curtesy Abolished], *supra* note 3.

[7] When preceded by "560" (*e.g.* section 560:2-201), section numbers in text refer to Hawaii's Uniform Probate Code, HAW. REV. STAT. ch. 560 (1976); when not so preceded, section numbers refer to the Uniform Probate Code, U.P.C. *supra* note 3.

[8] U.P.C. §2-201, *supra* note 3 (emphasis added).

This provision was adopted verbatim by the Hawaii legislature with a singular exception—the substitution of the words "net probate estate" for "augmented estate."[9]

Not long after the U.P.C. was adopted in Hawaii, a problem arose with respect to section 560: 2-201(b).[10] The application of the law of a decedent's domicile, which this subsection appeared to sanction, generated concern among attorneys, title companies and escrow companies that dower and curtesy had not, in fact, been entirely banished, but lurked in the wings, ready to enter Hawaii from those states still retaining dower.[11] It was feared that title to Hawaii realty would be encumbered as a result of this provision.

To dissipate the prevailing uncertainty as to a surviving spouse's right to the Hawaii realty of a nondomiciliary decedent, the Hawaii legislature amended section 560:2-201(b) of the Hawaii Revised Statutes on May 24, 1978, to its present form:

> If a married person not domiciled in this State dies possessed of any right, title or interest in or to real property located in this State, including interests under agreement of sale, title to such right, title or interest shall vest, and, the right, if any, of the surviving spouse to take an elective share in such right, title or interest, shall be governed, by the laws of this State. If a married person not domiciled in this State dies, the right, if any, of the surviving spouse to take any elective share in any property other than those described in the immediately preceding sentence is governed by the law of the decedent's domicile at death.[12]

Thus, the elective share interest of a nondomiciliary decedent's surviving spouse in Hawaii realty is now governed by Hawaii law. Conversely, the equivalent elective share interest in any other property is governed by the law of the decedent's domicile. This, the legislature maintained in the legislative history of the 1978 amendment, had always been its intent.[13]

While this amended provision applies to nondomiciliary decedents dying after May 24, 1978, the question of what law governs the property of those who died between July 1, 1977, the original effective date of section 560:2-201(b), and May 24, 1978, the date of the amendment, still remains unanswered. Although Hawaii's Uniform Probate Code generally became effective on July 1, 1976, the Hawaii legislature postponed the effective date of certain provisions, including section 560:2-201, until July 1, 1977 to enable courts, attorneys and professional fiduciaries to prepare adequately for and adapt to the new laws and procedures.[14] Arguably, the surviving spouse of such a decedent dying

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[9] HAW. REV. STAT. §560:2-201 (1976). The ramifications of this substitution are discussed at 116 *infra*.

[10] U.P.C. §2-201(b), quoted above, appears to require that another state's laws govern the disposition of Hawaii property owned by a nondomiciliary decedent at his death. U.P.C. §2-201(a) and its Hawaii counterpart, HAW. REV. STAT. §560:2-201(a) (1976), do not pose the problem since the right conferred by these provisions is specifically defined (*e.g.*, one third of the augmented estate) and not left to the law of the decedent's domicile at death.

[11] *See* Larsen, *A Question on UPC Property Rights*, 14 HAW. B. NEWS 2 (1977); Epling, *Dower and Curtesy Rights Abolished But Hardly Dead*, PAC. BUS. NEWS, July 11, 1977, at 1, col. 3-5.

[12] Act 123, 1978 Haw. Sess. Laws 209, 210 (emphasis in original).

[13] Conf. Comm. Rep. No. 33-78, 9th Leg., 2d Sess. (1978), Senate Journal (Hawaii), Reg. Sess. 1978, at 7680.

[14] *See* HAW. REV. STAT. §560:8-101 (1976); Conf. Comm. Rep. No. 24-76, 8th Leg., 1st Sess., 41 (1976), Senate Journal (Hawaii), Reg. Sess. 1976, at 872.

between July 1, 1977 and May 24, 1978 could claim by virtue of section 2-201(b) a dower interest in Hawaii realty through the law of the domiciliary state, notwithstanding Hawaii's abolition of dower as of July 1, 1977.

The purpose of this note is to clarify the meaning and operation of Hawaii's elective share statute in its original and amended forms and to discuss the statute's strengths and shortcomings. Because Hawaii's elective share provision is unique among those states which have adopted the Uniform Probate Code, an assessment of its merits will be furthered by contrasting Hawaii's provision with that of the U.P.C. and with prior Hawaii law.

I. Dower and Curtesy (Prior to July 1, 1977)

Largely mirroring the common law,[15] Hawaii's dower statute provided that "[e]very woman shall be endowed of one-third part of all the lands owned by her husband *at any time during marriage*, in fee simple, in freehold, or in leasehold, unless she is lawfully barred thereof."[16] In marked contrast to dower, Hawaii's curtesy statute conferred upon the surviving husband a life interest in one-third of the realty and an absolute interest in one third of all remaining property owned by his wife not "at any time during marriage" but at the date of her death.[17]

Designed to protect the surviving spouse against disinheritance, common law dower and curtesy rights could not be defeated by devise; neither were they subject to the decedent's debts.[18] Presently, statutory dower and curtesy, which, analogous to the common law, granted to the surviving spouse a life interest in one-third of the decedent's real property, have been abolished in most states and replaced with a fractional fee interest in the decedent's property, both real and personal.[19]

Until the adoption of the U.P.C., Hawaii was one of a minority of jurisdictions in which dower constituted a significant source of estates for life.[20] Under Hawaii's statutory dower provision, a widow was endowed with a one-third life interest in any real property owned in fee simple, freehold or leasehold by her husband during their marriage.[21] This dower provision applied to such realty

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[15] Common law dower entitled a wife to a life estate in one-third of the lands of which her husband was seised during coverture. Atkinson, *supra* note 5.

[16] Haw. Rev. Stat. §533-1 (1968 & Supp. 1970) (amended 1977) (emphasis added). Having undergone various amendments, Hawaii's dower statute has not always endowed a widow with an interest in leasehold property. Prior to 1939, however, a wife's dower interest did include all real property owned by her husband for a term of fifty years or more, provided that twenty-five years of the term remained unexpired. Revised Laws of Hawaii §4830 (1935) (amended 1939, Act 33 §1).

[17] Haw. Rev. Stat. §533-16 (1976).

[18] Atkinson, *supra* note 5, §§29-30.

[19] *Id.*

[20] R. Powell, The Law of Real Property ¶213 [1], at 170.16-.17 (1977).

[21] Although Haw. Rev. Stat. §533-1 (1976), unlike the curtesy statute (Haw. Rev. Stat. §533-16), did not specify whether a wife was endowed with a life interest or an interest in fee, dower was a life interest only. Valentin v. Brunette, 26 Haw. 417 (1922).

> There can be no doubt that in this jurisdiction the statutory interest by way of dower secured to the widow is an interest *for and during the remainder of her life only*, in one-third of the property mentioned.... A widow purely as dowress has no fee simple title to any of the lands of her husband. When she elects to take under the statute instead of under the will the interest which she so takes is a life interest only.

Id. at 421 (emphasis in original) (citations omitted).

owned by her husband not only at the moment of his death, but also at any time during marriage. This interest remained inchoate[22] or nonpossessory during marriage and ripened into a vested right only when a husband predeceased his wife. Where a wife predeceased her husband, her dower interest was extinguished.

Although the legislature supplanted dower with a right to an elective share, it preserved inchoate dower which had accrued prior to July 1, 1977, the effective date of the elective share provision.[23] Rather than deleting the statutory dower provision, the legislature amended it as follows:

> §533–1 Dower. Every woman shall be endowed of one-third part of all the lands which are not included in the net estate of her husband which is subject to her elective share and which were owned by her husband in fee simple, in freehold, or in leasehold at any time during marriage, *and prior to July 1, 1977*, unless she is lawfully barred thereof.[24]

The legislative history accompanying the amended statute[25] further elucidates the extent to which dower rights may be asserted under Hawaii's Uniform Probate Code:

> [T]he widow's dower interest exists only if two conditions are met: (i) the property was owned by her husband before July, 1977, and (ii) the property is not part of his probate estate. If the property is part of the probate estate, the widow's claim against it is by way of her elective share. Thus, the only instances after July 1, 1977, in which the widow will be asserting her dower interest will be in cases where pre-July 1, 1977 property owned by the husband was conveyed without securing a release of dower from the wife.[26]

The foregoing explanation manifests a conscious desire to circumscribe narrowly the instances in which dower rights will be allowed after July 1, 1977.

Unlike the dower provision, Hawaii's curtesy provision, section 533–16 of the Hawaii Revised Statutes (1976) was not modified upon the advent of the U.P.C. Because a husband's curtesy interest was confined to realty owned by his wife at the date of her death, a husband had no inchoate curtesy rights during her life.[27] In the absence of inchoate curtesy rights, clear title to property transferred by a wife during marriage could be conveyed without a "curtesy release." This fact obviated the type of statutory modification required to preserve inchoate dower interests. With the adoption of the U.P.C., the curtesy statute was, therefore, neither altered nor expunged, but merely restricted in its application. Section 560:8–102(18) of the Hawaii Revised Statutes, however, indicates that section 533–16 is applicable only to rights accrued prior to July 1, 1977; the rights of a surviving spouse after June 30, 1977 are governed by

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[22] An inchoate interest has been defined as "[a]n interest in real estate which is not a present interest, but which may ripen into a vested estate, if not barred, extinguished, or divested." BLACK'S LAW DICTIONARY 904 (rev. 4th ed. 1968). A wife's inchoate dower interest can be relinquished if she joins her husband in signing a deed, mortgage or lease. ATKINSON, *supra* note 5.

[23] *See* p. 113 *supra*.

[24] HAW. REV. STAT. §533–1 (1976 & Supp. 1978) (emphasis added).

[25] Conf. Comm. Rep. No. 36–77, 9th Leg., 1st Sess. (1977), Senate Journal (Hawaii), Reg. Sess. 1977, at 861.

[26] *Id.*

[27] HAW. REV. STAT. §533–16 (1976). "During the life of the wife the husband shall have no curtesy right inchoate or otherwise in the wife's property." *Id.*

Hawaii's Uniform Probate Code.[28] If, for example, a wife died on or after July 1, 1977, her widower would be entitled not to curtesy but to an elective share.

II. ELECTIVE SHARE: JULY 1, 1977 TO MAY 24, 1978

The elective share system was designed by the U.P.C. draftsmen to protect the spouse of a decedent domiciled in a common law jurisdiction against spousal disinheritance.[29] Accordingly, the U.P.C. provision not only expands a spouse's protection by reaching all real and personal assets owned by the decedent at death, but takes into account "donative transfers by will and will substitutes which would deprive the survivor of a 'fair share' of the decedent's estate."[30]

Eliminating gender distinctions with regard to marital interests, the elective share statute uniformly applies to either surviving spouse. Under the U.P.C. and in most states which have abolished dower, the surviving spouse may elect to reject the provisions of the decedent's will and take a statutory share of the decedent's probate estate. Such an election is to be distinguished from intestate succession,[31] under which a surviving spouse and other relatives are statutorily entitled to a portion of the decedent's estate in the event the decedent dies without a valid will.

Any attempt to create order out of the confusion arising from section 560:2-201(b) as originally enacted, must include consideration of the fundamental difference between the U.P.C. provision upon which Hawaii drew and Hawaii's provision. Although at first blush that difference appears minimal—the mere substitution of the words "net estate" in the Hawaii provision for the U.P.C.'s "augmented estate"—closer scrutiny reveals salient differences regarding policy considerations, the administration of estates, and the ultimate share to which the surviving spouse is entitled. Indeed, by rejecting the augmented estate concept, Hawaii excised part of what was intended to be a complete and harmonious system.

A. U.P.C. § 2-201(a) and Section560:2-201(a) of the Hawaii Revised Statutes

To implement the purpose of protecting the surviving spouse from disinheritance and to eliminate the need for judicial doctrines identifying certain transfers by spouses as "illusory" or "fraudulent", the Code draftsmen conferred on the surviving spouse of a domiciliary decedent the right to elect a one-third share of the augmented estate, as defined in section 2-201 of the U.P.C.[32] The augmented estate is essentially the net probate estate to which is added the *value* of two types of property. First, any property, real or personal, which was transferred during marriage to a person other than the surviving spouse and

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[28] HAW. REV. STAT. §560:8-102(18) (1976); *see also* HAW. REV. STAT. §560:8-101 (1976).

[29] U.P.C. art. 2, pt. 2 [Elective Share of Surviving Spouse], General Comment, *supra* note 3.

[30] *Id.*

[31] *See* U.P.C. §2-101 [Intestate Estate], §2-102 [Share of the Spouse], *supra* note 3; HAW. REV. STAT. §§560:2-101, 560:2-102 (1976).

[32] For a detailed explanation of the augmented estate concept, *see* U.P.C. §2-202 and Comment, *supra* note 3.

which served essentially as will substitutes[33] of the decedent, or over which he might have retained continued benefits or control, is added to the net probate estate. Second, the value of any property of the surviving spouse which derived from the decedent[34] is included in the augmented estate. Examples of the first category are stocks and securities which the decedent transferred to a relative on his deathbed; the second category would include a home which a husband purchased in his wife's name with his earnings, and systematic, substantial gifts to her throughout the years. Thus, the augmented estate concept protects not only widows and widowers from disinheritance, but also the decedent from a surviving spouse's possible desire to take more than a "fair share."[35] Section 2-201(1) of the U.P.C., however, provides that any transfer made with the surviving spouse's written consent or joinder is excluded from the augmented estate.[36]

A significant feature of the augmented estate concept, as described in section 2-202 of the U.P.C., is that the surviving spouse does not take a proportionate share in a particular asset, but receives a one-third interest in the dollar value of the augmented estate. The actual amount to which the surviving spouse is entitled is then determined by reducing the value of the one-third interest by the value of any property

> which passes or has passed to the surviving spouse by testate or intestate succession or other means and which has not been renounced . . . .
>
> (b) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.[37]

Given the relative complexity in computing the "augmented estate," the Hawaii Probate Code Revision Committee opted for an elective share of the "net estate," that is, the estate "which would, in the absence of the surviving spouse's election under section 560:2-205, be disposed of by the decedent's will or by intestate succession, reduced by all enforceable claims as specified in section 560:3-805."[38] Despite the assurances of the Code draftsmen that the

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[33] Transfers deemed to be will substitutes under U.P.C. §202, *supra* note 3, are essentially transfers of property by the decedent during marriage to someone other than his wife and for less than adequate and full consideration in money or money's worth. This includes transfers made within two years of the decedent's death to the extent that the aggregate transfers to any one donee in either of the years exceed $3,000, the amount of the annual gift tax exclusion, and transfers whereby property is held jointly and with right of survivorship by the decedent and another at the time of his death. *See* U.P.C. §2-202(1), *supra* note 3.

[34] *Id.*

[35] U.P.C. §2-202, Comment, *supra* note 3.

> The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and (2) to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other non-probate arrangements.

Id.

[36] U.P.C. §2-201(1), *supra* note 3.

[37] U.P.C. §2-207 [Charging Spouse With Gifts Received; Liability of Others for Balance of Elective Share], *supra* note 3.

[38] HAW. REV. STAT. §560:2-202 (1976).

augmented share system, albeit apparently complex, should not complicate the administration of a spouse's estate in most circumstances,[39] the Hawaii Probate Code Revision Committee felt that the augmented estate provision would entail "increased administrative work for the surviving spouse, personal representative, and their attorneys as they attempt to determine what assets comprise the augmented estate. The major problems will probably arise in identifying the interspousal transfers that must be included in the augmented estate."[40]

Thus, the Hawaii scheme does not protect the surviving spouse of a decedent domiciled in Hawaii from disinheritance through will substitutes as does the augmented share concept; neither, however, does the Hawaii scheme prevent a spouse who has already received property from the decedent through lifetime transfers, joint tenancy assets and other nonprobate arrangements, from electing one-third of the net probate estate.

B. Section 2-201(b) of the U.P.C. and Section 560:2-201(b) of the Hawaii Revised Statutes

Hawaii's section 560:2-201(b) was first adopted verbatim from the U.P.C. by the Hawaii legislature. It states: "If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death."[41] This sentence has raised by far the most nettlesome issue in this analysis of Hawaii's section 560:2-201(b), as originally enacted: Is the right of the surviving spouse of a nondomiciliary decedent to take an elective share in Hawaii realty governed by Hawaii law or by the law of decedent's domicile at death?

Some particularized problems stemming from this unsettled issue are the following: (1) under section 560:2-201(b), could dower or some unfamiliar statutory provision for the disposition of realty followed in a foreign jurisdiction encumber title to Hawaii realty?;[42] and (2) would section 560:2-201(b) leave those involved in property conveyances in perpetual uncertainty as to when a spouse's joinder in a lease, deed or mortgage is required? A discussion of the situs rule as it relates to marital property interests will facilitate an understanding of the problems posed by section 560:2-201(b).

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[39] U.P.C. art. 2, pt. 2, General Comment, *supra* note 3.

> Some of the apparent complexity arises from Section 2-202, which has the effect of compelling an electing spouse to allow credit for all funds attributable to the decedent when the spouse, by electing is claiming that more is due. This feature should serve to reduce the number of instances in which an elective share will be asserted.

Id.

[40] The Uniform Probate Code (Hawaii), Proposed Draft, 1972.

[41] HAW. REV. STAT. §560:2-201(b) (1976). Judicial Council of Hawaii Probate Code Revision Project 54.

[42] It should be presumed that the law of the decedent's domicile will be restricted to forms of dower, curtesy or community property. A decedent may at the date of death be domiciled in a foreign country (e.g. France) whose concepts regarding the disposition of property may include statutory protection of offspring as well as spouses. *See* P. BERTHÉLEMY *et al.*, LA VIE JURIDIQUE DES PEUPLES, III. FRANCE §V (1933); F. LAWSON, A. ANTON, & L. BROWN, INTRODUCTION TO FRENCH LAW, ch. 13, 14 (3d ed. 1967). On the *renvoi* problem in international situations, *see* In re Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652 (Sup. Ct. N.Y. 1950). *See* notes 46 & 47 *infra* and accompanying text for a general discussion of the *renvoi* problem.

1. *The Situs Rule.* The peripatetic lifestyle of the modern couple has heightened the need for conflict of laws analysis in the field of inheritance and succession. Whether attracted to other states by job opportunities, tax benefits, climate, or retirement communities, an ever-increasing number of couples, at some point in their lives, are purchasing property in one state and later moving to another. Conflict of laws principles also affect nonmigrating spouses who live and die in one jurisdiction, but purchase property in another, whether for investment, speculative, or recreational purposes. What law governs is a critical determination for the surviving spouse of a decedent with multistate assets. If, for example, a couple is domiciled in an elective share state but purchases a home in a dower state and a condominium in a state with neither dower nor elective share, what law governs the surviving spouse's rights and interests in those properties?

Answers to such questions are found in the long-standing conflict of laws doctrine of *lex loci rei sitae*,[43] commonly known as the "situs rule," according to which the law of the situs of the realty governs marital property interests of the survivng spouse in that realty.[44] These interests include rights to dower and curtesy, and to elective and forced shares.[45] The situs rule does not mean that the rights of the surviving spouse of a nondomiciliary decedent will always be identical to those of a domiciliary decedent since the state of the situs of the realty may defer to the law of the decedent's domicile or provide otherwise.

An unresolved question is what role the conflict of laws doctrine of *renvoi*[46] plays when the state in which the property is situated defers to the law of the decedent's domicile in determining the surviving spouse's interest in that property and the law of the domicile defers to the law of the property's situs. If State A, where the property is situated, looks to the law of "decedent's domicile," State B, is the reference to: 1) the "internal" law of State B, that is, the law that would be applied to a purely domestic case, or 2) to the "whole" law of State B, including State B's conflict of laws rules? If the reference is to the "whole" law of State B, State B's choice of law rule may refer the court back to the law of State A, where the property is situated, thereby invoking the doctrine of *renvoi*. If so, the cycle of references back and forth will not terminate unless one state accepts the *renvoi*.[47]

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[43] "The law of the place where the land is situated." In re Grayco Land Escrow, Ltd., 57 Haw. 436, 450, 559 P.2d 264, 274 (1977).

[44] *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§241-242 (1971); H. GOODRICH & E. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS §122 (4th ed. 1964) [hereinafter cited as GOODRICH & SCOLES]; R. LEFLAR, AMERICAN CONFLICTS LAW §§194-196 (2d ed. 1968); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 296-338 (1971).

[45] The term "forced share" as employed in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §242, Comment a (1971), refers to "the share, normally a specified percentage of the decedent's estate, which the surviving spouse has the right to claim against the provisions of the will." For all practical purposes, "forced share" is synonymous with elective share.

[46] The much debated problem of *renvoi* has been described as "nothing more than the question whether the whole law including its conflict of laws or the internal law of a foreign state is looked to for solution when a release is made to the law of another state." GOODRICH & SCOLES, *supra* note 44, §10.

[47] For an overview of the *renvoi* doctrine, see GOODRICH & SCOLES, *supra* note 44, §10; Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938).

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS §8 (1971) basically provides that "[w]hen directed by its own choice-of-law rule to apply 'the law' of another state, the forum applies the local law of the other state...."

One author concedes "the almost mystical acceptance of the law of the situs of real estate as the proper law to be applied in deciding all matters concerning realty . . . " and characterizes it as "the most monolithic of all choice-of-law rules."[48] Unlike conflict of laws rules in other areas of the law, this rule has emerged virtually unscathed from the various drafts and revisions of the *Restatement (Second) of Conflict of Laws.*[49]

Under the *Restatement*, both forced share interests of surviving spouses and common law and statutory dower are determined pursuant to the law of the situs of the real property.[50] The *Restatement* provides the following:

> (1) The forced share interest of a surviving spouse in the land of the deceased spouse is determined by the law that would be applied by the courts of the situs.
>
> (2) Whether a surviving spouse for whom provision has been made in the will of the deceased spouse may elect to take a forced share or dower interest in the land of the deceased spouse rather than to take under the will is determined by the law that would be applied by the courts of the situs.
>
> (c) These courts would usually apply their own local law in determining such questions.[51]

The situs rule is firmly rooted in Hawaii as well as in a majority of jurisdictions.[52] *In re Grayco Land Escrow, Ltd.*[53] involved an appeal from a decision holding taxpayers domiciled in California liable for Hawaii general excise taxes assessed against income from the sale of Hawaii realty. Affirming the decision of the Tax Appeal Court, the Hawaii Supreme Court stated:

> It is a universal principle of law that real property is exclusively subject to the law of the country or state within which it is situated. . . . Therefore, all matters concerning taxation of such realty, title, alienation, and transfer of such realty and the validity, effect, and construction which is to be accorded agreements intending to convey or otherwise deal with such realty are determined by the doctrine of *lex loci rei sitae*, that is, the law of the place where the land is located.[54]

Buttressing the situs rule in Hawaii is section 560:1-301,[55] which is identical to section 1-301 of the U.P.C.[56] and which governs the territorial application of Hawaii's Uniform Probate Code: "Except as otherwise provided in this Code, this Code applies to . . . , (2) *the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state* . . . ."[57] Although a state's law controls marital interests in all property situated within its borders, the state may nevertheless choose to defer to the law

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[48] R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 296-97 (1971).

[49] *Id.*

[50] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§241, 242 (1971).

[51] *Id.* §242.

[52] *See* In re Grayco Land Escrow, Ltd., 57 Haw. 436, 450, 559 P.2d 264, 274 (1977); Sinclair v. Sinclair, 99 N.H. 316, 317, 109 A.2d 851, 852 (1954); Pfau v. Moseley, 9 Ohio St. 2d 13, 17-18, 222 N.E.2d 639, 644 (1966); Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates*, 30 IND. L.J. 293 (1955).

[53] 57 Haw. 436, 559 P.2d 264 (1977).

[54] *Id.* at 450, 559 P.2d at 274 (citations omitted).

[55] HAW. REV. STAT. §560:1-301 (1976).

[56] U.P.C. §1-301, *supra* note 3.

[57] HAW. REV. STAT. §560:1-301 (1976) (emphasis added).

of a sister state where the disposition of such property is concerned. Thus, although section 560:1-301 states that Hawaii's Uniform Probate Code applies generally to Hawaii realty owned by a nondomiciliary decedent, section 560:2-201(b) as originally enacted appears to defer to the law of the decedent's domicile with respect to the surviving spouse's interest in that realty.[58]

Efforts to extract the meaning of section 2-201(b) of the U.P.C. and section 560:2-201(b) of the Hawaii Revised Statutes have been hampered by the fact that "elective share" is neither defined in the Code nor explained in the Comments. Does "elective share" as employed in those two provisions refer to the U.P.C.'s elective provision or to any elective share provision? Does it include statutory dower and curtesy? It has been suggested by Professor Richard V. Wellman[59] that "elective share" refers to a minimum interest in the decedent's estate of which the surviving spouse cannot be deprived. According to this view, elective share involves a statutory election and would not include community property rights nor provisions such as "homestead allowance" and "widow's year's support" which guarantee a widow benefits regardless of the will, intestate succession or elective share.[60]

Two conflicting interpretations of section 560:2-201(b) merit discussion. The statutory language, the Code's underlying policies, and logic support the first interpretation: that the governing law is that of decedent's domicile. Yet, a second interpretation was advanced by the Hawaii legislature which maintains that it intended that Hawaii law govern all interests of a nondomiciliary decedent's surviving spouse in Hawaii realty.[61] Since there is no evidence that the amended statute operates retroactively,[62] resolution of the issue cannot be ignored since it directly concerns the surviving spouses of nondomiciliary decedents who owned Hawaii realty and who died between July 1, 1977 and May 24, 1978. Additionally, the issue of which law governs the interest of the surviving spouse of a nondomiciliary decedent in Hawaii realty may affect those persons who have or will hold title to such property.

a. View I: The Law of Decedent's Domicile Governs the Right To an Elective Share, If Any, in Hawaii Realty

Several facts support the view that, under section 560:2-201(b) of the Hawaii Revised Statutes, the state of the situs of the realty, Hawaii, looks to the law of decedent's domicile at death to determine the surviving spouse's right in Hawaii realty.[63] First, the unamended statute expressly states that this right "is governed by the law of the decedent's domicile at death."[64] No distinction between real

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[58] *See* HAW. REV. STAT. §560:1-301 (1976) and U.P.C. §2-201(b), *supra* note 3.

[59] Educational Director for the Joint Editorial Board of the Uniform Probate Code, Chief Reporter and Draftsman of the Uniform Probate Code, and Professor of Law at the University of Georgia School of Law.

[60] (Conversation with Richard V. Wellman of January 19, 1979). *See also* U.P.C. §2-401 [Homestead allowance], *supra* note 3; HAW. REV. STAT. §560:2-401 (1976).

[61] Conf. Comm. Rep. No. 33-78, 9th Leg., 2d Sess. (1978), Senate Journal Hawaii, Reg. Sess. 1978, at 768; *see* note 13 *supra* and accompanying text.

[62] HAW. REV. STAT. §2-201(b) as amended became effective on May 24, 1978. *See* p. 113 *supra*.

[63] U.P.C. art. 2, pt. 2, General Comment; U.P.C. §2-201, Comment, *supra* note 3. The law of the decedent's domicile at death applies to the decedent's Hawaii personalty as well as realty. The Comments emphasize that the elective share system embraces both real and personal property.

[64] HAW. REV. STAT. §560:2-201(b) (1976).

and personal property is made; nor is it necessary, for the Comments emphasize that the elective share system embraces both real and personal assets.

Second, this interpretation comports with the Code's underlying purposes and policies, foremost among which are the following:

> (1) to simplify and clarify the law concerning the affairs of decedents, . . . ;
> (2) to discover and make effective the intent of a decedent in distribution of his property;
> (3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;
> . . . .
> (5) to make uniform the law among the various jurisdictions.[65]

The policy of uniformity in the administration of estates is again enunciated in the General Comment to the elective share provision. "Uniformity of law on the problems covered by this Part is much to be desired. It is especially important that states limit the applicability of rules protecting spouses so that only states of domiciliary decedents are involved."[66] It has been suggested that in resolving the *renvoi* problem of whether to apply the "internal" law or the "whole" law, courts should consider the reasons for which the forum chose to refer to the law of another state in the first place.[67] The U.P.C.'s stated purposes and policies make it apparent that the U.P.C. draftsmen intended that the internal law of the decedent's domicile be applied.

The elective share provision was designed to simplify the administration of estates of decedents with multistate assets. Uniformity is achieved when all U.P.C. states defer to the law of decedent's domicile with respect to marital property interests of the surviving spouse.

> Once it is perceived that the elective share remedy was designed for use in multi-state estates, it becomes apparent that it is unnecessary and undesirable for this remedy to be controlled by the laws of more than one state. 2-201(b) obviously supports this if it is read, as suggested above, to refer successors of non-domiciliaries to the courts of the domicile for marital property rights.[68]

Thus, under View I, rather than receiving shares in realty which differ according to the realty's location, the surviving spouse takes under the law of decedent's domicile.

Assume, for example, that a person domiciled in State X, a U.P.C. state, died owning Hawaii realty on May 23, 1978, prior to the change in Hawaii law.[69] The surviving spouse would be entitled to a one-third share of the augmented estate under the law of State X. Assuming that there are sufficient assets in the augmented estate with which to satisfy the elective share, the right to such a share would create no liens on Hawaii realty since, under the augmented share concept, the spouse is entitled to a share of the dollar value and not to a one-third share of the property itself.[70]

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[65] U.P.C. §1-102 [Purposes; Rule of construction], *supra* note 3.

[66] U.P.C. art. 2, pt. 2, General comment, *supra* note 3.

[67] GOODRICH & SCOLES, *supra* note 44, §10.

[68] Wellman, *A Question About 2-201(b)*, 22 UPC NOTES 9, 9 (1978) [hereinafter cited as Wellman].

[69] *See* note 14 *supra* and accompanying text.

[70] Note, however, that under the augmented share concept, original transferees and appointees of the decedent and their donees, to the extent the donees have the property or its proceeds, are

Assume as another example that a decedent with Hawaii realty dies domiciled in State Y, a state which does not protect surviving spouses by statutory election or by dower. Under View I of section 2–201(b), Hawaii, the situs of the realty, would look to State Y's law to determine the surviving spouse's interest. There being no elective share or dower provision in State Y, in the absence of common law or other statutory rights, the surviving spouse would be entitled to nothing if he or she is disinherited. This result explains the words "if any" in section 2–201(b) since a state may feel that surviving spouses need no statutory protection.

Finally, assume that a decedent with Hawaii realty dies domiciled in South Carolina, one of the few states with statutory dower. If Hawaii law defers to the law of the decedent's state of domicile, would the surviving spouse have a dower interest in the Hawaii realty? On the one hand, it can be argued that since Hawaii indeed abolished dower and curtesy, the situs rule would prevent the entry of dower from a foreign state. On the other hand, if as it appears, the state of the situs defers to the law of decedent's domicile, absent language to the contrary, the surviving spouse has a dower interest in the real property. This latter theory was, in fact, considered by the widow of a Washington state domiciliary decedent who died seised of Montana realty.[71] Having elected to reject the will and claim her community property under Washington law, she contended that section 2–210(b) of Montana's U.P.C. meant that a Montana court should treat her claim as it had been treated under Washington's community property law. "In short, the contention was that section 2–201(b) had the effect of bringing the domicile's community property rules into Montana, so that election like that required in Washington would result."[72] This issue was not, however, judicially resolved.[73]

Wellman, who firmly rejects the notion that the U.P.C. draftsmen could have contemplated the entry of dower, curtesy or community property rules into a common law state which had abandoned them,[74] proposes an argument which could be advanced to counter any assertion that section 2–201(b) of the U.P.C. purports to give a dower interest in land located in another state.

> First, I would argue that 2-201(b) only relates to a state's elective share provisions that are congenial with local policy, including the policy of keeping land titles straight and comprehensible to local title examiners. If this argument is accepted, the local UPC section is read as not commanding local respect for the foreign dower interest that cannot be identified on the basis of local records.[75]

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subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate. U.P.C. §2–207(c), *supra* note 3.

[71] Wellman, *supra* note 68.

[72] *Id.*

[73] To this author's knowledge, this incident was never brought to court for judicial resolution. (Conversation with Richard V. Wellman of January 19, 1979).

[74] *See* Wellman, *supra* note 68.

[75] Letter from Richard V. Wellman to Patricia Y. Lee (February 8, 1979). Professor Wellman adds:

> If this argument fails and the local court concludes that dower attaches locally because of the extraterritorial effect of the laws of the decedent's domicile, I suppose that purchasers without notice would be protected. This would probably mean that no dower attached locally, except as against heirs and devisees of the decedent, unless and until some process, like lis pendens was followed to give warning to purchasers.

Id.

Logic suggests that if the U.P.C. draftsmen had intended to abolish dower, they would not have tolerated its survival in a U.P.C. state. Yet, despite its persuasive force, logic does not foreclose the possibility that the question of whether section 2–201(b) permits the entry of dower into a state which had intended to abolish it may wind its way into the courts for judicial resolution.

b. View II: The Law of Hawaii Determines the Surviving Spouse's Interest in Hawaii Realty

An alternative reading of section 560:2–201(b) is that which the Hawaii legislature purports to have intended when it originally enacted the provision. In 1978, upon amending the elective share statute, the legislature stated:

> Section 4 amends Section 560:2–201(b) to clarify that Hawaii law governs all interest in Hawaii realty. This has always been the intent of the Legislature, but attorneys for title companies have expressed the concern that the present language of §2–201(b) could be construed to have title to Hawaii realty affected by the law of decedent's domicile at death.[76]

Despite this retrospective declaration of intent, nothing in section 560:2–201(b) as originally enacted indicates that Hawaii law was intended to govern the right of a surviving spouse of a nondomiciliary decedent to an elective share in Hawaii realty. Where the statute addresses governing law, no ambiguity is apparent; that right is "governed by the law of the decedent's domicile at death."[77]

If the issue of governing law reaches the courts, it is difficult to predict the outcome of such a case in Hawaii. If the statute is deemed plain and unambiguous, the general rule of construction bars resorting to legislative history[78] so that View I would probably prevail. If, however, the statute is deemed ambiguous, the legislative history of section 2–201(b) as amended may play an important role in supporting View II. If Hawaii law governed the interest of the surviving spouse of a nondomiciliary decedent who died between July 1, 1977 and May 24, 1978, the survivor would be entitled to take an elective share of one-third of the estate located in Hawaii as would the surviving spouse of a Hawaii domiciliary decedent. If, however, the U.P.C. draftsmen had intended that the elective share interests of spouses of domiciliary and nondomiciliary decedents be identical, the statutory language of sections 560:2–201(a) and 560:

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[76] Conf. Comm. Rep. No. 33–78, 9th Leg., 2d Sess. (1978), Senate Journal Hawaii, Reg. Sess. 1978, at 768.

[77] HAW. REV. STAT. §560:2–201(b) (1976).

[78] Souder v. Brennan, 367 F. Supp. 808 (D.D.C. 1973).

> A basic canon of statutory construction is that when statutory language is clear on its face and fairly susceptible of but one construction, that construction must be given to it. Even where there is legislative history in point, albeit ambiguous or contradictory, it is unnecessary to refer to it and improper to allow such history to override the plain meaning of the statutory language. Most certainly, then, the absence of any legislative history in point should not outweigh the words of the statute.

Id. at 812–13 (footnotes omitted); National Labor Relations Board v. Plasterers' Local Union No. 79, 404 U. S. 116, 129 n. 24 (1971); United States v. Oregon, 366 U. S. 643, 648 (1961); Territory of Hawaii v. Narimatsu, 41 Haw. 398, 401 (1956); Territory of Hawaii v. Fasi, 40 Haw. 478, 484 (1954).

2–201(b) would likewise be identical. Their dissimilarity supports the better reasoned View I that, during this interim period preceding the amended statute, governing law is that of the decedent's domicile at death.

III. Elective Share After May 24, 1978

Amended on May 28, 1978,[79] section 560:2–201(b) of the Hawaii Revised Statutes[80] clearly distinguishes governing law with respect to interests, first, in real property and, second, in all other property. It somewhat resolves the thorny problem of what law governs the right of a nondomiciliary decedent's surviving spouse to an elective share in Hawaii realty owned by a decedent dying after May 24, 1978. Since the laws of Hawaii do, indeed, provide the right to take an elective share, the words "if any" in the first sentence of section 560:2–201(b)[81] are superfluous and appear to have been unintentionally borrowed from the preamended statute wherein they served an important function. In section 2–201(b) of the U.P.C., the same words give meaning to the provision's operation:

> The words "if any" in 2–201(b) are significant for they show that Code draftsmen plainly contemplated that some states might choose to do nothing for spouses of their decedents. The force of U.P.C., therefore, is merely that it demonstrates how a state may extend its spousal protection legislation to values in other states if it chooses to do so. The moral is one for the legislature of the state of domicile.[82]

The words "if any", however, are appropriate in section 560:2–201(b) where they apply to property other than realty, since, in that instance, Hawaii defers to the law of domicile.

If we assume that section 560:2–201(b) of the Hawaii Revised Statutes, as amended, is valid and applicable to nondomiciliary decedents dying after May 24, 1978, no spousal joinder is necessary to release dower in deeds, leases and mortgages. Nevertheless, a spouse's signature in property conveyances may be desirable for reasons other than release of dower, especially where the signature is easily obtained.[83] A cautious approach will mitigate the likelihood of litigation and safeguard the rights of the parties involved.

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[79] *See* note 12 *supra* and accompanying text.

[80] Haw. Rev. Stat. §560:2–201(b) (1976 & Supp. 1978).

[81] *Id.*

[82] Wellman, *supra* note 68, at 9.

[83] Securing a wife's signature eliminates the necessity of determining whether a dower interest exists. In addition to convenience, there are at least two other reasons for continuing to secure a spouse's signature in deeds, leases and mortgages. First, it protects those persons who have or will have an interest in the property from a possible claim by the widow that the provisions which supplanted dower are unconstitutional. Second, it protects such persons from claims to the property under a "constructive trust" theory.

If, for example, a husband and wife with community property funds move to a common-law jurisdiction such as Hawaii, after which the husband uses the funds belonging to both spouses under community property law to purchase property in his own name, the wife, upon his death, might claim a one-half interest in the property under a theory of "constructive trust" since the land was purchased with money which legally belonged to her. *See* Edwards v. Edwards, 108 Okla. 93, 103, 233 P. 477, 484–87 (1924); Depas v. Mayo, 11 Mo. 314, 317–20 (1848); *see generally* Goodrich & Scoles, *supra* note 44, at §122 (4th ed. 1964); Lay, *Migrants from Community Property States—Filling the Legislative Gap*, 53 Cornell L. Rev. 832, 834–35 (1968).

CONCLUSION

Despite the legislature's assertion that the underlying intent of section 560:2–201(b) was that Hawaii law would govern all interests in Hawaii realty, the statute, prior to its amendment, failed to convey this intent. It is more than likely that, by amending the elective share provision, the Hawaii legislature was not "clarifying" the law, but radically altering it. Impetus for the amendment was probably provided by fear that unencumbered title was being subverted by dower which had not been completely effaced.

Although the statute in its amended form has allayed such fears, it unfortunately at the same time subverts the underlying purposes of the U.P.C., Hawaii's Uniform Probate Code, and the elective share system. To the extent that the interest of the surviving spouse of a nondomiciliary decedent in Hawaii realty is governed by the law of Hawaii, which no longer defers to the domiciliary state, the stated goals of uniformity, simplicity, and clarity are not achieved. If, for example, the spouse of a person domiciled in a U.P.C. state dies with multistate assets which include real property in Hawaii, he or she will take a one-third share of the *augmented estate* located in his own and other U.P.C. jurisdictions and one-third of the *net estate* locate in Hawaii.

If the primary motivating force behind the statute's amendment was concern that dower could still encumber title to Hawaii realty, and if the Hawaii legislature did not seek to undermine the purposes and policies of the U.P.C., it should reinstate section 2–201(b) of the U.P.C. and provide statutorily that in no instance shall dower enter Hawaii by way of another jurisdiction. To prevent the importation of any exotic concepts of disposition from foreign countries, deference to the law of the other jurisdiction could be statutorily restricted to American common-law states. Moreover, "elective share" should be defined for purposes of clarity and the augmented share concept should be reconsidered.

Changes in the elective share statute proposed by this note may provide a more equitable scheme and would further the Code's policy of simplicity in the administration of decedents' estates. The merits of such changes, however, must be balanced against Hawaii's particular interests such as the disposition of land situated within its boundaries and facility in determining what comprises a decedent's estate for elective share purposes.

Patricia Y. Lee

THE TORT OF INVASION OF PRIVACY IN HAWAII*

I. INTRODUCTION

In 1968, the Hawaii Supreme Court in *Fergerstrom v. Hawaiian Ocean View Estates*,[1] recognized a common law cause of action for invasion of privacy resulting from the unauthorized appropriation of an individual's name and picture for commercial purposes. Although there has been no further case law development of the tort of invasion of privacy since *Fergerstrom* was decided, an amendment to the Hawaii Constitution in 1978 entitled *Right to Privacy*[2] will significantly affect development of the tort in Hawaii.

In *Fergerstrom*, the plaintiffs were a husband and wife who constructed their home on land purchased from the defendant corporation. While the house was under construction, defendant's employees photographed plaintiffs standing outside of the house. The defendant later used these photographs to promote the sale of homes in sales brochures, published advertisements and television commercials. The plaintiffs subsequently brought an action for the tortious invasion of their right of privacy. They alleged that the defendant corporation appropriated their names and photographs without their prior knowledge or consent and that the defendant's actions caused continuing invasions of their privacy by the "continuous stream of defendant's 'sales prospects' coming onto plaintiffs' property, using plaintiffs' facilities and generally bothering plaintiffs in their said home . . . ."[3]

After denial of defendant's motion for summary judgment in the Hawaii Circuit Court, the case was brought on interlocutory appeal to the Hawaii Supreme Court. The court held that the plaintiffs' complaint stated a cause of action for invasion of the right of privacy insofar as the defendant may have appropriated plaintiffs' name and picture without permission for commercial purposes. The court rejected defendant's contention that neither the English common law nor Hawaii case law recognized a right of privacy. The court also rejected the five basic arguments against judicial recognition of an action for invasion of privacy as set forth in the 1902 decision of *Roberson v. Rochester Folding-Box Company*,[4] by noting that these considerations may have been

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* This note will describe the development of tortious invasion of privacy in Hawaii. The principal case will be explained first, followed by a discussion of the various approaches to analyzing this area of law. Next, state statutes dealing with privacy will be explored. Finally, the note will discuss the impact of the provisions of the Hawaii Constitution on the development of privacy law in this state.

[1] 50 Haw. 374, 441 P.2d 141 (1968).

[2] HAW. CONST. art. I, §6 (new section adopted 1978).

[3] Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. at 374, 441 P.2d at 142.

[4] 171 N.Y. 538, 64 N.E. 442 (1902). The five basic arguments against recognition of the tort are: 1) the absence of precedent in the ancient English common law; 2) the purely mental character of the injury; 3) the danger that a vast amount of litigation would be encouraged; 4) the difficulty in distinguishing between public and private figures; and 5) the undue restrictions that such recognition would impose on free speech and press. Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. 374, 375–76, 441 P.2d 141, 143 (1968).

persuasive in 1902, but that they amounted to "little more than straws in the wind today."[5]

The defendant corporation's major argument was that since the English common law had not recognized a cause of action for invasion of privacy, only the legislature could provide for such a remedy. The court rejected the defendant's limited view of the nature of the common law by noting that such a view would be "an absolute annihilation of the common law system."[6] The court pointed to its recent recognition of the tort of intentional infliction of emotional distress[7] as an example of the common law's ability to "expand and adapt to the social, economic, and political changes inherent in a vibrant human society."[8] The Hawaii court thereby emphasized the capacity for orderly growth of the common law over strict adherence to precedent.[9]

By specifically restricting their holding to protection against unauthorized commercial appropriation of a person's name or picture, the court refrained from recognizing other causes of action generally associated with the right of privacy.[10] This limited holding by the court, coupled with the lack of any reference to Prosser's[11] and the Restatement of Torts[12] classifications (or any

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[5] *Id.* at 376, 441 P.2d at 143.

[6] *Id.* at 375, 441 P.2d at 143.

[7] *Id.* at 376, 441 P.2d at 143 (referring to Fraser v. Blue Cross Animal Hospital, 39 Haw. 370 (1952)).

[8] Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. at 376, 441 P.2d at 143 (1968).

[9] *Id. See* Lum v. Fullaway, 42 Haw. 500, 502 (1958).

[10] Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. at 378, 441 P.2d at 143 (1968). Professor Treece has used *Fergerstrom* to illustrate the dual nature of an action for appropriation. The unauthorized commercial use of a plaintiff's identity invades both his right to personal privacy and his pecuniary interest in his name and physical likeness. Treece has asserted that, in *Fergerstrom*, the Hawaii court would have allowed recovery for appropriation "regardless of facts suggesting an invasion of privacy and regardless of the legal system's willingness to recognize invasion of privacy as a tort." Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 653–54 (1973).

However, in the last paragraph of *Fergerstrom*, the court indicated that appropriation of name and picture for commercial purposes was an invasion of privacy and suggested that it may be but one aspect of the tort. Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. at 378, 441 P. 2d at 144 (1968).

[11] Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) [hereinafter cited as Prosser]. *See* text accompanying notes 42–51 *infra.*

[12] RESTATEMENT (SECOND) OF TORTS §§652A–652I (1976) [hereinafter cited as RESTATEMENT]. The approach taken by the RESTATEMENT is practically a mirror image of Prosser's four torts of invasion of privacy. In all probability, this is due to Dean Prosser's influence since he was the reporter for the American Law Institute until 1970, three years after the initial adoption of his categories in Tentative Draft No. 13, 1967. *See* J. HENDERSON & R. PEARSON, THE TORTS PROCESS at 882 (1975). Kalven has noted that "given the legal mind's weakness for neat labels and categories and given the deserved Prosser prestige, it is a safe prediction that the fourfold view will come to dominate whatever thinking is done about the right of privacy in the future." Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 332 (1966).

According to RESTATEMENT §652A (General Principle), the right of privacy is invaded by: (a) unreasonable intrusion upon the seclusion of an individual, (b) appropriation of an individual's name or likeness, (c) unreasonable publicity given to an individual's private life, or (d) publicity which unreasonably places an individual before the public in a false light. The comments to this section note that these four forms of the tort are the only ones which have been held to be actionable, but mention that the categorization is not meant to be exclusive. The comments also recognize the possibility that an invasion of privacy may be actionable under more than one category although a plaintiff is limited to one recovery of damages.

The relevant sections of the 1976 RESTATEMENT are as follows:

§652B. Intrusion Upon Seclusion

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

other classifications) may tend to restrict the development of the tort.[13] A short discussion of the history of the tortious invasion of privacy will aid in laying the foundation for future development of the tort in Hawaii.

II. HISTORY OF THE TORT

The appropriation of another's name or likeness for commercial purposes is but one aspect of the tort of invasion of privacy as it is generally recognized.[14] The tort was first conceptualized[15] in an 1890 law review article[16] by Samuel D.

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§652C. Appropriation of Name or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

§652D. Publicity Given to Private Life

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

§652E. Publicity Placing Person in False Light

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Caveat:

The Institute takes no position on whether there are any circumstances under which recovery can be obtained under this Section if the actor did not know of or act with reckless disregard as to the falsity of the matter publicized and the false light in which the other would be placed but was negligent in regard to these matters.

§652F. Absolute Privileges

The rules on absolute privileges to publish defamatory matter stated in §§583 to 592A apply to the publication of any matter that is an invasion of privacy.

§652G. Conditional Privileges

The rules on conditional privileges to publish defamatory matter stated in §§594 to 598A, and on the special privileges stated in §§611 and 612, apply to the publication of any matter that is an invasion of privacy.

§652H. Damages

One who has established a cause of action for invasion of his privacy is entitled to recover damages for

(a) the harm to his interest in privacy resulting from the invasion;

(b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and

(c) special damage of which the invasion is a legal cause.

§652I. Personal Character of Right of Privacy

Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.

[13] *Contra*, note 9 *supra*. "[T]he genius of the common law . . . is its capacity for orderly growth." Lum v. Fullaway, 42 Haw. at 502.

[14] *See* Prosser, *supra* note 11, and RESTATEMENT, *supra* note 12, §§652A–652E.

[15] *See* Prosser, *supra* note 11. *But see* Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977). Gerety asserts that "Sir James Fitzjames Stephen . . . , two decades before Warren and Brandeis, was the first modern lawyer or philosopher to discuss the concept explicitly . . . ." *Id.* at 238.

[16] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Warren and Louis D. Brandeis written in response to the "yellow journalism" of the era and prompted more specifically by annoying press coverage of Warren's family.[17] This work has been recognized as one of the most influential law review articles in the history of American law.[18] Essentially, the recommendation in the Warren-Brandeis article was that individuals should be protected from public disclosure of truthful but personal facts by the press when such disclosure would cause them emotional distress.[19]

A little over a decade after the Warren-Brandeis article appeared, the courts began to take notice of a developing trend in privacy law. In an unreported 1890 case, New York became the first state to "allow recovery upon the independent basis of the right of privacy".[20] In a 1902 case, with a similar fact pattern, the New York Court of Appeals in a four to three decision held that there was no cause of action for invasion of the right of privacy.[21] The holding resulted in "a storm of public disapproval, which led one of the concurring judges to take the unprecedented step of publishing a law review article in defense of the decision."[22] Georgia was the first state to have its highest court recognize the right of privacy. The 1905 decision, *Pavesich v. New England Life Insurance Company*,[23] dealt with a defendant's use of an unconsenting plaintiff's photograph to promote the sale of insurance. This decision is generally recognized as the leading case on invasion of privacy in this country.[24] For the next three decades the decisions were split, following either the *Roberson* or *Pavesich* rationales. However, after the *Restatement of Torts*[25] acknowledged the right of privacy in 1939, the tide changed and more courts began to recognize the tort.

Currently only Rhode Island, Wisconsin, and Nebraska have expressly declined to recognize the tort of invasion of privacy under common law, or in a court of equity.[26] The Rhode Island Supreme Court has unequivocally indicated that recognition of the tort must come from the legislature, not the courts.[27] Although Wisconsin recently recognized the tort only by statute,[28]

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[17] A. MASON, BRANDEIS A FREE MAN'S LIFE at 70 (1946).

[18] Kalven, *supra* note 12, at 327.

[19] Warren & Brandeis, *supra* note 16, at 196.

[20] Prosser, *supra* note 11, at 385. Prosser cited an 1890 New York Supreme Court case in which the court granted relief to an actress from an embarrassing publication of her picture. *Id.* at 385, n. 8.

[21] Roberson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

[22] Prosser, *supra* note 11, at 385. *See* O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902). The law review article in defense of the *Roberson* decision apparently failed in its purpose because in the following year the New York legislature enacted a statute which protected individuals' interests in the use of their names, portraits, or pictures for advertising or trade purposes. This statute, as amended in 1921, is presently the basis of recovery for tortious invasion of privacy in New York. *See* N.Y. CIV. RIGHTS LAW §§50, 51 (McKinney 1976).

[23] 122 Ga. 190, 50 S.E. 68 (1905).

[24] *See* Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 NW. U. L. REV. 553, 558–59 (1961), and Prosser, *supra* note 11, at 386.

[25] §867 (1939). *See* Prosser, *supra* note 11, at 386.

[26] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 804, §117 (4th ed. 1971) [hereinafter cited as W. PROSSER, TORTS]. Since the 1971 edition of Prosser's Handbook, Texas has also recognized this tort in Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973); and both Rhode Island and Wisconsin have enacted tort privacy statutes. *See* Gen. Laws of R.I. 1956, Reenactment of 1969 tit. 9, ch. 1, §28 (Bobbs-Merrill 1978); and ch. 176, §5, 1977 Wis. Laws 756 (to be codified as Wis. Stat. §895.50).

[27] Henry v. Cherry & Webb, 30 R.I. 13, 37, 73 A. 97, 107 (1909), followed in Gravina v. Brunswick Corp, 338 F. Supp. 1, 2–3 (D.R.I. 1972). *See* Gen. Laws of R.I. 1956, Reenactment of 1969 tit. 9, ch. 1, §28 (Bobbs-Merrill 1978).

[28] Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956). This case has been criticized by Prosser as an "atrocity". Prosser, *supra* note 11, at 388, n. 58.

recent case law developments indicated that a change of opinion was overdue. In the 1974 case of *Slawek v. Stroh*,[29] the Wisconsin Supreme Court said, "[a]s a generalization, Wisconsin does not recognize a cause of action for invasion of privacy; however, an exception was recognized in *Alsteen v. Gehl* . . . ."[30] The exception noted by the *Alsteen v. Gehl*[31] court was as follows:

> We now conclude that a person may recover damages for severe emotional stress alone, if such psychological condition is the result of the extreme and outrageous conduct of another and if such course of conduct was undertaken by the defendant for the purpose of inflicting psychological harm upon the injured person.[32]

The Nebraska case of *Brunson v. Ranks Army Store*,[33] which has been sharply criticized,[34] denied the existence of an action in tort for invasion of the right of privacy. However, relevant to the possible recognition of such an action is Professor Perlman's assertion that, if given the opportunity, the Nebraska Supreme Court would re-examine its stand on the *Brunson* case.[35] Perlman notes that the court's movement toward using stare decisis "as a guiding principle rather than an inflexible command" casts doubt on the importance of *Brunson* as a precedent.[36]

In sum, it appears that the recognition of a tort remedy for invasion of privacy has gained a foothold in all state jurisdictions.

III. Definition of "Right of Privacy"

With the exception of the unauthorized appropriation of plaintiff's name or picture for commercial purposes,[37] the scope of tortious invasion of privacy in Hawaii is unsettled. Attempts at defining the parameters of the tort have often failed due to the multitude of protected interests. The numerous approaches to classifying these interests have further complicated the issue, rendering the requirements necessary to establish a prima facie case unclear.

From the early attempt of Warren and Brandeis to define privacy as the

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[29] 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

[30] *Id.* at 315, 215 N.W.2d at 20 (1974). *See also* Schaefer v. State Bar, 77 Wis. 2d 120, 252 N.W.2d 343 (1977). The fact that the Wisconsin court in *Schaefer* did not flatly deny the existence of a right to privacy may indicate that, if given the opportunity, it would have recognized the right in a subsequent decision.

[31] 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

[32] *Id.* at 356–57, 124 N.W.2d at 316. The *Alsteen* court set forth four factors which must be established in order for plaintiff to recover: defendant's conduct must be (1) intentional, (2) extreme and outrageous, (3) the cause-in-fact of plaintiff's injury and (4) must result in an extreme disabling response on the part of the plaintiff. *Id.* at 359–61, 124 N.W.2d at 318. Thus, in Wisconsin, the cause of action for intentional infliction of emotional distress may provide a basis of recovery for invasions of privacy where these four conditions have been met.

[33] 161 Neb. 519, 73 N.W.2d 803 (1955).

[34] *See* Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. at 375, 441 P.2d at 143 (1968).

[35] Perlman, *The Right to Privacy in Nebraska: A Re-Examination*, 45 Neb. L. Rev. 728, 753 (1966).

[36] *Id.* at 730. Perlman supports his thesis by referring to the court's unprecedented overruling, in Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966), of a long line of cases dealing with exemption of charitable organizations from tort liability. He indicates that the *Myers* decision has eroded the principle of strict stare decisis that was one of the bases of the court's decision in *Brunson*. Therefore, the court may re-examine its position on the tortious invasion of privacy when the opportunity to do so presents itself.

[37] Fergerstrom v. Hawaiian Ocean View Estates, 50 Haw. 374, 441 P.2d 141 (1968).

right "to be let alone"[38] sprang other less general definitions.[39] In addition to the commentators, at least one court has attempted to define the tort of invasion of privacy. In *Continental Optical Company v. Reed*,[40] the court defined the tort as "[t]he unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibility."[41]

Other commentators have avoided the problem of developing a definition of the tort by proposing schemes for classifying the interests sought to be protected. The primary relevance of these different definitions and approaches to the tort is that they furnish the courts or legislature in Hawaii with alternative approaches to developing the law in this area. A brief survey of the major approaches will provide a general overview of the tort of invasion of privacy.

IV. Conceptual Approaches to the Right of Privacy

Dean William Prosser formulated what is probably the most widely known approach to defining the tortious invasion of privacy.

> What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[42]

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[38] Warren & Brandeis, *supra* note 16, at 195 (quoting T. Cooley, Torts 29 (2d ed. 1888)).

[39] Professor Westin has defined privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." A. Westin, Privacy and Freedom 7 (1967). This view has been criticized by Professor Lusky as being overly broad because it could conceivably include anything a person says, thus confusing the issue through over-simplification. Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 Colum. L. Rev. 693, 695–96 (1972). Lusky offers his own definition: "Privacy is the condition enjoyed by one who can control the communication of information about himself. . . . The condition of privacy may be absolute or contingent, depending upon the degree of control one possesses." *Id.* at 709.

See Gerety, *supra* note 15. Professor Gerety, in one of the more recent treatments of the subject, defined privacy as "autonomy or control over the intimacies of personal identity." *Id.* at 236. This definition is normative and rests on two assumptions: (1) people have a common commitment to preserving the value of privacy in their lives, and (2) they have a common conception of what, in fact, is private. *Id.*

[40] 119 Ind. App. 643, 86 N.E.2d 306 (1949).

[41] *Id.* at 648, 86 N.E.2d at 308 (quoting Annot. 138 A.L.R. 22, 25 (1942)).

[42] Prosser, *supra* note 11, at 389 (footnote omitted). See W. Prosser, Torts, *supra* note 26. Discussing the four kinds of invasions of privacy in the order of intrusion, public disclosure of private facts, false light in the public eye, and appropriation, Prosser stated:

> The first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires

The first category, intrusion, primarily protects invasions of mental interests of the plaintiff, and has been used where the remedies afforded in actions of trespass, nuisance, intentional infliction of mental distress and invasions of constitutional rights have proved inadequate or unavailable. There must be a violation in the nature of a prying or intrusion, and the requirement of physical intrusion has been relaxed, affording remedy for non-physical or the marginally physical intrusions of wiretapping and audio amplification with microphones. "[T]he intrusion must be something which would be offensive or objectionable to a reasonable man . . . ,"[43] and must be into some facet of plaintiff's life which is entitled to be private.[44]

Under the second category there must be disclosure to the public[45] of private facts which are not the subject of public record open to public inspection, that are offensive and objectionable to a reasonable man of ordinary sensibilities.[46] The interest sought to be protected here is that of plaintiff's reputation. Thus, the defense of the truth of the disclosed facts is eliminated.[47]

The third form of invasion of privacy, false light in the public eye, also seeks to protect the plaintiff's reputation, and is so intertwined with the law of defamation that Dean Prosser has questioned "whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation. . . ."[48] Both defamation and "false light" require publicity, although the "false light" cases may involve publicity of truthful statements while the maintenance of defamation actions requires the statements to be false. The "false light" statement need not be defamatory, but, if it is, as is often the case, an action for defamation will also lie. Common circumstances in which the plaintiff is placed in a false light are: where there is publicity falsely attributing some opinion or statement to plaintiff; where plaintiff's picture is used to illustrate an article or book with which he has no connection; and where plaintiff's picture, name, or fingerprints are improperly included in police mugshot files when he has never been convicted of any crime.[49]

Prosser's fourth category deals with the appropriation of plaintiff's identity for commercial purposes. The interest sought to be protected here is primarily

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falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest.

Id. at 814.

[43] Prosser, *supra* note 11, at 390–91.

[44] *Id.* at 391.

[45] *Id.* at 393. "[I]t has been agreed that it is no invasion to communicate . . . [the fact that plaintiff does not pay his debts] . . . to the plaintiff's employer, or to any other individual, or even to a small group, unless there is some breach of contract, trust or confidential relation which will afford an independent basis for relief." *Id.* at 393–94 (footnotes omitted).

[46] *Id.* at 394–97.

[47] *Id.* at 398. *See generally* Time, Inc. v. Virgil, *cert. den.*, 425 U. S. 998 (1976); Cox Broadcasting Corp. v. Cohn, 420 U. S. 469 (1975); Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975); Virgil v. Sports Illustrated, 424 F. Supp. 1286 (1976). Although these cases discuss the RESTATEMENT OF TORTS provision, there are no practical differences between the Prosser and RESTATEMENT delineations of this category of tortious invasion of privacy.

[48] Prosser, *supra* note 11, at 401.

[49] *Id.* at 398–401. There are constitutional limitations on the scope of the application of the false light aspect of invasion of privacy. *See* Gertz v. Robert Welch, Inc., 418 U. S. 323 (1974), and Time, Inc. v. Hill, 385 U. S. 374 (1967). *See generally* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976), and Note, *Triangulating The Limits Of The Tort Of Invasion Of Privacy: The Development Of The Remedy In Light Of The Expansion Of Constitutional Privilege*, 3 HASTINGS CONST. L. Q. 543 (1976).

plaintiff's proprietary interest in the exclusive use of his name, likeness, or other aspect of his identity. To support this cause of action, plaintiff must show that there has been an appropriation of an aspect of his identity. A mere incidental use of his name in a publication or picture or the use of some part of his identity not readily identifiable as plaintiff's is not actionable. Once the plaintiff is identifiable, the defendant must also be shown to have appropriated the name or likeness for his own advantage. The usual case is made upon a showing of defendant's use of plaintiff's identity for commercial purposes such as advertising.[50] The few states which have recognized the tort of invasion of privacy through statute have all based liability on the appropriation of plaintiff's identity for commercial purposes.[51]

Although the trend of modern authority has been in the direction of adopting Prosser's fourfold scheme, there have been voices of dissent. Professor Bloustein has voiced criticism of the four-part approach on the ground that it obscures the fact that the enumerated harms are all basically offenses to one's reasonable sense of personal dignity.[52] Instead, he advocates the use of a single tort designed to protect the dignity of man, and in turn, his individuality.[53] Professor Kalven submitted the proposition that, in Prosser's fourfold scheme, only the appropriation category was worthy of recognition.[54] At the outset, Kalven recognized that privacy was linked to individual dignity and the needs of human existence, without which we might be living in an Orwellian 1984 society.[55] Regarding Prosser's category of intrusion, Kalven asserted that all but a handful of such intrusion cases could be dealt with by applying the law of trespass.[56] Kalven indicated that the category of false light in the public eye raised both conceptual and practical difficulties in its apparent extension of the law of defamation. He questioned how a statement not sufficiently offensive to the reasonable man to be defamatory could then become sufficiently offensive to the reasonable man to constitute an invasion of privacy, and whether, if the expansion of defamation law was intended, the expansion should be done openly and directly rather than by creating a new action in tort.[57]

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[50] Prosser, *supra* note 11, at 401–07. *See* note 1 *supra*. *See also* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) (unconsented publication of plaintiff's picture for commercial advertising purposes held to be an actionable invasion of privacy). *Cf.* Zacchini v. Scripps-Howard Broadcasting Co., 433 U. S. 562 (1977) (unconsented to television news broadcast of a performer's entire act subjected media to liability for appropriation of his commerical stake in his act).

[51] CAL. CIV. CODE §3344 (West Supp. 1978); N.Y. CIV. RIGHTS LAW §§50, 51 (McKinney 1976); OKLA. STAT. ANN. tit 21, §§839.1, 839.2 (West 1965); UTAH CODE ANN. 1953 §§76–9–405 to 406 (1978); Va. Code §8.01-40 (1977); Gen. Laws of R.I. 1956, Reenactment of 1969 tit. 9, ch. 1, §28 (Bobbs-Merrill 1978); Mass. Gen Laws Ann. ch. 214, §§1B, 3A (1974); and ch. 176, §5, 1977 Wis. Laws 756 (to be codified as Wis. Stat. §895.50).

[52] Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1002–05 (1964).

[53] *Id.* at 1003. Bloustein commented on the social value served by the law of privacy:

> The conception of man embodied in our tradition and incorporated in our Constitution stands at odds to such human fungibility. And our law of privacy attempts to preserve individuality by placing sanctions upon outrageous or unreasonable violations of the conditions of its sustenance. This, then, is the social value served by the law of privacy, and it is served not only in the law of tort, but in numerous other areas of the law as well.

Id.

[54] Kalven, *supra* note 12, at 333. Kalven criticized Warren & Brandeis' analysis of the right of privacy, Warren & Brandeis, *supra* note 16, and concluded that the effort to protect the right of privacy through tort law was a mistake. Kalven, *supra* note 12, at 327, 329.

[55] *Id.* at 326.

[56] *Id.* at 332.

[57] *Id.* at 340.

As to the tort of public disclosure of private facts, Kalven noted two problems: first, the absence of a legal profile,[58] *i.e.*, a prima facie case and a measure of damages, and second, the constitutional privilege and right to serve the public interest by publishing news. These two factors, coupled with his belief that "[t]he victims on whose behalf the privacy tort remedy was designed will not in the real world elect to use it . . . privacy will recruit claimants inversely to the magnitude of the offense to privacy involved,"[59] led Kalven to question whether an action in tort for public disclosure of private facts ought to be recognized.

In addition to the approaches suggested by Prosser and his critics, a number of other commentators have proposed schemes for delineating the tort of invasion of privacy. Harper and James have proposed a four-part tort similar to Prosser's, but with a Bloustein modification,[60] Dean Leon Green has suggested dividing the tort into a three-part classification of harms;[61] and Dean John Wade argues for the total redesignation of the law of privacy under the rubric of another tort category, the intentional infliction of mental suffering.[62]

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[58] *Id.* at 333. "[T]he tort has no legal profile. We do not know what constitutes a prima facie case, we do not know on what basis damages are to be measured, we do not know whether the basis of liability is limited to intentional invasions or includes also negligent invasions and even strict liability." *Id.*

[59] *Id.* at 338. *Contra*, Greenawalt, *New York's Right of Privacy—The Need for Change*, 42 BROOKLYN L. REV. 159 (1975). Professor Greenawalt disagrees with Kalven's theory that privacy will recruit claimants inversely to the magnitude of the offense. Greenawalt argues that some claimants are so hurt they would be willing to suffer the additional exposure to obtain restitution, especially if the disclosure has already been made to the injured's family and acquaintances. He also notes that most suits are settled before trial without additional exposure and asserts that the existence of a tort remedy for invasion of privacy would deter potential violators. *Id.* at 167–68.

[60] 1 F. HARPER & F. JAMES, JR., THE LAW OF TORTS, §§9.5–.7 (4th ed. 1956) [hereinafter cited as HARPER & JAMES]. Harper and James suggest "that the most important interests in privacy are (a) the interest in seclusion, (b) the interest in personal dignity and self-respect, (c) the interest in privacy of name, likeness and life history and (d) the interest in sentimental associations." *Id.* at 681 (footnote omitted). Regarding the interest in seclusion (analogous to Prosser's category of intrusion), they note the dual aspects of a person's interest in preventing others from seeing and hearing what he does or says and his interest in avoiding any offensive or indecent conduct or words of other people.

The category of interest in personal dignity and self-respect incorporates Bloustein's thesis that all invasions of privacy are offenses against a person's reasonable sense of personal dignity. Bloustein, *supra* note 52, at 1000–03. Harper and James, however, follow Prosser's view that this interest is but one aspect of privacy.

Harper and James' remaining two categories, the interest in privacy of name, likeness and life history, and the interest in sentimental associations, closely mirror Prosser's categories of appropriation and public disclosure of private facts, respectively. In sum, Harper and James appear to utilize an approach similar to Prosser's.

[61] Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932) (ILL. L. REV. is now NW. U. L. REV.). The approach to the tort advanced by Dean Green is designed to clarify the confusion created by a lack of distinction between interests of personality and interests of property. Green proposes a classification of harms: "Harms are of three general types—(1) physical harms, (2) harms of appropriation, (3) harms of defamation. In most cases the type of harm stands out clearly. In some they all may be present, or may be found in varied combinations." *Id.* at 239.

Dean Green posits that the confusion in court opinions is due to the courts' indiscriminate treatment of all cases involving interests of personality under the general heading of "privacy." He submits that privacy is merely one of the several interests of personality, with the other interests being physical integrity, feelings or emotions, capacity for activity or service, name, likeness, and history. *Id.* at 238–39. Dean Green suggests that classifying invasions of privacy according to the type of harm done to the specific interest of personality involved will afford an acceptable scheme of analysis, thereby avoiding confusion. *Id.* at 239.

[62] Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962). Probably the most innovative proposal in this area comes from Dean Wade who feels that the development of the law of privacy presents "a splendid opportunity for reform of the traditional law regarding the actionability of language which harms an individual's peace of mind or his reputation." *Id.* at 1122. Wade argues that the principle behind the law of privacy is much broader than those which

V. STATUTORY APPROACHES

At the present time, states which have statutory remedies for invasions of privacy are few in number, and the statutes are narrowly circumscribed. The few states[63] which have enacted tort right-to-privacy statutes have, for the most part, dealt exclusively with the unauthorized appropriation of plaintiff's likeness or personal identity for commercial, advertising, or trade purposes. The following discussion will outline features of these state statutes which may be relevant and helpful to the development of a commercial misappropriation statute in Hawaii.

The New York provision consists of two parts.[64] Section 50, entitled "Right of Privacy," is a criminal statute which provides that the unconsented use of a living person's name, portrait, or picture for advertising or trade purposes is a misdemeanor. Section 51 provides civil relief against such use in the form of injunction and/or damages, and if the appropriation was "knowingly" perpetrated by defendant, the statute gives the jury discretion to award exemplary damages. The New York provision was formulated in response to the 1902

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the Prosser and RESTATEMENT categories suggest, and predicts that the law of privacy will absorb the law of defamation in recognition of this general principle. Wade's conclusion is that the tort of intentional infliction of mental suffering will envelop established torts such as assault, defamation and invasion of privacy to afford an integrated system of protection from intentional offenses against an individual's peace of mind. *Id.* at 1125.

Both the Hawaii court in Fraser v. Blue Cross Animal Hospital, 39 Haw. 370 (1952), and the Wisconsin court in Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963), have recognized the tort of intentional infliction of emotional distress. *Fraser* dealt with a creditor's repeated attempts to collect a debt through telephone calls. The court set forth three requirements for recovery in tort for intentional infliction of emotional distress: the tortious act, which may be an act of mere communication, must (1) be intentional and (2) unreasonable, and (3) the actor should be alerted to the probability that it will result in illness. *Fraser* also suggests that resulting physical injury is a prerequisite to recovery. 39 Hawaii at 375 (1952).

Cf. Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970), wherein the Hawaii Supreme Court recognized a cause of action for negligent infliction of serious emotional distress. The court held that, "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* at 173, 472 P.2d at 520. Recovery for this tort requires that there be (1) negligence which results in (2) serious mental distress to the plaintiff, which distress was a (3) reasonably foreseeable consequence of defendant's act. *Id.* at 173–74, 472 P.2d at 520–21. In Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974), the court held that absence of physical injury should not bar recovery for negligent infliction of serious mental distress. *See also* Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime"*, 1 U. HAW. L. REV. 1 (1979); Koshiba, *Negligent Infliction of Mental Distress: Rodrigues v. State and Leong v. Takasaki*, 11 HAWAII B. J. 29 (1974).

Since Wisconsin has only recently given explicit recognition to the right of privacy, the possibility that the Wisconsin court would follow Dean Wade's suggestion cannot be dismissed. Even in Hawaii where the court has recognized the tort of invasion of privacy for commercial misappropriation, the option of allowing recovery for other types of invasions of privacy (false light in the public eye, intrusion, and public disclosure of private facts) through expansion of *Fraser* is still open. Thus, under the present Hawaii case law and statutory law dealing with the right of privacy, recovery for invasions of privacy other than commercial appropriation might be recognized by the court pursuant to the tort actions for intentional infliction of emotional distress and negligent infliction of serious mental distress.

[63] California, New York, Oklahoma, Utah, Virginia, Rhode Island, and Wisconsin.

Although Dean Prosser has suggested that Griswold v. Connecticut, 381 U. S. 479 (1965) requires these state statutes be repealed because in some cases they limit recovery for invasion o' privacy under the common law, they remain in force. W. PROSSER, TORTS, *supra* note 26, at 816. The federal statute relevant to this area is the Lanham Act which provides that the name, portrait or signature of any living individual may not be used in a registered trademark except with the individual's consent. 15 U.S.C. §1052(c) (1976).

[64] N.Y. Civ. RIGHTS LAW, §§50, 51 (McKinney 1976).

New York Court of Appeals decision in *Roberson v. Rochester Folding-Box Company*,[65] which denied any relief for a common law invasion of privacy. There have been indications[66] that either the New York court will modify its 1902 holding to recognize a common law right of privacy,[67] or the state legislature will enact a broader statutory format to recognize forms of invasions of privacy other than unauthorized commercial appropriation,[68] while perhaps deleting the criminal section.[69]

The Virignia Code section 8.01–40[70] deals solely with unauthorized commercial appropriation, and is similar to section 51 of the New York statute, except that the Virginia statute provides for survival of the cause of action for the benefit of surviving consorts and next of kin, and imposes a twenty-year statute of limitations for an action brought after the aggrieved person's death.

Under the Oklahoma statutes,[71] unauthorized commercial appropriation is a misdemeanor, and like the New York and Virginia statutes, they provide for relief through injunctions, damages, and in the case of a "knowingly" guilty defendant, exemplary damages. Oklahoma, like Virginia, provides for survival of the cause of action for the benefit of certain survivors of the person whose name, portrait, or picture was appropriated. A 1965 amendment to the Oklahoma law repealed a 1955 statute which categorized unauthorized commercial appropriation as a felony resulting in a possible fine of $1,000 or possible imprisonment for five years, and which had a fifty-year statute of limitations.[72]

The Utah statutes,[73] as amended in 1973, provide injunctive relief, actual damages, and attorney fees in the case of unauthorized appropriation for

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[65] 171 N.Y. 538, 64 N.E. 442 (1902). Prosser, *supra* note 11, at 385. *See* N.Y. Sess. Laws 1903, ch. 132, §§1–2. Now, as amended in 1921, N.Y. Civ. Rights Law, §§50–51; Discussion in text accompanying note 21 *supra*.

[66] Greenawalt, *supra* note 59, at 162–65.

[67] In Galella v. Onassis, 353 F.Supp. 196 (S.D.N.Y. 1972), *aff'd as modified*, 487 F.2d 986 (2d Cir. 1973), the federal district court concluded that the New York Court of Appeals would recognize a common law cause of action for tortious invasion of privacy if given the opportunity to do so; and the United States Court of Appeals agreed that the New York court might well modify or distinguish the 1902 *Roberson* decision. Galella v. Onassis, 487 F.2d 986, 995, n. 12 (2d Cir. 1973).

[68] Greenawalt, *supra* note 59, at 163. The New York Law Revision Commission proposed in 1976 that the legislature amend the right of privacy law by adding the following:

> Any person who is subjected to an unreasonable invasion of privacy that would be highly offensive to a reasonable person and that is not covered by the first paragraph of this section may maintain an equitable action in the supreme court of this state against the person, firm, or corporation invading his privacy, to prevent and restrain any continuation of the invasion; and may also sue and recover damages for any injuries sustained by reason of such invasion and if the defendant shall knowingly have unreasonably invaded his privacy in a manner that would be highly offensive to a reasonable person, the jury, in its discretion, may award exemplary damages.

See Leg. Doc. (1976) No. 65[D], which accompanies 1976 Senate Bill No. 7693 and 1976 Assembly Bill No. 10351.

Id., n. 14.

[69] *Id.* at 163, n. 15. "It is entirely possible that in its seventy-two year history, section 50 has never been used by a prosecutor and has never resulted in a criminal conviction or even trial." *Id.*, n. 15.

[70] VA. CODE §8.01–40 (1977).

[71] OKLA. STAT. ANN. tit. 21, §§839.1, 839.2 (West Supp. 1978–1979).

[72] Id. §839 (West 1958).

[73] UTAH CODE ANN. §§76–9–405 to 406 (1977). The former 1953 version of the statute made a distinction between the unauthorized use of the name or picture of a public institution or officer and that of an individual. The present statute has combined the two categories under "abuse of personal identity," and its framers have apparently consciously refrained from using terms such as "right of privacy," "invasion of privacy," or "appropriation."

commercial purposes of an individual's name, picture or portrait, and classify the offense as a misdemeanor. These remedies are available to the aggrieved individual, or his heirs if he is deceased, coupled with an award of exemplary damages if defendant's conduct is found to be malicious.

Another state that has enacted a statute dealing with the tortious invasion of privacy is California, which passed Civil Code section 3344 during the 1971 regular session of the California Legislature.[74] As in the aforementioned statutes, the California statute also deals with unauthorized commercial appropriation of plaintiff's identity or likeness, but unlike the other states, California has explicitly retained the common law tort action for invasion of the right of privacy by appropriation. Section 3344(g) provides that the remedies enacted by section 3344 shall be cumulative and in addition to any others allowed by law.

As a result, in California there are two causes of action for unauthorized commercial appropriation of a person's name, photograph, or likeness. The common law action was set forth in the leading case of *Fairfield v. American Photocopy Equipment Company*,[75] where recovery was granted for the unauthorized use of plaintiff's name for advertising photocopy machines. The *Fairfield* decision would allow recovery for invasion of privacy even where the defendant acts through inadvertence or mistake.[76]

Under section 3344, plaintiff can recover actual damages subject to a statutory minimum of $300 from a defendant who knowingly appropriates plaintiff's name, photograph or likeness for commercial purposes without plaintiff's prior consent.[77] In contrast to the *Fairfield* decision, the defendant can plead inadvertence or mistake as a defense.[78]

The California statute has features which distinguish it from the state statutes above. Valid consents need not be in writing as required by the other statutes. A mere incidental use, or one not essential to the purpose of the publication in

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[74] CAL. CIV. CODE §3344 (West Supp. 1978).

[75] 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

[76] *Id.* at 87, 291 P.2d at 197.

[77] *See* Comment, *Commercial Appropriation of an Individual's Name, Photograph or Likeness: A New Remedy for Californians*, 3 PAC. L.J. 651, 661 (1972). The author suggests that the $300 minimum damage level afforded to all plaintiffs bestows a property right worth at least that amount on every Californian in their own name, photograph or likeness. *Id.* at 662–63. The student commentator traced the development of property rights as related to the minimum damage provision through a 1929 California Supreme Court water rights case which defined property as "everything which one persan [sic] can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value." *Id.* at 663 (quoting from Yuba River Power Co. v. Nevada Irrigation District, 207 Cal. 521, 523, 279 P.128, 129 (1929)). He then asserted that because it is possible to place a money value upon such a right, it should therefore become assignable to and enforceable by a third party. Nevertheless, the commentator recognized that the California courts had yet to adopt the property interest theory in connection with section 3344. *See* Comment, *supra* note 77, at 669.

The author in Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 N.W. U. L. REV. 553 (1969), asserts that recovery for invasions of privacy based on a property-oriented rationale would result in a sound basis of recovery, as well as providing for a rational basis for computing damages. The commentator in Eisenberg, *Lugosi v. Universal Pictures: Descent of the Right of Publicity*, 29 HASTINGS L.J. 751 (1978), urges the California Supreme Court to recognize a descendable right of publicity under the property theory in the pending case of Lugosi v. Universal Pictures, 70 Cal. App. 3d 552, 139 Cal. Rptr. 35 (1977), *petition for hearing granted*, Civil No. L.A. 30824 (Cal. Sup. Ct., Aug. 11, 1977). However, the RESTATEMENT, *supra* note 12, §652I takes the position that except for the category of appropriation of one's name or likeness, the right to maintain a cause of action for invasion of privacy is not descendable.

[78] CAL. CIV. CODE §3344 (West Supp. 1978).

which it appears, raises a rebuttable presumption that it was not a "knowing use."[79] Section 3344 also immunizes owners and employees of advertising media from liability if they had no knowledge of the unauthorized appropriation.[80] There is also no liability for any use in a political campaign, or a public affairs or sports broadcast.[81]

In Hawaii there is uncertainty regarding liability for tortious invasions of privacy due to two factors: (1) the lack of Hawaii case law on the subject and (2) the tort of invasion of privacy seems to be expanding in other jurisdictions, rendering the elements of the tort unclear. Legislative assistance in the form of statutory enactments clearly enumerating the elements and scope of the tort of invasion of privacy will be helpful at this time. Perhaps the adoption of the 1978 amendment to the Hawaii Constitution dealing with the right to privacy may provide the impetus for the development of statutory law on the tortious invasion of privacy.

VI. HAWAII CONSTITUTIONAL AMENDMENTS

Since the recognition of the common law tort of invasion of privacy by the Hawaii court in 1968, there have been two amendments to the Hawaii Constitution that are relevant to defining the scope of the tort. The 1968 amendment was an addition to article I, section 5; the 1978 amendment established a new provision, article I, section 6. Broadly speaking, there is no direct relationship between the tort of invasion of privacy and what is generally known as the constitutional right of privacy.[82] The common law tort cause of action for invasion of privacy protects individuals from actions of private parties. In contrast, the protections offered by the constitutional right of privacy are designed to counter governmental infringements upon an individual's privacy. However, the records of the proceedings of both the 1968 and 1978 Hawaii constitutional amendments indicate an intent of the Convention delegates to extend the protections of the constitutional right to include the protection against non-governmental infringement upon an individual's privacy.

A. Constitutional Convention of 1968

In 1968, article I, section 5 of the Hawaii Constitution was amended to prohibit "unreasonable . . . invasions of privacy."[83] Despite the belief held by

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[79] *Id.* §3344(c).

[80] *Id.* §3344(f).

[81] *Id.* §3344(d).

[82] Cope, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631, 651 (1977). *See* Katz v. United States, 389 U. S. 347 (1967). In *Katz*, the Court stated that although the Fourth Amendment did not establish a general constitutional right to privacy, the Fourth Amendment did protect the privacy of individuals against certain kinds of governmental intrusion. *Id.* at 350. In contrast, the Court stated that "a person's *general* right to privacy . . . is . . . left largely to the law of the individual States." *Id.* at 350–51 (footnotes omitted).

[83] HAW. CONST. art. I, §5:

> The *right of the people to be secure* in their persons, houses, papers and effects *against unreasonable* searches, seizures, and *invasions of privacy* shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted. (Emphasis added.)

one commentator[84] and by some of the convention delegates[85] that the amendment established a "new right of privacy in the state,"[86] Hawaii Supreme Court decisions demonstrated a reluctance to extend article I, section 5 right of privacy protections to any area beyond governmental infringement upon an individual's privacy in criminal cases.[87] Thus, although there was an intent that the 1968 amendment do so, the amendment had little effect on the development of the tort of invasion of privacy.

B. Constitutional Convention of 1978

In 1978, the Hawaii Constitution was again amended. A newly adopted section entitled "Right to Privacy"[88] was modeled after similar provisions contained in the Alaska and Montana Constitutions.[89] This amendment will significantly affect the development of the tort of invasion of privacy. The Committee on Bill of Rights, Suffrage, and Elections explicitly stated that the right of privacy shall cover the areas of tort privacy, informational privacy, and the right to personal autonomy.[90] Of particular significance to the law regarding tortious invasion of privacy is the following statement by the Committee:

> Your Committee believes that the right of privacy encompasses the common law right of privacy or tort privacy. This is a recognition that the dissemination of private and personal matters, be it true, embarrassing or not, can cause mental pain and distress far greater than bodily injury. For example, the right can be used to protect an individual from invasion of his private affairs, public disclosure of embarrassing facts, and publicity placing the individual in a false light. In short, this right of privacy includes the right on [sic] an individual to tell the world to "mind your own business."[91]

Particularly noticeable in this statement is the apparent use of Prosser's approach to tortious invasion of privacy, even though the category of unauthorized commercial appropriation is not mentioned.[92]

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[84] N. MELLER, WITH AN UNDERSTANDING HEART: CONSTITUTION MAKING IN HAWAII 97 (1971).

[85] II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 4–5 (1972); I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968 233–34 (1973).

[86] N. MELLER, *supra* note 84.

[87] State v. Baker, 56 Haw. 271, 280, 535 P.2d 1394, 1399 (1975). *See also* State v. Roy, 54 Haw. 513, 517, 510 P.2d 1066, 1068 (1973), where the court noted that the words "invasions of privacy" were added to art. I, §5 by the delegates to the 1968 Constitutional Convention only to protect against governmental misuse of electronic surveillance techniques. *But see id.* at 518, 510 P.2d at 1069 (Levinson, J., concurring): "I do not think that protection against governmental use of electronic surveillance techniques was the only reason why the delegates to the 1968 Constitutional Convention added to article I, section 5 the words 'invasions of privacy', as the opinion of the court implies."

[88] HAW. CONST. art. I, §6: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." (New section adopted 1978.)

[89] __ PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, (hereinafter cited as PROCEEDINGS), written testimony of delegate Akira Hino on Proposal 99 (relating to the right to privacy), Bill of Rights, Suffrage, and Elections Committee (1978).

[90] PROCEEDINGS, *supra* note 89, Bill of Rights, Suffrage, and Elections Standing Committee Report No. 69 at 7–8.

[91] *Id.* at 7.

[92] *See* Prosser, *supra* note 11, at 389. *See also* Interview with Neal Okabayashi and Akira Hino, co-draftspersons of the "Right to Privacy" amendment, in Honolulu (Nov. 27, 1978). Both persons emphasized that there was no intention on their part to suggest a particular format because the amendment meant different things to different people.

Any confusion that may have existed in 1968 regarding the actual intent of the proposed amendment did not manifest itself in the 1978 proceedings. The Committee of the Whole noted that approval of the amendment would result in the Hawaii Constitution containing two provisions relating to privacy.[93] It further stated that the provisions were not to be construed as identical. The Committee intended that the 1978 article I, section 6 provision entitled "Right to Privacy" assume the status of a fundamental right,[94] whereas, the 1968 amendment to article I, section 5 did not treat privacy as a fundamental right.

The distinction between the protection provided by the right to privacy against private action and governmental action may be dissolved. The Committee of the Whole stated, "[I]t is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of *constitutional* analysis. Privacy as used in this sense concerns the possible abuses . . . of government or *private parties* . . . ."[95] Although the Committee on Bill of Rights, Suffrage, and Elections recognized that "the Constitution acts as a safeguard against the actions of government and not private parties",[96] the Committee glossed over this distinction by simply stating that statutory language could be drafted to protect individuals against the actions of private parties. In doing so, the delegates avoided the issue of whether a private cause of action will be implied from the recognition of the right of privacy as a fundamental right.[97] Due to the uncertainty generated by the blurring of the distinction between the protection against private action and governmental action, the actual scope of the privacy protections provided by this new amendment will have to be determined by the court or the legislature.[98]

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[93] PROCEEDINGS, *supra* note 89, Committee of the Whole Report No. 15 at 3.

[94] *Id.* The 1968 privacy provision contained in article I, section 5 was intended to be construed as a test of whether the prohibition against unreasonable searches and seizures applies, to be construed in light of the language in Katz v. United States, 389 U. S. 347 (1967) (warrantless electronic surveillance of petitioner's conversation while using a public telephone booth violated the privacy upon which petitioner justifiably relied).

In contrast, the new constitutional amendment was intended to ensure that privacy would be treated as a "fundamental right for purposes of constitutional analysis." PROCEEDINGS, *supra* note 89, Committee of the Whole Report No. 15 at 3.

The Bill of Rights Committee stated, "Your Committee, by equating privacy with the first amendment rights, intends that the right be considered a fundamental right and that interference with the activities protected by it be minimal" and that "the state must use the least restrictive means should it desire to interfere with the right." *Id.* Bill of Rights, Suffrage, and Elections Standing Committee Report No. 69 at 8, 9.

[95] PROCEEDINGS, *supra* note 89, Committee of the Whole Report No. 15 at 3. (Emphasis added.)

[96] *Id.*, Committee on Bill of Rights, Suffrage, and Elections Standing Committee Report No. 69 at 9.

[97] In Hawaii, prior to the enactment of the 1978 provision, an argument could have been made to the effect that due to similarities between the Fourth Amendment of the Federal Constitution and article I, section 5 of the Hawaii Constitution, an invasion of an individual's privacy by the government would subject the government to a cause of action for damages. *See* Bivens v. Six Unknown Federal Narcotics Agents, 403 U. S. 388 (1971) (government agents acting under color of authority were subject to a cause of action for damages for infringement of petitioner's fundamental Fourth Amendment rights). With the 1978 recognition of the right to privacy as the equivalent of a fundamental right, there may be, by analogy to the fundamental Fourth Amendment rights infringed upon in *Bivens*, an even stronger argument for allowing a cause of action for damages resulting from an invasion of a person's privacy by the government.

[98] Because all delegates were representatives of different interest groups, any agreement reached was the result of an accommodation of conflicting interests rather than a pure policy decision. The fact that the right to privacy amendment meant different things to various people, coupled with an apparent lack of discussion or constitutional analysis of the fundamental right, may require resort to the courts to determine the scope of the amendment. Interview with Neal Okabayashi, co-drafter of the "Right to Privacy" Standing Committee Report No. 69, in Honolulu (May 11, 1979).

Although the right to privacy amendment was ratified[99] in spite of substantial opposition by organized groups,[100] the intent of the 1978 Convention delegates that article I, section 6 assume the status of a fundamental right is likely to ensure that the new amendment will not be a meaningless gesture. The second half of the new provision, mandating that the Hawaii legislature take affirmative steps to implement the right to privacy, will speed the development of the tort of invasion of privacy.[101]

However, the other co-drafter is of the opinion that the legislature should enact statutes to clearly define the scope of privacy protections under this amendment before a test case comes before the court. Interview with Akira Hino, co-drafter of the "Right to Privacy" Standing Committee Report No. 69, in Honolulu (May 14, 1979).

[99] Passage of the amendment required support of a majority of all votes cast on the question, which must also equal at least thirty-five percent (35%) of all votes cast on Nov. 7, 1978. Final passing vote: yes-131,244; no-120,982. Office of the Lt. Governor, State of Hawaii.

[100] The Hawaii State Bar Association opposed the right to privacy proposal on the ground that it would generate uncertainty and undue litigation. The Association also felt that the right to privacy was already adequately protected by the federal and state constitutions. Honolulu Advertiser, Oct. 28, 1978, at A-10, col. 1.

The Hawaii Prosecuting Attorneys' Association believed the right to privacy was adequately protected by the 1968 version of HAW. CONST. art. I, §5, and they also opposed the new amendment because of a fear that it would interfere with efforts to control crime. Honolulu Star-Bulletin, Oct. 31, 1978, at A-12, col. 2.

Representatives of nearly every major news media outlet jointly opposed the amendment because they felt it could lead to harassing lawsuits by persons who were subjects of news reports. Honolulu Star-Bulletin, Sept. 19, 1978, at A-2, col. 3. In response to the concerns of the news media, the Constitutional Convention passed Resolution No. 51 which explicitly stated that the said amendment was "not intended to violate the freedom of the press." PROCEEDINGS, *supra* note 89, Resolution No. 51.

The media's apprehensions may be well founded. The recent trend of United States Supreme Court decisions has been away from maintaining the traditional preferred status for the press toward favoring the right of individuals. Lee, *The Supreme Court on Privacy and the Press*, 12 GA. L. REV. 215, 246 (1978).

To allay any fears that the proposed amendment might restrict intergovernmental access to data necessary for the proper administration of government, the Standing Committee Report stated, "Your Committee does not believe that exchanging and sharing of information between separate components of government should be prohibited." PROCEEDINGS, *supra* note 89, Committee on Bill of Rights, Suffrage, and Elections Standing Committee Report No. 69 at 9. As the Committee of the Whole emphasized, "Privacy as used in this sense concerns the possible abuses in the use of highly personal and intimate information in the hands of government or private parties but is not intended to deter the government from the legitimate compilation and dissemination of data." *Id.*, Committee of the Whole Report No. 15 at 3.

[101] Affirmative steps to implement the right to privacy may be taken by the legislature as in Alaska after adoption of a similar constitutional amendment. *See* ALASKA STAT. §18.23.030 (Supp. 1977) (data acquired under state-sponsored health care system only available for purposes of review, and not subject to subpoena or discovery). *See also Id.* §§12.62.010–.060 (generally protects the individual's privacy in relation to information about criminal offenses). *See generally* Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510–2520 (1970) (relating to interception of wire and oral communications); Federal Privacy Act of 1974, 5 U.S.C. §552a (1976); Freedom of Information Act, 5 U.S.C. §552 (1976); and Government in the Sunshine Act, 5 U.S.C. §552b (1976). In attempting to implement the right to privacy in tort law, the Hawaii legislature may wish to consider the New York Law Revision Commission proposal, note 68 *supra*; the seven state appropriation statutes, note 51 *supra*, and *see* text accompanying notes 63–81 *supra*; and the two-part tort of "intrusion" and "unauthorized use of private information" discussed in Note, *Tortious Invasion of Privacy: Minnesota as a Model*, 4 WILLIAM MITCHELL L. REV. 163, 206 (1978). *But cf.* Cope, *supra* note 82, at 738. Cope suggests that the second sentence in the Alaska constitutional right of privacy provision which is similar to the second sentence in the Hawaii provision, note 88 *supra*, renders it susceptible to the interpretation that it does not provide any protection against invasions of privacy absent legislative action.

See generally In February 1979, the Hawaii legislature attempted to implement the Right to Privacy amendment by introducing a bill patterned after the Federal Privacy Act of 1974. The Senate bill was tabled until the following session due to substantial opposition by organized groups who asserted that the bill suffered from vagueness, and that it would have undesirable legal and administrative implications. Honolulu Star-Bulletin, Feb. 10, 1979, at A-3, col. 3.

CONCLUSION

Although the law of tortious invasion of privacy has been adequately developed in some American jurisdictions, the scope and prima facie elements of the tort in Hawaii are still unclear. This uncertainty regarding the scope of the tort may be due to the lack of subsequent development of the tort in Hawaii since the 1968 *Fergerstrom* decision.

In attempting to define the tort of invasion of privacy, it may be wise for Hawaii's courts to expressly recognize the difference between injuries to feelings or interests of personality, and injuries to proprietary interests. Recognition of this difference will avoid the confusion experienced in some jurisdictions resulting from proceeding upon an inadequate analysis of the underlying interests sought to be protected. Although these categories are not mutually exclusive, the tort as it now stands in Prosser's four part scheme can be divided into two categories, primarily protecting two distinct interests. The tort of appropriation for commercial purposes primarily protects plaintiff's proprietary interest in his name, likeness, or personality. The remaining three categories of intrusion, public disclosure of private facts, and false light in the public eye protect the plaintiff primarily from injuries to feelings. Adoption of this modified approach to Prosser's analysis of the tort may be facilitated and supported by the fact that most courts and the *RESTATEMENT (SECOND) OF TORTS* have already adopted the basic four part categorization. However, caution should be exercised in assuming the Prosser format will necessarily be adopted in Hawaii, because there is no reference in *Fergerstrom*, even in a footnote, to Prosser or his four part tort.

Another possible approach that the Hawaii courts may take is the integration of the tort of invasion of privacy, with the exception of cases dealing purely with injuries to proprietary interests, into the torts of intentional and/or negligent infliction of emotional distress, as suggested by Dean Wade. Both torts are recognized under Hawaii case law, and the prima facie elements of both are stated in the leading cases. In handling the injuries to proprietary interests, Hawaii can look to state statutes such as those in New York, Virginia, Oklahoma, Utah, California, Rhode Island, Massachusetts, and Wisconsin, which provide statutory protection against invasions of privacy, and to case law in other jurisdictions.

The initial recognition of the common law tort of invasion of privacy in the *Fergerstrom* decision, coupled with the elevation of the right to privacy to the status of a fundamental right by the 1978 constitutional amendment of article I, section 6, should provide the impetus for further development of this area of tort law. Additionally, it is hoped that the Hawaii appellate courts will define the scope, elements, damages, and defenses relating to the tort at their earliest opportunity.

Steven S. C. Lim

"LAST RIGHTS": HAWAII'S LAW ON THE RIGHT TO CHOICE OF THERAPY FOR DYING PATIENTS

I. INTRODUCTION

A terminally ill woman, whose prognosis indicated that she would not survive another month under the orthodox treatment she was receiving, requested that she be permitted to take a drug whose use was not approved by federal law.[1] Should she as a dying person have a greater freedom of choice of therapy than do those who are not dying? There is humanitarian appeal in permitting a dying patient to have her last request granted, to have a last ditch effort made to save her life when all else has failed,[2] even though the treatment she desires may not have been proved effective and is not sanctioned by law. This would at least allow the dying patient to have some hope of recovery and the peace of mind that every effort was being made to save her life.

The Hawaii Territorial Legislature seemed to adopt this view of a terminal patient's right to choice of therapy in a 1909 amendment to Section 1069 of Chapter 89 of the Revised Laws of Hawaii 1905,[3] the statute that dealt with the definition of the practice of medicine. The 1909 amendement survives as a proviso in Hawaii Revised Statutes Section 453-1 [hereinafter referred to as the "Proviso"] which states:

> [W]hen a duly licensed physician pronounces a person affected with any disease hopeless and beyond recovery and gives a written certificate to that effect to the person affected or his attendant nothing herein shall forbid any person from giving

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[1] These are the basic facts of Suenram v. Society of Valley Hospital, 155 N.J. Super. 593, 383 A.2d 143 (1977). For a brief description of the case, *see* note 83 *infra.*

[2] This idea was expressed in recent cases involving the use of the anti-cancer drug Laetrile. The court in Rutherford v. United States, 438 F.Supp. 1287 (W.D. Okla. 1977), *aff'd*, 582 F.2d 1234 (10th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3497 (No. 78-605), *cert. denied*, 47 U.S.L.W. 3497 (No. 78-763) (Jan 22, 1979), stated: "Individuals for whom no orthodox cure is available surely are entitled to select a health care approach with which they feel compatible." *Id.* at 1293. The court in Suenram v. Society of Valley Hospital, 155 N.J. Super. 593, 383 A.2d 143 (1977), indicated that a dying person has the right to have a last ditch effort made to save her life. It stated that "[t]o deny a person her last opportunity to make a choice as to how to combat a disease which has ravaged her body would display a lack of understanding of the meaning of the individual's rights in our free society." *Id.* at 603, 383 A.2d at 148. The court in People v. Privitera, 74 Cal. App. 3d 936, 141 Cal. Rptr. 764 (1977), indicating that it would be inhumane not to permit a terminal patient to have some hope of relief, stated:

> The state has ... criminalized the doctor who is willing to innovate, willing to try an unapproved drug with the consent of his patient. From the terminal patient's viewpoint a new depth of inhumanity is reached by a broad sweep of this law so interpreted. No compelling interest of the state requires Dr. Privitera's nineteen cancer patients to endure the unendurable, to die, even forbidden hope.

Id., 141 Cal. Rptr. at 778.

[3] FIFTH LEGISLATURE OF THE TERRITORY OF HAWAII, JOURNAL OF THE SENATE 528 (1909) [hereinafter cited as 1909 HAW. S. J.].

or furnishing any remedial agent or measure when so requested by or on behalf of the affected person.[4]

Although this provision appears to grant the "hopeless patient"[5] complete freedom of choice of therapy, it is one of the purposes of this Note to show that its present application is a limited one. For example, furnishing the anti-cancer drug, Laetrile, would not be permitted despite the Proviso.[6] Nevertheless, the Proviso can be viewed as enlightened law in the context of the current movement throughout the United States toward broader patients' rights[7] and of the growing interest in unorthodox medicine.[8] These trends are reflected in the evolving law dealing with the rights of terminally ill patients to refuse lifesaving treatment and to die natural deaths,[9] and in the recent Laetrile cases in which the right to choice of therapy has been recognized to include the right in certain circumstances to have treatment that is prohibited by law.[10]

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[4] The entire statute provides:

§453-1 Practice of Medicine defined. For the purposes of this chapter the practice of medicine includes the use of drugs and medicines, water, electricity, hypnotism, or any means or method, or any agent, either tangible or intangible, for the treatment of disease in the human subject; provided, that when a duly licensed physician pronounces a person affected with any disease hopeless and beyond recovery and gives a written certificate to that effect to the person affected or his attendant nothing herein shall forbid any person from giving or furnishing any remedial agent or measure when so requested by or on behalf of the affected person.

This section shall not amend or repeal the law respecting the treatment of those affected with leprosy.

HAW. REV. STAT. §453-1 (1976).

[5] The actual statutory language is "hopeless and beyond recovery." *Id.* When the phrase "hopeless patient" is used hereinafter, it will refer to a patient whose condition is hopeless and beyond recovery in a dictionary sense. When the term "hopeless and beyond recovery" is used hereinafter, it will refer to the statutory term of art contained in the Proviso.

[6] *See* notes 22, 28 and 37 *infra* and accompanying text.

[7] The 1976 Hawaii State Senate passed S.R. No. 278, Eighth Legislature, State of Hawaii (1976), which urged the adoption of a patient's bill of rights by the medical profession that would include statements of patients' rights and correlative professional responsibilities. JOURNAL OF THE SENATE OF THE EIGHTH LEGISLATURE OF THE STATE OF HAWAII REGULAR SESSION OF 1976 at 594 (1976).

In 1977, the Hawaii State House of Representatives proposed H.B. No. 445, Ninth Legislature, State of Hawaii (1977) [hereinafter referred to as H.B. No. 445 (1977)], relating to "Death with Dignity," which would permit a person to execute a document authorizing the termination of treatment intended to save or sustain his life if his condition at the time of such treatment is "irremediable." *See* notes 75-77 *infra* and accompanying text.

In 1978, the Hawaii State Legislature passed Act 248, 1978 Haw. Sess. Laws 760, which defines death and allows physicians to discontinue life support for patients who are legally dead but are being kept physically alive by artificial life support systems. HAW. REV. STAT. §327C-1 (Supp. 1978).

[8] Comment, *Restrictions on Unorthodox Health Treatment in California: A Legal and Economic Analysis*, 29 U.C.L.A. L. REV. 647 (1977). "A correlative of the waning faith in the medical profession evidenced by the medical malpractice crisis is the recent revival of unorthodox health treatment." *Id.* at 647. A general definition of unorthodox medicine is:

Fundamentally, the distinction between orthodox and fringe medicine today is that orthodox treatment relies mainly on fighting disease with the help of drugs or surgery, whereas unorthodox treatment concentrates on stimulating the patient's constitution to fight on its own behalf on the assumption that this is safer and more effective. . . . Man has built-in recuperative powers which can be seen at work when a cut heals into a scar, without attention; and this process, all fringe practitioners agree, can be speeded up, sometimes to an astonishing degree by suitable stimuli.

Id. n. 3.

[9] *See* text accompanying notes 64-77 *infra.*

[10] *See* text accompanying notes 83-97 *infra.*

This Note first analyzes the Proviso, its limitations, and its legislative history. Next, the policy underlying the evolving law on the rights of dying patients is examined and compared to the policy that underlies the Proviso. This comparison demonstrates that although the Proviso has been limited in application by the effect of subsequent legislative enactments, its rationale is nonetheless consistent with current legal trends. The Note concludes by suggesting legislative measures that would make the Proviso more consistent with contemporary policy with respect to hopeless patients.

II. Analysis of the Proviso

A. "Hopeless and Beyond Recovery"

The application of the Proviso is limited to cases involving patients "affected with any disease"[11] who are "hopeless and beyond recovery."[12] As a prerequisite to the application of the statute, the patient must obtain from a "duly licensed physician"[13] a written certificate certifying that he is in fact hopeless and beyond recovery.[14]

The meaning of the term "hopeless and beyond recovery" is not clear and is open to interpretation. On the one hand, the term may be construed broadly to apply to patients who are afflicted with any of a wide range of incurable diseases. Such a broad construction is suggested by the legislative history of the Proviso, which indicates that leprosy, tuberculosis, and asthma were intended to be included among the diseases that could result in one's being pronounced hopeless and beyond recovery.[15] Since some forms of leprosy and tuberculosis were considered to be fatal in 1909,[16] it may be inferred that the framers intended to include patients with terminal illness within the scope of the Proviso. In addition, however, the reference in the Proviso's legislative history to asthma, which was not considered to be a fatal disease in 1909,[17] indicates

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[11] Haw. Rev. Stat. §453-1 (1976).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] The amendment as originally proposed provided that the Proviso should apply to the "treatment of a person supposed to have leprosy, asthma, consumption or tuberculosis in any case which a duly licensed physician shall have, by written certificate, pronounced hopeless and beyond recovery." 1909 Haw. S. J., *supra* note 3, at 528. The statutory reference to leprosy, asthma, and consumption or tuberculosis was eliminated by the Committee on Public Health and replaced by the broader term "any disease." *Id.* at 792.

[16] In 1909, twenty-five percent of all deaths in the United States was caused by tuberculosis. A. Lowell, Tuberculosis 7 (1969). "In 1900, and several years thereafter, tuberculosis was the leading cause of death in the United States. . . ." *Id.* at 71.

"Untreated lepromatous leprosy is progressive and fatal in 10–20 years." M. Krupp & M. Chatton, Current Medical Diagnosis and Treatment 843 (1978).

[17]

> From an historical standpoint, it is interesting that statistical information about asthma deaths was incomplete until relatively recently, and a review of the medical literature confirms its rarity in children before 1950. Likewise, in adults, death during an asthmatic attack was felt to be almost unknown prior to 1930. This phenomenon was reflected in the textbooks and medical publications of that time. For example, Trousseau writing in the first half of the nineteenth century remarked that "asthma is not fatal" and Andral in his pathology text published in 1839, made the quaint statement that "asthma is a brevet of long life." In America, Oliver Wendell Holmes, commenting on his own symptoms echoed the same sentiments. . . ."

Fischer, *Asthma as a Lethal Disease: The Cincinnati Experience,* 13 J. Asthma Research 27 (Sept. 1975).

that patients afflicted with diseases that were incurable but *not* fatal were also to be included within the scope of those who might be pronounced "hopeless and beyond recovery".[18]

On the other hand, this broad construction of the term may today be obsolete. Due to modern life-support technology, it may be said that no one is ever completely hopeless and beyond recovery until he is actually dead. The life of a dying patient may be prolonged for an indefinite period of time during which a breakthrough in medical treatment may render his disease curable.[19] Thus, in the absence of any specific definition to guide its interpretation, it is not clear how broadly or narrowly the term "hopeless and beyond recovery" should be construed in connection with the practical application of the Proviso.

B. Limited Protection for the Treating Person

The Proviso states that "nothing herein shall forbid *any person* from giving or furnishing any remedial agent or measure . . . ."[20] In *Territory v. Takamine*,[21] the Hawaii Supreme Court, in dicta, stated that the Proviso operates as a defense[22] to the provisions of Chapter 453 of the Hawaii Revised Statutes,

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[18] *E.g.*, a patient with multiple sclerosis may be hopeless and beyond recovery even though his condition is usually not fatal. There is no specific treatment for this degenerative disease but the immediate cause of a multiple sclerosis victim's death is usually some other disease or complication. M. KRUPP & M. CHATTON, *supra* note 16, at 592–93. Thus, such a patient, even though not terminally ill, may be considered to be hopeless and beyond recovery in the sense that he has lost the normal use of parts of his body and there is no justifiable hope of regaining such use. *Id.*

[19] This is the Hawaii Medical Association's (HMA) attitude, as of March 1978, toward a similar term, "irremediable condition," which is the term used in the recently proposed legislation, H.B. No. 445 (Haw. 1977) *supra* note 7, that would allow a person to execute a document legally authorizing the discontinuation of life-saving medical treatment for himself when his condition is irremediable and when other specified requirements are satisfied.

In a letter to Hawaii State Senator Donald S. Nishimura and the Hawaii State Senate Judiciary Committee, the HMA stated, as part of its reason for opposing the bill, that the term "irremediable condition" was too vague and that with advances in modern medicine, it would be difficult to ever say that a person was terminally ill. The HMA stated:

> There is medically operational or scientific definition of what constitutes an "irremediable condition." Specifically, there are no medical indices of what disorders constitute an irremediable condition nor are there any criteria available for determining when a specific disease changes from being remediable into irremediableness. Advances in medical research have been so far-reaching in recent years that a disorder that might be designated by a lay person as a "terminal illness" on one day is no longer such the next. Changes have been such that many physicians no longer use the phrase such as "he only has .. months to live," or "the illness is terminal."

Letter from Marion L. Hanlon to Donald S. Nishimura (Mar. 16, 1978).

The Food and Drug Administration (FDA) has expressed a similar view regarding the term "terminal." In support of its opposition to allowing terminal cancer patients to use Laetrile, the FDA quoted Dr. Peter H. Wiernik, Chief of the Clinical Oncology Branch of the National Cancer Institutes's Baltimore Cancer Research Center:

> One major difficulty in making a particular chemical available for terminal patients only, is that no one can prospectively define the term "terminal" with any accuracy. A patient can be said to be terminal only after he dies. Many patients who are critically ill respond to modern day management of cancer.

42 Fed. Reg. 39,768, 39,805(1977).

However, a U. S. District Court in Rutherford v. United States, 429 F.Supp. 506 (W.D. Okla. 1977), set forth guidelines that it found to be sufficiently definitive for the designation of the class of "terminally ill cancer patients" by physician certification. *Id.* at 509. For the text of the guidelines, *see* note 104 *infra*.

[20] HAW. REV. STAT. §453–1 (1976) (emphasis added).

[21] 21 Haw. 465 (1913).

[22] "The provisos of . . . [HAW. REV. STAT. §453–1] are matters which an accused may show in defense, but they do not enter into the definition or description of the offense. . . . " *Id.* at 467.

which provides for the regulation of the practice of medicine,[23] standards of professional conduct for the licensed physician,[24] and sanctions for the failure to comply with its provisions.[25] Thus, under the Proviso, any person licensed or unlicensed who gives or furnishes a remedial agent or measure to a patient who is certified to be hopeless and beyond recovery would be protected from the sanctions of Chapter 453. However, there is no indication that the Proviso will operate as a defense to any other legal sanctions.[26]

For example, a physician might furnish a large quantity of pain killer to a hopeless patient upon the patient's request. Assuming that the pain killer is considered to be a "remedial agent,"[27] the physician would be protected by the Proviso from any sanctions of Chapter 453, even if his action was deemed to be inappropriate or unnecessary and otherwise in violation of the Chapter.[28] If, however, the patient died as a result of an overdose of the pain killer he had received, the Proviso would not protect the physician from charges of homicide[29]

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[23] HAW. REV. STAT. §453-2 (Supp. 1978) states:
Except as otherwise provided by law, no person shall practice medicine or surgery in the State either gratuitously or for pay . . . without having a valid unrevoked license or a limited and temporary license, obtained from the board of medical examiners, in form and manner substantially as hereinafter set forth.

[24] HAW. REV. STAT. §453-8 (Supp. 1978) provides, *inter alia:*
Any license to practice medicine and surgery may be revoked, limited, or suspended by the board of medical examiners at any time in a proceeding before the board for any one or more of the following acts or conditions on the part of the holder of such license:

. . .

(10) Professional misconduct or gross carelessness or manifest incapacity in the practice of medicine or surgery;
(11) Conduct or practice contrary to recognized standards of ethics of the medical profession;
(12) Consistently utilizing medical service or treatment which is inappropriate or unnecessary

. . . .

[25] A penalty of a fine of not more than $500 and imprisonment of not more than six months for the practice of medicine without a license is provided by statute. HAW. REV. STAT. §453-13 (1976). Sanctions against the licensed physician for failure to comply with the provisions of Chapter 453 include revocation of license, HAW. REV. STAT. §453-8 (Supp. 1978), and other disciplinary action, HAW. REV. STAT. §453-8.2 (1976).

[26] The Proviso states that "nothing *herein* shall prevent any person from giving or furnishing any remedial agent or measure. . . . " HAW. REV. STAT. §453-1 (1976) (emphasis added). "Herein" in the statute refers to "this chapter," which refers to Chapter 453 of the Hawaii Revised Statutes dealing with the practice of medicine. *Id.* For the complete text of the statute, *see* note 4 *supra* and accompanying text.

[27] The Proviso does not expressly state whether the "agent or measure" offered to the hopeless patient must be intended to cure or curtail the disease in order to be "remedial," or whether it would be sufficient that it was intended only to give the patient relief from pain or other symptoms of the disease. The legislative history of the Proviso suggests that a liberal construction of the term was intended. The Public Health Committee report in favor of the adoption of the Proviso stated that the purpose of the Proviso was to afford certain hopelessly ill patients "the opportunity of availing themselves of *any* hope of relief which might be offered. . . . " 1909 HAW. S. J. *supra* note 3, at 417 (emphasis added). Arguably, a pain killer might be considered to be a "remedial agent" even though it would not cure the disease because it would provide some "hope of relief" from pain.

[28] HAW. REV. STAT. §453-8(12) (Supp. 1978). *See* note 24 *supra* for the text of this statutory provision.

[29] "A person commits the offense of murder if he intentionally or knowingly causes the death of another person." HAW. REV. STAT. §707-701 (1976). According to the comments to this section, the requirement of "intentionally or knowingly" is satisfied if the person has the conscious object of causing the death of another or if he is "practically certain" that he will cause death. Thus, if a physician is practically certain that a dosage of drugs given to his patient would cause death, and his patient dies as a result of an overdose of those drugs, the physician may be guilty of murder.

A physician might be guilty of manslaughter if he recklessly causes the death of his patient.

or causing his patient to commit suicide.[30]

Similarly, the Proviso would furnish only limited protection to the unlicensed person who gives or furnishes a remedial agent or measure to a qualified patient. Such a person would be protected by the Proviso from prosecution for the practice of medicine without a license but would not be protected from possible tort[31] or criminal liability[32] for the adverse effects of the remedies he furnished.

C. "Any Remedial Agent or Measure"

The protection afforded to the person who furnishes the remedial agent or measure is intended to make a wider range of therapy available to the hopeless patient.[33] However, notwithstanding the fact that the Proviso states broadly that "any remedial agent or measure" may be furnished to the hopeless patient, in practice the range of available remedies is very limited.

Since the Proviso operates only as a defense to the provisions of Chapter 453,[34] the use of drugs would still be controlled by the Hawaii Food, Drug, and Cosmetics Act,[35] and by its federal counterpart.[36] For example, the use of the anti-cancer drug, Laetrile, which has never been approved by the Food and Drug Administration (FDA), is banned under these statutes[37] notwithstanding the Proviso. The use of hallucinogens and narcotics would remain regulated by

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HAW REV. STAT. §707-702(1)(a) (1976). Recklessness with respect to a result of a person's conduct involves conscious disregard of a substantial and unjustified risk that the conduct will cause such a result. HAW. REV. STAT. §702-206(3)(c) (1976). Thus, if a physician gives a dangerous dosage of drugs to a patient and disregards a substantial risk to the patient, he may be guilty of manslaughter if the patient dies as a result of an overdose. However, the physician who furnished a large amount of painkiller to a dying patient could argue that the risk was justified, that other physicians would do the same, *see* note 80 *infra*, that it would not amount to a "gross deviation from the standard of conduct that a law abiding person would observe in the same situation," HAW. REV. STAT. §702-206(3)(d) (1976), and that therefore, it is not reckless conduct.

[30] Under HAW. REV. STAT. §707-702(1)(b) (1976), a person commits manslaughter if he intentionally causes another person to commit suicide. Thus, if a physician furnishes a lethal quantity of drugs with the intent that the patient take the drugs by himself to end his own life, the physician may be guilty of manslaughter.

[31] *See e.g.* Tittle v. Hurlbutt, 53 Haw. 526, 497 P.2d 1354 (1972). In that case, a physician who was not licensed to practice in Hawaii was sued for allegedly causing the cerebral palsy of a newborn infant. The court held in favor of the physician.

[32] *See* notes 29-30 *supra.*

[33] The Hawaii Public Health Committee stated that the object of the Proviso was "to give those afflicted ... the opportunity of availing themselves of any hope of relief *without subjecting those willing to render them aid to the indignities of prosecution and persecution.*" 1909 HAW. S. J. *supra* note 3, at 417 (emphasis added).

[34] *See* notes 22 and 28 *supra.*

[35] HAW. REV. STAT. §328 *et. seq.* (1976 and Supp. 1978).

[36] Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §301 *et. seq.* (1976 and Supp. 1979).

[37] Federal law provides that "no person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) of this section is effective with respect to such drug." 21 U.S.C. §355 (1976 and Supp. 1979). Grounds for the rejection of an application include inadequate proof of safety or effectiveness. *Id.* In August 1977, the FDA, after extensive hearings, found, *inter alia*, that Laetrile is neither safe nor effective for the purposes claimed and is consequently banned from interstate commerce. 42 Fed. Reg. 39,768, 39,768 (1977).

Hawaii law provides that "No person shall sell, deliver, offer for sale, hold for sale, or give away any new drug unless ... an application with respect thereto has been approved and the approval has not been withdrawn under [FDA law]. ... " HAW. REV. STAT. §328-17 (1976). Thus, Laetrile is banned under both state and federal law.

the State Uniform Controlled Substances Act[38] and persons would be subject to criminal penalties for promoting such substances.[39] Thus, the Proviso does not make available any drugs that are not otherwise already available to the patient.[40]

The kind of health care treatments intended to be made available under the Proviso is not clear. Some clues regarding the framers' intent may be found in the changes to the original draft of the 1909 amendment. As originally proposed, the amendment covered "the *practice* of any method, or the *application* of any remedial agent or measure . . . ."[41] On third reading, it was changed to apply to the "giving or furnishing of any remedial agent or measure . . . ."[42] This is the current language of the Proviso.[43] It might be inferred from this change that the framers believed that the "practice" of a method and the "application" of agents or measures were seperate and distinct from the "giving and furnishing" of agents or measures. Further, it indicates the framers belief that methods which are practiced, and agents and measures capable of being applied are separate and distinct from agents and measures that are given or furnished. Based on such inference, these words might be narrowly interpreted. For example, methods that are practiced or agents that are applied might be primarily those that are administered externally while agents that are given or furnished might be primarily those that are taken internally. Also, the practice of a method or the application of a measure implies the close supervision of the treating person whereas an agent that is given or furnished may be used by the patient independent of the presence of the treating person. It is unclear whether the framers, by altering the words of the Proviso, meant to exclude from the protection of the Proviso, treatments that are administered externally and treatments that require the presence of the treating person, or whether they

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[38] HAW. REV. STAT. §329 *et. seq.* (1976 and Supp. 1978).

[39] HAW. REV. STAT. §712-1240 *et. seq.* (1976 and Supp. 1978).

[40] However, the Proviso may permit the furnishing by a licensed physician of legally available drugs in unusual amounts. *See* note 27 *supra* and accompanying text. Inroads have been made into the area of freedom of choice of therapy in the recent Hawaii Supreme Court case of State v. Bachman, No. 6392 (Haw. Sup. Ct., filed May 21, 1979). In that case, a person who had been convicted for the possession of marijuana attempted to assert the defense of medical necessity. Although the court held that such defense was ineffective in this case due to the lack of required medical testimony, the court stated in its *per curiam* opinion that "[i]t is entirely possible that medical necessity would be asserted as a defense to a marijuana possession charge in a proper case." *Id.* slip op. at 1-2. The court stated that in order to assert such a defense successfully, there must be a showing by competent medical testimony that (1) the harm to which defendant was exposed was serious and imminent, (2) that other conventional medical alternatives were ineffective or unavailable, and (3) that there were beneficial effects upon the defendant's condition of the use of marijuana. *Id.* slip op. at 2. The court relied, *inter alia*, on the statutory "choice of evils" defense Haw. Rev. Stat. §703-302, and the case of United States v. Randall, 20 Cr. L. 2299 (D.C. Super. Ct. filed Nov. 24, 1976). In that case, in which the patient sought the right to use marijuana for the treatment of his glaucoma, the court upheld the validity of the defense of medical necessity.

A terminally ill patient might similarly attempt to raise this same defense. He would be in a position to bring in medical testimony that there are no effective conventional medical alternatives available. If his life expectancy was not long, he could also claim that there is a serious and immediate danger of his death. However, the patient may have difficulty in meeting the remaining requirement of medical testimony that there is benefit to the patient. The Hawaii Supreme Court did not set forth standards of how much benefits must be shown, but it did say that "[r]elief from simple discomfort would not suffice." State v. Bachman, No. 6392. slip op. at 2 (Haw. Sup. Ct., filed May 21, 1979).

[41] 1909 HAW. S. J. 528 (emphasis added).

[42] *Id.* at 872.

[43] HAW. REV. STAT. §453-1 (1976).

instead meant "agents or measures" to encompass both internally and externally administered treatments, and both treatments requiring the presence of the treating person and those not requiring his presence.

However, implying that the phrase "giving or furnishing any remedial agent or measure" should be broadly construed is the fact that in the definition of the practice of medicine that precedes the Proviso in Section 453-1 of the Hawaii Revised Statutes, the term "any agent"[44] is modified by the words "tangible or intangible."[45] Furthermore, this term of general description is preceded by words of specificity such as electricity[46] and hypnotism, which may be used as guidelines for the interpretation of the general term.[47] If the term "any remedial agent or measure" in the Proviso is construed in light of these words of specificity, external treatments which, like hypnotism or the application of electricity, require the close supervision or presence of the treating person are likely to be within the coverage of the Proviso.

A further limitation on the use of the Proviso is the fact that even though the Proviso permits, within its limits, any licensed or unlicensed person to provide any remedial agent or measure, if the agent or measure is regulated by the particular licensing provisions of a healing art outside the practice of medicine, such as acupuncture, the person providing the remedy will still have to comply with the licensing requirements of that particular healing modality.[48]

Thus, when the term "any remedial agent or measure" is veiwed within the overall scheme of health-care regulation, it becomes apparent that the variety of treatment available under the Proviso is limited.

III. The Policy Objectives of the Proviso

As already discussed, the legislative history of the Proviso indicates that its framers intended to afford to hopeless patients a broader choice of health care alternatives than was available to other kinds of patients. The purpose of the 1909 amendment as stated by the Public Health Committee was to afford hopeless patients "the opportunity of availing themselves of any hope of relief which might be offered . . . ."[49] The Committee supported the admendment by stating:

> Your Committee is inclined to believe that the restrictions imposed by law have prevented proper tests being made in the past by those who believed in the efficacy

[44] Haw. Rev. Stat. §453-1 (1976). For the text of this part of the statute, *see* note 4 *supra.*

[45] *Id.*

[46] Electrotherapy is defined as the use of different forms of electric machines for therapeutic purposes and is referred to as a kind of practice. *See* Joyner v. State, 181 Miss. 245, 179 So. 573 (1938).

[47] Where words of general description follow the enumeration of certain things, such words may be restricted in their meaning to things of like kind and character to those enumerated under the rule of *ejusdem generis* as stated in State v. Kahalewai, 56 Haw. 481, 488, 541, P.2d 1020, 1025 (1975). Although in that case, the rule was used in the interpretation of a criminal statute, it is possible that this rule may be used in the interpretation of the Proviso.

[48] The Proviso operates as a defense only to the sanctions of Chapter 453 of the Hawaii Revised Statutes, *see* notes 22 and 23 *supra.* Thus, for example, if a person practiced acupuncture without a license on a hopeless patient who fulfills the prerequisites for operation of the Proviso, he would nevertheless be vulnerable to prosecution under Haw. Rev. Stat. §436D (1976), which sets forth the licensing requirement for the practice of acupuncture.

[49] 1909 Haw. S. J. *supra* note 3, at 417.

> of their treatment of the diseases named in the Bill. We know many instances where the professional medico had given up hope, and the insignificant and apparently ignorant herb man saves the abandoned patients.[50]

It may be inferred from the reference to the "herb man" in this Committee report that the Proviso was intended to permit the use of such unorthodox treatments as Hawaiian herbal therapy[51] and treatments found in Eastern medicine,[52] which probably arrived in Hawaii during this era with the immigrant plantation workers from the Orient.[53] The Proviso thus allowed patients who were certified to be hopeless and beyond recovery by a licensed physician to turn to practitioners of such medical arts even though the practitioners were not licensed to practice medicine. Similarly, the Proviso also accommodated unorthodox healing arts of Western origin such as naturopathy and chiropractic which, in 1909, were not specifically approved by law.[54]

Since 1909, this purpose of accommodating unorthodox healing arts has been fulfilled to a degree by the statutory legitimization of certain of them, such as acupuncture,[55] naturopathy,[56] and chiropractic.[57] To this extent, the Proviso may be outdated. The Proviso may also be outdated in that, since its enactment, cures or controls have been found for asthma,[58] leprosy,[59] and tuberculosis,[60] which were the diseases which the framers were primarily concerned.[61]

On the other hand, although some of its objectives have been fulfilled by subsequent legislation and developments in medicine, the Proviso has renewed significance in light of the growing interest in unorthodox medicine and the current movement in favor of patients' rights.[62] It has particular significance in

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[50] *Id.*

[51] Hawaiian herbal medicine was legitimized in 1919 by Act 193. 1919 HAW. SESS. LAWS 261.

[52] Eastern medicine includes oriental herb medicine, acupuncture, moxibustion, and massage. The fundamental difference between Eastern and Western medicine is that Western medicine generally uses a scientific approach to treatment whereas the foundation of the Eastern medical arts is the theory of the balance between the two universal potencies, "yin" and "yang," and the theory of the interrelationship of the five basic elements, earth, metal, water, wood, and fire. H. WALLNOFFER & A. VON ROTTAUCHER, CHINESE FOLK MEDICINE, 11-22 (1972).

[53] For example, the 1913 case of Territory v. Takamine, 21 Haw. 465 (1913), which is the only Hawaii Supreme Court case that discusses the Proviso, involved the use of a substance called "mogusa". *Id.* at 466. "Mogusa" or "moxa" is a substance used in the Chinese healing art of "moxibustion". H. WALLNOFFER & A. VON ROTTAUCHER, CHINESE FOLK MEDICINE, 135 (1972).

[54] *See* notes 56 and 57 *infra.*

[55] In 1975, Act 206 was passed. It legitimized acupuncture by establishing laws to license and regulate its practice. 1974 Haw. Sess. Laws 444. These laws may be found in HAW. REV. STAT. §436D (1976).

[56] Act 77, passed in 1925, established laws to license and regulate the practice of naturopathy. 1925 HAW. SESS. LAWS 416. These laws may be found in HAW. REV. STAT. §455 (1976), *as amended by* Acts 162 and 208, 1978 Haw. Sess. Laws 416.

[57] Chiropractic was first recognized by law in 1919 when an amendment to §1017 of the REV. LAWS OF HAW. 1915 regarding the practice of medicine and surgery was passed. The amendment established a provisional licensing procedure for the practice of chiropractic until a board of chiropractic examiners could be created. 1919 Haw. Sess. Laws 24. However, it was not until 1925 that the board of chiropractic examiners was established by Act 99. This act created a set of laws governing the practice of chiropractic apart from the laws governing the practice of medicine. 1925 Haw. Sess. Laws 115, codified today in HAW. REV. STAT. §442 (1976) *as amended by* Act 208, 1978 Haw. Sess. Laws 416.

[58] BRONCHIAL ASTHMA: MECHANISMS AND THERAPEUTICS 1121 (E. WEISS & M. SEGAL ed. 1976).

[59] M. KRUPP & M. CHATTON, CURRENT MEDICAL DIAGNOSIS AND TREATMENT 843 (1978).

[60] A. LOWELL, TUBERCULOSIS 16 (1969).

[61] *See* note 15 *supra* and accompanying text.

[62] *See* notes 7 and 8 *supra.*

the context of evolving law regarding the freedom of choice in health care decisions for the dying patient. The basic policy underlying both the Proviso and the various examples of evolving law to be discussed in this section is that hopeless or dying patients should have a right to a broader choice of health care alternatives than other kinds of patients.[63]

A. The Right to Die

This underlying policy is recognized in the decisions in the "right to die" cases, *In re Quinlan*[64] and *Superintendent of Belchertown v. Saikewicz.*[65] In both cases the courts permitted the patients to refuse treatment based, *inter alia*, on the patients' poor prognosis. In *Quinlan*, the patient was comatose with no chance of returning to sapient life,[66] her guardian sought to assert her right to refuse therapy. *Saikewicz* involved a profoundly mentally retarded sixty-seven-year-old man who was suffering from acute leukemia. His prognosis without treatment was death within a matter of months.[67] With chemotherapy, he had

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[63] Although the threshold requirements are different in the various types of situations to be discussed in this section, the policy of affording the patient who meets those requirements the right to a broader choice of health care alternatives than is available to patients who do not meet such requirements is present in each situation. The differences between the various threshold requirements will be described in this footnote; the terms "hopeless" and "dying" will be used when generally discussing threshold requirements or the above-mentioned underlying policy.

In the case of In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), the court indicated that the right of a patient to choose to refuse lifesaving treatment grew stronger as her prognosis dimmed. In this case, the patient's dim prognosis was due to an irreversible coma. *See* note 71 *infra* and accompanying text. In a similar case, Superintendent of Belchertown v. Saikewicz, Mass. , 370 N.E.2d 417 (1977), the prognosis that triggered the court's granting the patient the right to refuse lifesaving treatment was death within a few months due to terminal cancer. *See* text accompanying notes 65 and 66 *infra.*

"Terminally ill" was the term used in Rutherford v. United States, 429 F.Supp. 506 (W.D. Okla. 1977), wherein the court granted to a class of cancer patients the right to use the illegal drug, Laetrile. The court indicated that "terminally ill" referred to an illness that possessed a high and predictable mortality rate. *See* note 108 *infra.* This term would probably not include an irreversible coma, as was present in *Quinlan*, because such a condition does not have a high and predictable mortality rate unless life support systems are removed. In re Quinlan, 70 N.J. 10, 25–26, 355 A.2d 647, 655 (1976).

"Irremediable condition" is the term used in Hawaii's proposed legislation, H.B. No. 445 (1977), relating to living wills and death with dignity, which would give a patient suffering from an "irremediable condition" the right to order, through a properly executed document, termination of treatment intended to save or sustain his life. *See* notes 75–76 *infra.* "Irremediable condition" is defined as a serious illness or impairment that is medically thought, in the patient's case, to be incurable and that causes the patient severe distress or renders him incapable of rational existence. H.B. No. 445 §3(2) (1977). This term probably would include a patient in an irreversible coma as in *Quinlan*, as well as a patient suffering from terminal cancer as in *Saikewicz.*

If interpreted broadly, the term used in the Proviso, "hopeless and beyond recovery," is similar to the term "irremediable condition" insofar as both a terminal cancer patient and a patient in an irreversible coma may be deemed to be suffering an incurable condition from which there is no hope of recovery. However, in order to qualify under the Proviso, a patient who is "hopeless and beyond recovery" must be suffering from a *disease. See* note 5 *supra.* In contrast, H.B. No. 445 (1977) does not require that a patient's "irremediable condition" be the result of a disease in order to qualify for its benefits. Thus, a person in an irreversible coma due to brain damage caused by an accident could be found to be suffering from an "irremediable condition" but would not qualify under the Proviso because he is not suffering from a disease. The term "hopeless and beyond recovery" is extensively discussed in notes 11–19 *infra* and accompanying text.

[64] 70 N.J. 10, 355, A.2d 647 (1976).

[65] Mass. ., 370 N.E.2d 417 (1977).

[66] In re Quinlan, at 25–26, 355 A.2d at 655 (1976).

[67] Superintendent of Belchertown v. Saikewicz, at , 370 N.E.2d 417, 421 (1977).

a thirty-to-fifty-percent chance of remission for a period of two-to-thirteen months.[68]

In both cases, the court found that the right to refuse lifesaving therapy was encompassed by the unwritten constitutional right to privacy[69] as set forth in *Griswold v. Connecticut*.[70] The courts balanced this right against the states' interest in requiring therapy for the patients. The court in *Saikewicz* enumerated the state interests as the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide, and maintaining the ethical integrity of the medical profession.[71] In both cases, the courts found that the patients' rights outweighed the states' interests because the states' interest in requiring therapy diminished as the prognosis of the patient grew worse.[72] The court in *Quinlan* stated: "We think that the State's interest *contra* weakens and the individual's right to privacy grows as the ... prognosis dims. Ultimately there comes a point at which the individual's rights overcome the state interest."[73] Similarly, the court in *Saikewicz* indicated that the state interest in requiring therapy changes when a patient's death becomes imminent. The court stated:

> [T]he interest of the state in prolonging a life must be reconciled with the interest of an individual to reject the traumatic cost of that prolongation. There is a substantial distinction in the State's insistence that human life be saved where the affliction is curable as opposed to the State interest where, as here, the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended.[74]

In Hawaii, the recently proposed "Death with Dignity" legislation[75] would grant a similar right by statute. It would permit any qualified adult to execute a document known as a "Declaration,"[76] which would have the legal effect of authorizing a physician to withhold resuscitory techniques and to discontinue feedings or treatment of the patient if he is suffering from an "irremediable condition."[77]

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[68] *Id.* at __, 370 N.E.2d at 420.

[69] *Id.* at __, 370 N.E.2d at 424; In re Quinlan, 70 N.J. 10, 40, 355 A.2d 647, 663 (1976).

[70] 381 U. S. 479 (1965). In *Saikewicz*, the court stated that the right to privacy under *Griswold* also protected the right of a patient against unwanted infringements of bodily integrity in appropriate circumstances as in *Quinlan*. __Mass. at __, 370 N.E.2d at 424 (1977).

[71] *Id.* at __, 370 N.E.2d at 425.

[72] The medical profession also implicitly recognizes the diminished interest in preserving or prolonging the life of a patient whose prognosis is poor by its acceptance of the practice of issuing orders not to resuscitate certain patients whose conditions are severely deteriorated. The treating physician orders nurses and other hospital staff not to undertake any heroic effort to revive a patient with irreversible failure of multiple organ systems, terminal illness, or irreversible brain failure. Grenvick, et al., *Cessation of Therapy in Terminal Illness and Brain Death*, 6 CRITICAL CARE MEDICINE 284 (1978). In the case of In re Dinnerstein, __Mass.__, 380 N.E.2d 134 (1978), the physician sought to issue orders not to resuscitate a woman who had Alzheimer's disease, an incurable degenerative disease of the brain which left her in an essentially vegetative state. The court held that under the circumstances, which included the facts that the patient was in a vegetative state and was irreversibly and terminally ill, issuing orders not to resuscitate was not prohibited by law and that the validity of such an order by a physician was not dependent on prior judicial approval. *Id.* at __, 380 N.E.2d at 138.

[73] In re Quinlan, at 41, 355 A.2d at 664.

[74] Superintendent of Belchertown v. Saikewicz, at __, 370 N.E. 2d at 425–26.

[75] H.B. No. 445 (1977).

[76] *Id.* §3(1).

[77] *Id.* §2. "Irremediable condition is defined as a serious illness or impairment which is medically

B. Freedom of Choice of Therapy

The Hawaii "Death with Dignity" legislation goes beyond affording the dying patient the right to refuse treatment. It would also provide for the right of a patient suffering from an "irremediable condition medically thought to be terminal" to receive "whatever quantity of drugs may be required to keep him free of pain. . . ."[78] If no amount of drugs would relieve his pain, he would be entitled to drugs that would render him continuously unconscious.[79] Such use of drugs implicitly recognizes another change in the balance between the state interests and the patient's rights when the patient becomes terminally ill because it places his interest in being free of pain ahead of the state interest in protecting his safety.[80] This legislation is similar to the Proviso insofar as the Proviso would permit a physician to administer unusual quantities of drugs[81] without incurring the sanctions of Chapter 453 of the Hawaii Revised Statutes.[82]

The courts in the recent Laetrile cases recognized an analogous right to choice of therapy on the part of terminally ill cancer patients.[83] The United States district court in *Rutherford v. United States*[84] compared the right to refuse therapy with the right to choice of therapy in this way:

> [I]t appears uncontrovertible that a patient has the right to refuse cancer treatment altogether, and should he decide to forego conventional treatment, does he not possess

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thought to be, in a particular patient's case, incurable and expected to cause him severe distress or render him incapable of rational existence." *Id.* §3(2).

[78] *Id.* §12. Note that under this proposed "Death with Dignity" legislation, the patient's irremediable condition must be *incurable* in order to permit him to refuse lifesaving treatment, whereas his irremediable condition must be *terminal* before the Bill permits him to have an unlimited quantity of drugs to keep him free of pain.

[79] *Id.*

[80] This change in the balance between state interest and the patient's interest reflects the treatment of their terminally ill patients of a substantial number of practitioners in the medical profession. "In a recent survey of internists, forty-three percent said that they would administer increasing doses of narcotics to their terminal cancer patients in pain, knowing full well that in addition to easing pain, the drug could eventually cause fatal respiratory arrest." Lupo, *Determining the Right to Die—A Physician's Responsibility*, 63 J. FLORIDA MED. A. 243 (1976). This indicates that the policy of putting a terminal patient's interest in being free of pain ahead of the interest in protecting his safety is recognized by many medical professionals.

In Superintendent of Belchertown v. Saikewicz, Mass. , 370 N.E.2d 417 (1977), the court stated that "the prevailing ethical practice seems to be to recognize that the dying are more often in need of comfort than treatment." *Id.* at , 370 N.E.2d at 426.

Recently suggested treatment guidelines for the care of the terminally ill reflect this same principle:

> Once treatment for disease is ineffective, care should be designed for comfort rather than survival. The physician should discuss the alternatives of continuing the primarily disease-oriented treatments versus shifting to a person-oriented, comfort care approach.
>
> Thus at some point a decision is made to halt aggressive disease therapy and a plan is adopted to relieve symptoms rather than prolong the dying process.

Schmale and Patterson, *Comfort Care Only—Treatment Guidelines for the Terminal Patient*, PSYCHOSOCIAL CARE OF THE DYING PATIENT 13, 15 (C. Garfield ed. 1978).

[81] *See* note 27 *supra.*

[82] *See* notes 22 and 28 *supra.*

[83] In Suenram v. Society of Valley Hospital, 155 N.J. Super. 593, 383 A.2d 143 (1977), the Superior Court of New Jersey enjoined a hospital from preventing a terminally ill patient's use of Laetrile, which was legal under Massachusetts law but was not approved by the FDA and the hospital. The court stated that "[t]he right of the patient to choose or reject a cancer treatment on the advice of a licensed medical doctor, whether or not it is approved by the State or hospital, could not be of a more fundamental nature." *Id.* at 603, 383 A.2d at 146. *See also* notes 84–94 *infra* and accompanying text.

[84] 438 F.Supp. 1287 (W.D. Okla., 1977), *aff'd* 582 F.2d 1234 (10th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3497 (No. 78-605), *cert. denied*, 47 U.S.L.W. 3497 (No. 78-763) (Jan. 22, 1979).

a further right to enlist such nontoxic treatments, however unconventional, as he finds to be of comfort, particularly where recommended by his physician?[85]

In *Rutherford*, a class action was brought by terminally ill cancer patients challenging the application of an FDA law that prevented their use of Laetrile. The court held that Laetrile was statutorily exempt from the FDA law,[86] and stated that "[b]y denying the right to use a nontoxic substance in connection with one's own personal health-care, FDA has offended the constitutional right to privacy".[87] The constitutional right to choice of therapy recognized by the federal district court in *Rutherford* was not limited to terminally ill patients.[88] On appeal, however, the Court of Appeals for the Tenth Circuit avoided the constitutional question and, on narrower grounds, affirmed the district court's decision only to the extent that terminally ill patients may use Laetrile administered in intravenous form by a licensed physician.[89] Referring to the FDA's requirement that Laetrile be proven safe and effective before being distributed legally in interstate commerce, the court held as a matter of law that the safety and effectiveness requirements of the statute as now written had no application to terminally ill cancer patients because the terms "safe" and "effective" were meaningless in connection with a fatal disease for which there was no known cure.[90] Although the court did not rely on a balancing-of-interests analysis, it recognized the principle that the state interest diminishes when the patient becomes terminally ill. Commenting on the FDA's argument that the ban on Laetrile was justified by the state's interest in preventing a patient's reliance on Laetrile from causing him to delay effective therapy, the court stated that "[i]n any event, FDA's argument may lose its force in the case of a terminally ill patient or in the case of a patient suffering from a disease for which there are no 'effective' remedies.[91]

In *People v. Privitera*,[92] a case in which a physician challenged a state statute that prohibited the sale and prescription of Laetrile, the California appellate court struck down the statute on grounds that it had no rational relation to its expressed purpose of protecting the public from fraudulent medical treatment. The court indicated that the right to choice of therapy was fundamental in nature and could only be impinged upon by a compelling state interest.[93] It

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[85] *Id.* at 1299–1300.

[86] The court reviewed the findings in the FDA's commissioner's decision on the status of Laetrile, *id.* at 1289–90, and held that based on the administrative record, the FDA's classification of Laetrile as a "new drug" was arbitrary, capricious, and an abuse of discretion. In so holding, the court stated that Laetrile had in fact been used for the treatment of cancer for over twenty-five years, was generally recognized as safe, and was, pursuant to a "grandfather clause," exempt from the 1962 amendments to the FDA drug laws, which required that all new drugs be proven "effective" as well as safe. *Id.* at 1295.

[87] *Id.* at 1301.

[88] The court reasoned that the constitutional right of personal privacy as discerned within the penumbras of the Bill of Rights as recognized in Roe v. Wade, 410 U. S. 113, 152 (1973), was a fundamental right. *Id.* at 1299. Citing Justice Douglas's concurring opinion in Doe v. Bolton, 410 U. S. 179 (1973), the *Rutherford* court stated that "Mr. Justice Douglas referred to 'the freedom to care for one's health and person' as coming within the purview of this right." *Id.* at 1299.

[89] Rutherford v. United States, 582 F.2d 1234 (10th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3497 (No. 78-605), *cert. denied*, 47 U.S.L.W. 3497 (No. 78-763) (Jan. 22, 1979).

[90] *Id.* at 1237.

[91] *Id.* at 1236.

[92] 74 Cal. App. 3d 936, 141 Cal. Rptr. 764 (1977).

[93] *Id.* at __, 141 Cal. Rptr. at 782.

implied that there is no compelling state interest to justify the banning of Laetrile in circumstances where patients are terminally ill with cancer.[94] Although he dissented, Associate Justice Cologne, who asserted in his opinion that the state law against Laetrile should be upheld, recognized that terminally ill patients should be allowed to use Laetrile. He stated:

> I cannot charge wrongdoing by the manufacturers, distributors and physicians who may profit from the dispensing of Laetrile if they merely provide hope to the *terminally ill who have no recognized cure available* but there is a grievous wrong committed when they consciously or unconsciously deny proper treatment to those who could benefit by early effective treatment.[95]

Thus, both the majority and the dissent in *Privitera*,[96] as well as the court of appeals in *Rutherford*[97] recognize that Laetrile should be made available to terminally ill cancer patients even where the state may properly bar its use by other patients.

Like the right-to-die cases,[98] the proposed living will legislation,[99] and the proposed provision for the administration of unlimited painkillers,[100] the Laetrile cases also recognize the principle underlying the Proviso that the freedom of choice of health care alternatives for the dying or the hopeless patient should be greater than that of other patients. Thus, although some of its objectives have been satisfied by subsequent legislation and developments in medicine, the underlying policy of the Proviso is consistent with the policies implicit in current developments in the law as described above.

IV. Legislative Consideration

In light of the above-described developments in the law regarding the dying patient's freedom of choice in health care, it would be appropriate for the Hawaii Legislature to re-examine the Proviso.

A. Defining "Hopeless and Beyond Recovery"

One issue that should be considered is the clarification of the term "hopeless and beyond recovery." At present, a physician may be reluctant to sign the certificate required by the Proviso because the vagueness of that term provides no clear guidelines upon which to base medical judgment.[101] The physician's reluctance may restrict an otherwise qualified patient's access to the intended benefits of the Proviso. Needed clarification could be accomplished, for exam-

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[94] *Id.* at __, 141 Cal. Rptr. at 781 (emphasis added and footnote omitted). The court based its implication on cases from other jurisdictions wherein the FDA was enjoined from interfering with terminal cancer patients' rights to use Laetrile. *Id.* at __, 141 Cal. Rptr. at 781.

[95] *Id.* at __, 141 Cal. Rptr. at 791.

[96] 74 Cal. App. 3d 936, 141 Cal. Rptr. 765 (1977).

[97] 582 F.2d 1234 (10th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3497 (No. 78-605), *cert. denied*, 47 U.S.L.W. 3497 (No. 78-763) (Jan. 22, 1979).

[98] *See* notes 64–65 *supra* and accompanying text.

[99] *See* notes 75–77 *supra* and accompanying text.

[100] *See* notes 78–79 *supra* and accompanying text.

[101] *See* note 19 *supra* and text accompanying notes 15–19 *supra*.

ple, by the legally sanctioned adoption[102] of a standard form of certification attesting to a patient's "hopeless" condition similar to that which was contained in the order of the district court in the Laetrile case, *Rutherford v. United States.*[103] The *Rutherford* court required that the document include a specific definition of the term, "terminally ill."[104] A standard form of certification that included a clear definition of "hopeless and beyond recovery" would meet physicians' objections that the term is too vague and not susceptible of uniform application.[105]

B. Redefining the Scope of Remedies Available to the Hopeless Patient

Legislation to clarify and redefine the range of therapies intended to be permitted by the Proviso should be considered as well. As discussed above, the range of non-drug therapies available under the Proviso is not clear due partially to the possible distinction between the term "any remedial agent or measure" and the term "the practice of any method."[106] Many of the myriad unorthodox non-drug healing theories[107] may be considered to be practices of methods.[108] Whether or not such practices of methods are intended to be included within the ambit of the Proviso's protection should be spelled out.

If the range of remedies intended to be made available under the Proviso is clarified, those who seek to help hopeless patients would then be more certain as to when the protection of the Proviso could be invoked and consequently would make them more willing to aid the patients. This would help fulfill the Proviso's objective of giving hopeless patients "the opportunity of availing themselves of any hope of relief which might be offered without subjecting those willing to render them aid to the indignities of prosecution and persecution."[109]

As suggested earlier,[110] the availability of various drug therapies and the

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[102] Such an adoption of a standard form of the required certificate may be by legislative act or by court order as in the case of Rutherford v. United States, 429 F.Supp. 506 (W.D. Okla. 1977).

[103] *Id.*

[104] In its Order and Decree, the court in *Rutherford* established guidelines for defining the class of "terminally ill cancer patients". The court stated:

> The phrase "terminally ill cancer patient" refers to anyone who, in affidavit form as hereafter described, is declared by a practicing physician (M.D.) to be terminally ill.
>
> Such affidavit shall include the following:
>
> 1. that there is histologic evidence of a rapidly progressive malignancy in the patient possessive of a high and predictable mortality rate; and
> 2. (a) that further orthodox treatment would not reasonably be expected to benefit the patient; or
>
> (b) that laetrile will be administered only in conjunction with established and recognized forms of cancer treatment; or
>
> (c) that the patient has made a knowing and intelligent election to take laetrile after being fully apprised of the full range of recognized treatments available and of the fact that laetrile is considered by most cancer experts to be of no value in combatting the disease.

Id. at 513.

[105] *See* note 19 *supra.*

[106] *See* notes 41–43 *supra* and accompanying text.

[107] One author, writing on the subject of alternative healing methods, lists sixty different forms of unorthodox healing arts, such as acupuncture, herbal therapy, massage, and psychic healing. D. LAW, A GUIDE TO ALTERNATIVE MEDICINE (1976).

[108] *See e.g.*, note 46 *supra.*

[109] 1909 HAW. S. J. *supra* note 3, at 417.

[110] *See* paragraph following note 48 *supra.*

range of non-drug therapies available under the Proviso are limited by other relevant laws. In order to further fulfill the above-mentioned purpose, lawmakers may wish to consider measures to ensure that the interplay between these laws and the Proviso so that these laws promote rather than detract from modern policy. For example, the expansion of the protection of the Proviso to include a defense to laws regarding the use of drugs[111] and the practice of other healing arts might be considered.

C. Requiring Informed Consent

Perhaps the chief benefits of the availability of alternative therapies are psychological rather than physical. Even if the therapy selected under the Proviso ultimately fails, giving the dying patient broad freedom of choice of therapy may help him cope with the dying process. The severe stress associated with the discovery that one's condition is terminal is said to be due, in part, to "psychological pain," a component of which is the feeling of having lost control over one's life.[112] Affording the dying patient a choice of therapy may serve to alleviate this psychological pain because it will give him a feeling of control over the management of his own body.[113]

Ironically, it is this stressful condition of the dying patient and the intense desire to regain some control over his own life that provides some justification for restricting the freedom of choice of therapy. Studies have shown that the emotional trauma associated with the discovery of a life-threatening disease such as cancer impairs the decisionmaking ability of the patient and makes him more vulnerable to fraud and quackery.[114] A legislative measure that might

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[111] As discussed earlier, the use of drugs is regulated by state and federal drug laws, and by criminal laws. *See* notes 33-39 *supra* and accompanying text. The broad implications of creating a defense to these laws are beyond the scope of this Note. However, it should be pointed out that while the Proviso may be amended to create a defense to state drug and criminal laws, federal laws would still regulate the use of drugs in interstate commerce under the "supremacy clause" of the United States Constitution. U. S. CONST. art. VI, cl. 2.

Also, it should be noted that the creation of a defense to the criminal laws under the Proviso may lead to the anomalous result of protecting the person furnishing the drugs from prosecution but not the patient receiving them. For example, the patient would not be protected from prosecution for the possession of an illegal drug. However, the recent Hawaii Supreme Court case of State v. Bachman, No. 6392 (Haw. Sup. Ct., filed May 21, 1979), indicates that the defense of medical necessity may protect such a patient. *See* note 40 *supra*.

[112]

> The dying patient experiencing psychological pain is frequently the frightened or anxious patient, the lonely or depressed patient, or the hurt and angry patient. As he begins his final stage of growth by anticipating his own death, the terminally ill patient often endeavors to set things in balance by attempting to maintain a kind of psychological homeostasis of equifinality with his inner emotional self and *his* perception of the immediate environment. This imbalance or loss of control over his or her life, especially the now new experience of learning how to die, usually calls up a repertoire of coping behaviors aimed chiefly at reducing the stresses of dying and at regaining control over one's life.

Woodson, *Hospice Care in Terminal Illness*, PSYCHOSOCIAL CARE OF THE DYING PATIENT 365, 370–71 (C. Garfield ed. 1978).

[113] One author suggests that in order to help the dying patient overcome or cope with the fear of loss of self control, he should be allowed to have maximum freedom of choice in his own bodily management. He states that "we can continue to provide the dying with the opportunity to exercise physical management of their bodies, to the extent that it is possible. So although the dying must ultimately relinquish self control, it remains a gradual process." Pattison, *The Living Dying Process*, PSYCHOSOCIAL CARE OF THE DYING PATIENT 133, 165 (C. Garfield ed. 1978).

[114] In its decision on the status of Laetrile, the FDA quoted John J. Dawson of the Mountain States Tumor Institute who stated that "[r]esearch conducted at the Mountain States Tumor

help alleviate the problem of fraud and quackery is a requirement that a written informed consent to the treatment be obtained from the patient as a prerequisite to the operation of the Proviso.[115] Such a law should require that the physician or the treating person disclose the nature, risks, and probable effect of the unorthodox treatment.[116] This disclosure may, to a certain extent, serve the purpose of preventing fraud by requiring purveyors of quackery to disclose the ineffectiveness of their purported remedies, thus helping to ensure that the patient will not be misled. The disclosure would assist the patient in making a meaningful choice rather than a desperate decision.

V. CONCLUSION

Although the original intent of the Proviso was to provide hopelessly ill patients the opportunity to take advantage of any hope of relief that might be offered, the scope of remedial measures actually available pursuant to the Proviso is limited by the drug and criminal laws and by provisions for the licensing of the various healing arts. Under the Proviso, it appears that the hopeless patient upon his request, may receive from a licensed physician unlimited amounts of drugs to relieve his pain. It also appears that the patient may receive any non-drug therapy from any person, as long as the therapy is not proscribed by laws outside Chapter 453 of the Hawaii Revised Statutes. Aside from these generalizations, however, the true scope of the Proviso is not clear.

Clarification of the range of therapies available under the Proviso and of the definition of "hopeless and beyond recovery" may lead to greater willingness on the part of those offering treatment to make available a broad choice of treatment alternatives because they would be more certain of when they would be protected by the Proviso.

A requirement of informed consent would better protect the patient from fraud and quackery. Finally, the expansion of the protection of the Proviso to include a defense to laws regarding the use of drugs and the practice of other healing arts might be considered in order to serve modern policy with respect to the hopeless and dying patient.

This policy is evidenced by the modern movement in favor of greater freedom of choice of treatment for the dying patient. This trend may give new life and significance to the old but progressive Hawaii Proviso which, along with recent

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Institute and elsewhere indicates that the emotional trauma of a cancer diagnosis severely impairs the patient's and family's ability to engage in rational decision making processes." 42 Fed. Reg. 39,768, 39,804 (1977). The FDA also stated that "[c]ancer patients are most vulnerable to the manipulations of others when they feel they are (1) being abandoned, (2) unable to control pain, and (3) unable to maintain a 'state of dignity' by being able to make decisions for themselves." *Id.* at 39,798. The FDA went on to conclude that "[t]he choice of Laetrile therapy, by persons under the severe stresses associated with discovery of cancer and in response to misinformation presented persuasively by Laetrile proponents, cannot be regarded as a choice which is free." *Id.* at 39,804.

[115] The Proviso presently requires merely a request from the patient. HAW. REV. STAT. §453-1 (1976).

[116] A statutory informed consent requirement could specify guidelines similar to those found in the informed consent provision enacted with respect to medical torts, HAW. REV. STAT. §671-3 (1976). The statute provides: "The standards shall include provisions which are designed to reasonably inform and to be understandable by a patient or a patient's guardian of the probable risks and effects of the proposed treatment or surgical procedure, and of the probable risks of not receiving the proposed treatment or surgical procedure." *Id.*

caselaw on the right to die and the right to choice of therapy, endeavors to provide broad rights for the hopeless patient and last rights for the dying patient.

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RECENT DEVELOPMENT

Even as this Note goes to press, the United States Supreme Court has in the case of United States v. Rutherford[117] upheld the FDA ban on Laetrile and reversed the 10th Circuit Court of Appeals decision which permitted the use of Laetrile for terminally ill patients.[118] While this Supreme Court decision indicates a retreat from the trend in favor of freedom of choice of therapy for dying patients, it is also indicative of the uncertainty in the law in this area since the court did not address the constitutional issue of the patient's right to privacy.[119] This uncertainty may give the legislature more reason to re-evaluate the Proviso in order to clarify the rights of hopeless and dying patients regarding their freedom of choice of therapy.

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[117] 47 U.S.L.W. 4724 (1979).

[118] The Supreme Court found that there was no special provision exempting terminally ill patients from the FDA laws which banned Laetrile. *Id.* at 4726. The Supreme Court also found that the 10th Circuit Court of Appeals erred in concluding that the safety and effectiveness standards of FDA law had no reasonable application to terminally ill patients. *Id.* at 4737. The Supreme Court noted that there already existed some provisions for terminally ill patients to avail themselves of experimental drugs within the scope of FDA law in U.S.C. S355 (i), and that any further exemptions are subjects of legislative judgement and not judicial interference. *Id.* at 4728.

[119] The Supreme Court denied certiorari on the constitutional issue of the patient's right to privacy. 47 U.S.L.W. 3497.